

Same-Sex Relationships In Western Australia

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Subjects: [Gay and lesbian legal rights](#) (Other articles)

Gay couples -- Legal status, laws, etc. -- Western Australia

Lesbians couples -- Legal status, laws, etc. -- Western Australia

Issue: [Volume 7, Number 4 \(December 2000\)](#)

Category: [Refereed Articles](#)

Editors' Note: Although this article is addressed to a non legally educated audience it is published here as a refereed scholarly paper. The article has been formally refereed and in the editors' view it demonstrates a high level of scholarship both in the underlying research and in the careful, comprehensible and accurate expression.

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[Introduction](#)

1. In January, 1999 a number of articles appeared in the West Australian and other local Perth newspapers describing the community's quite justified disbelief at the legal mistreatment of Perth resident, Danilo Rodrigues Romao.
2. Mr Romao, a gay man, suffered the tragic loss of his same-sex partner of 27 years, John Gilbert, in September 1997. Although the two men had shared a life together and jointly owned most of the belongings in their Mount Lawley home, Mr Romao was informed in January of this year that he would probably lose his home to some of Mr Gilbert's distant relatives.
3. The property title to the couple's home was in Mr Gilbert's name alone. If the couple were heterosexual, the house would have almost certainly been given to Mr Gilbert's partner. Because their relationship is not recognised as "valid" under West Australian law, however, Mr Romao has no automatic legal claim to Mr Gilbert's estate and is now at the mercy of Mr Gilbert's relatives - persons whose legal rights rank ahead of Mr Romao.
4. Danilo Romao's situation, while tragic and clearly discriminatory, is not uncommon. Each year, many lesbian and gay male relationships in Western Australia are legally labelled "invalid", "not recognised", "unequal." This results in many gay men and lesbians being denied access to shared property, denied the right to adopt children and being discriminated against in employment. It also results in costly litigation proceedings often avoided by those in heterosexual relationships.
5. Western Australia remains the only Australian State without basic human rights protections for lesbians, gay men and their partners. Same-sex relationships are denied legal recognition and this often results in unacceptable social and legal inequality. This paper aims to provide basic legal information and advice to those in same-sex relationships. It outlines what the law is and, to the extent that this is possible in a State that appears adverse to true systemic equality, how best to ensure that these relationships are granted some degree of protection and legal recognition.
6. Like our heterosexual counterparts, lesbians and gay men form many different types of relationships. As such, it is rather difficult to write a paper that applies to each and every relationship within our community. As always, it is best and often necessary to consult with a lawyer before making any decisions which might impact on the legal status of your particular situation. This paper does not constitute legal advice. Rather, it offers a brief introduction to those legal issues and questions which we believe are most likely to impact on the lives of lesbians, gay men and their families. We offer some suggestions for devising strategies but, as always, strongly suggest that those who foresee

problems seek professional legal advice.

7. On a much wider level, we write this paper in an attempt to encourage all persons committed to social justice to continue their struggle for the full recognition of our relationships and needs. While we have not covered every topic of interest to the lesbian and gay community, we do hope that this paper goes some way in detailing the state of the law in Western Australia, while encouraging much needed social activism and legal reform. [\[1\]](#)

Property and Finances

Introduction

8. As with many other areas of the law, people in same-sex relationships are not granted the same property rights and benefits as people in heterosexual relationships. Further, given that Western Australia's Equal Opportunity Act does not prohibit discrimination on the basis of sexual orientation or sexuality (as is the case in all other states), same-sex couples, as well as lesbian and gay people generally, will often find that they can be discriminated against in property matters with few legal avenues in place to assist them.
9. It is vital that lesbians and gay men in same-sex relationships think carefully about how best to arrange their financial affairs in order to ensure that both they and their partner are offered as much protection as possible in the event of death, relationship breakdown, when dealing with superannuation etc.

Buying Property

10. In so far as the law is concerned, property is divided into real property (which includes land and buildings) and personal property (which includes virtually everything else that is capable of being owned).

Real Property

11. When two or more people purchase real estate together, they can own it either as tenants in common or as joint tenants.

Tenancy in Common

12. A tenancy in common is a specified share in a particular property or parcel of land. In the event that a relationship ends, the share or interest which each party to the relationship has in a particular property or land can be disposed of as each party sees fit.
13. Where you or your partner dies, the deceased's share forms part of their estate, and may be divided up according to their will. If the partner dies without a will, then that person's property will go to their next of kin. This means that their share of the property can go to their father or mother, but will not go to their same-sex partner. This arises because same-sex partners are not legally recognised as the deceased's next of kin.
14. Hence, if property is purchased as a tenancy in common, it is essential that a valid, legally recognised will be written, signed and witnessed. This will ensure that if one partner dies, their share of the property will not transfer to a third party.
15. Owning property or land as tenants in common is sometimes advantageous if one partner wishes to use their share of the property to settle outstanding financial debts. However, this type of ownership arrangement may prove impracticable and less desirable if one partner wishes to sell his/her share of

the property or land to which her/his partner has access.

Joint Tenants

16. Where you and your partner hold property as joint tenants, both of you hold the property as legally recognised co-owners. This means that you both hold an undivided share in the whole title of the property. Where one partner dies, the survivor automatically becomes the whole owner of the property. This occurs irrespective of the will of the partner who dies since the property does not form part of the deceased's estate. The advantage of this type of arrangement is that it prevents an outsider (like the deceased partner's next of kin) from obtaining a share in the property or estate, thus providing more security for the co-owner and avoiding sometimes stressful legal proceedings.
17. Should your partner already own property and wish to ensure that you are entitled to it in the event of her or his death (ie, by placing your name on the title as a joint tenant or by saying so in her or his will), you should again consider the best way to ensure that this is done. While joint tenancy may seem more appealing, you should note that in Western Australia, a stamp duty tax applies to any change of ownership. While heterosexual couples and opposite-sex co-habitant couples are exempt from this tax, same-sex couples are not legally exempt and will thus find themselves having to pay an at times hefty tax. While this is clearly discriminatory, it is nonetheless the state of the law in Western Australia and you should prepare yourselves accordingly.
18. Should a relationship end, one partner may wish to sell their share and the other may refuse or may be unable to afford to purchase their partner's share of the property. While it is sometime preferable to avoid legal proceedings, as they can prove costly and emotionally difficult, sometimes we are left with no option and it is possible to obtain a court order for the forced sale of jointly owned property. If you should find yourselves in this situation, you may prefer to use the courts only after all forms of dispute resolution (such as arbitration and mediation) have proven unsuccessful.

Property Agreements

Agreements as to Purchase and Sale of the Property

19. The division of property at the end of a relationship often proves difficult. This is particularly the case where one party has initially purchased the property and it has then become the joint home with both partners making contributions to the mortgage or to home improvements.
20. Before you decide to commit yourselves to any purchase of property, it is important that you obtain legal advice as to how the ownership and purchase of the property should be arranged and what, if any, arrangements should be made in the event of sale of the property.
21. A formal property agreement can be prepared to avoid problems in the future. Such agreements prevent problems arising in the event of relationship break-up or death of a partner. It is recommended that you consult a lawyer for legal advice in advance of any purchase, rather than lose a large proportion of your share of the property in the future should your relationship end.
22. It is best if you decide in advance what will happen to your property in the event of a relationship breakdown. A contractual agreement can be prepared to deal with issues such as who will continue to live in the property (if you own the property as joint tenants), who will pay what outgoings, whether the property should be sold, if so then how and to whom, and who will meet the expenses of moving. These agreements can prove useful to the courts should any dispute arise as to each person's rights and obligations upon relationship breakdown. An example of such an agreement, prepared by Canadian lesbian activist and writer Laurie Bell, is provided in Appendix A to this paper.

Renovation, Alteration or Maintenance of Property

23. For many of us, our home is our most valuable asset and as those of us that own homes will tell you, home ownership and maintenance comes at a price. Never assume that that last renovation will in fact be your last!
24. It is imperative that you keep documentation and records regarding the purchase of the home and each partner's contribution of time, labour and money towards any renovations, alterations or maintenance of the property. In the event of relationship breakdown, this will help avoid problems arising out of disputes about these contributions.

Tax Implications of Transfer of Property

25. Should you decide to purchase your partner's interest in property, you should again note that when real property is transferred, stamp duty imposed by the State Government is payable at specified rates that are determined by the sale price. Heterosexual couples who separate are entitled to certain exemptions from payment of stamp duties when they transfer property from two names to one name, if this is done in accordance with a court order or registered agreement. This is not the case for same-sex couples. You may choose, therefore, to make some arrangement in your property agreement to have these expenses covered in the event of relationship breakdown.

Rental of Home or Property

26. Because the Equal Opportunity Act (WA) does not cover discrimination on the basis of sexual orientation, lesbians and gay men can be denied accommodation on the basis of their sexuality. Similarly, in some circumstances lesbians and gay men can be asked to leave their rental properties on the basis of their sexuality. Having said that, although equal opportunity legislation does not protect against unjust termination of a lease on the basis of sexuality, it is nevertheless quite difficult to remove tenants from many rental arrangements. You should always check your rights as a tenant under the Residential Tenancies Act (WA).
27. If a lesbian or gay man is evicted from rented residential premises and they believe it may be on the basis of their sexuality, they should first determine if they are subject to a fixed term lease. If their lease is for a fixed period (ie, one year), the property owner cannot by law force them from their apartment or house unless there has been a clear breach of one of a number of the provisions in the Residential Tenancies Act.
28. Section 73 of the Act, for example, allows for the termination of an agreement where the tenant is causing serious damage to the property. Sexuality status is not a ground for termination. Thus, a person who is a party to a fixed term agreement cannot be evicted by reason of their sexuality alone. Fixed term agreements thus provide lesbians and gay men with the most comprehensive protection when renting property.
29. If there is no fixed term agreement, (ie, an agreement that does not clearly specify the duration of occupation), then the owner of the property can demand that the premises be vacated without issuing a reason, provided that the time period specified by the Act is complied with. Section 64 of the Act states that:
 1. An owner may give notice of termination of an agreement to a tenant without specifying any grounds for the notice.
 2. Where an owner gives notice of termination under this section the period must be no less than 60 days.
 3. This section does not apply in relation to an agreement that creates a tenancy for a fixed term during the currency of the term.
30. Thus, if a property owner wishes to remove a tenant because he or she objects to that tenant's

sexuality, they do apparently have the right to do so without providing a reason for termination. Sixty days notice must, however, be given.

31. If you are having rental difficulties and think you are being unjustly asked to leave your premises, you should direct your inquiries to:

Tenants' Advice Service
P.O Box 8437
Perth Business Centre
East Perth WA 6849
Telephone: 9221 0088
Facsimile: 9221 9609

32. This is a specialist service which provides an advice and advocacy service for all residential tenants.

Personal Property

33. In relation to personal property like cars and washing machines, generally the legal owner is the person whose name appears on the purchase documents. Hence, for expensive registrable items such as motor vehicles, the registration papers (which appear in one name) will establish ownership even where two people have purchased the car for the use of both parties.
34. Careful consideration of the possibility of a relationship breakdown before property is purchased will avoid unnecessary arguments as to its ownership when the relationship ends.
35. If you are not content to simply rely on registration documents, both partners to a relationship should keep records of what they have purchased, who paid what etc. You may also choose to outline (in a relationship agreement) who is entitled to what upon separation.

Finances

36. Occasionally, there are problems attached to the financial arrangements made by couples wanting to invest in property. For example, sometimes one partner will have more money than her or his partner but may nonetheless want to ensure that the property is seen as belonging equally to both partners.
37. While a joint tenancy can resolve this issue, some people may not want to hold their property in joint tenancy. There are several financial arrangements available to gay and lesbian couples intending to invest in property which may resolve some of these problems.

Trusts

38. Assuming your property is not held in joint tenancy, if you and your partner decide to make unequal contributions to the purchase of a property you may nonetheless want to ensure that the property is seen as belonging equally to each partner. Apart from the option of drawing up a property agreement, you may also wish to consider creating a trust.
39. If a partner has made a contribution to the acquisition of the property but their name does not appear on the legal documents which indicate ownership, they may be able to establish that the legal owner held their share of the property on trust for them. To do this, however, they must be able to establish that there was a shared intention that the legal owner was holding the property on trust for the two of them. The best way to establish this is in writing by a proper trust document by a lawyer.
40. This avoids the problems that arise where, after sale of a property, the partner who has made a larger contribution claims a greater share of the proceeds of sale of the property. The trust effectively states that the person who has made the larger contribution intended that both owners would have an equal share in the property, despite the fact the other partner made a smaller contribution.

Alternatively, the trust document may state that the parties hold their interests in the property in proportion to their contributions.

41. There may be tax implications in creating a trust and transferring property in this way. It is advisable to consult a lawyer to ensure that both parties' intentions are properly documented and that the tax implications are properly considered.

Mortgages

42. Most people who require financing for the purchase of their property obtain it by taking out a mortgage. Both partners enter into a financial agreement with a bank or a financial institution whereby money is borrowed on the security of the property. If the mortgagor (the borrowers) fail to repay the loan as arranged, the mortgagee (the bank) can then take steps to have the property sold to recover the amount outstanding. This process is known as foreclosure.
43. If the property is owned by you and your partner as joint tenants, the mortgagee will most likely require both of you to become parties to the mortgage. Where you own the property as tenants in common, and only one partner needs to borrow money by way of mortgage, then only that partner's share of the property is subject to the mortgage.
44. If the mortgage is taken in both your names, then each person is equally liable for periodic repayments until the full amount is paid. You are also equally liable for the full repayment in the event of foreclosure. It is also possible to make arrangements whereby one person is liable for a greater share of the mortgage. This can be done by means of an indemnity. This means that one partner can claim back from the other that agreed part of the debt that she/he was obliged to pay under the mortgage. You should seek legal advice if you intend to make such arrangements.
45. In addition to the usual building and content insurance which you take out when buying the property, you should also consider mortgage and life insurance. These types of insurance operate to protect against the possibility of one partner being unable to pay their share of the mortgage, thereby leaving the other with the burden of paying the whole amount.
46. Mortgage insurance can be taken out by both partners to protect mortgage repayments in the event of illness or retrenchments. The period of protection will be limited depending on the terms of the insurance agreement.
47. Life insurance may also be taken out by one partner on the life of the other. This protects one partner from the burden of repaying the whole mortgage if the other partner dies. It further gives the surviving partner a lump sum payment on the death of the other partner.
48. You should always ensure that your partner is listed as the beneficiary on any insurance policy in which a beneficiary is listed. Similarly, should a relationship end, you should take steps to remove your ex-partner's name from these documents.

Other Joint Financial Arrangements

49. Where you and your partner enter into joint financial arrangements, you are both equally liable for any debts that arise. For example, where you have a joint credit card account, both of you are liable for payment of the accounts irrespective of who is at the receiving end of the goods or services purchased. It is therefore important that you be aware of the conditions attached to any credit card or loan agreement before you enter into it with another person or arrange to have another person issued with a credit card in your name or account.
50. Many couples open joint accounts as this makes it easier for paying bills etc. It is important to remember that the joint bank account continues even when your relationship comes to an end. It only closes when one partner takes action to close the account. If the joint account allows both

partners to withdraw funds independently, then you should reach some agreement as to how the credit should be distributed upon closing the account.

51. In the event of death of one owner of a joint bank account, the money in the account automatically becomes the property of the surviving owner, and is not distributed according to a will. This is very useful if you wish to ensure that your partner has ready access to cash in the event of an emergency.
52. Be aware that in the event of a relationship breakdown, one partner can withdraw the entire amount in the account without the knowledge of the other partner. This can be prevented by writing to your financial institution upon relationship breakdown and requesting that all funds be frozen until property matters are finalised.

Children

Introduction

53. More and more lesbian and gay couples are choosing to have and raise children. Some lesbians and gay men have children from previous heterosexual relationships. Others have either become or want to become parents via a 'less traditional' manner, such as through donor insemination, using either a known or anonymous donor. Still others have chosen to raise children as part of an extended family (ie, as in the case of one or two lesbians who choose to have and raise a child with one or two gay men).
54. It is vitally important for you and your partner to consider the legal implications of bringing children into your relationship. The law does not readily accommodate gay and lesbian parents or co-parents and there are many legal hurdles which you and your partner should be made aware of before choosing to have or raise a child. The absence of specific legislative provisions covering gay and lesbian parents and co-parents is generally to the detriment of those parents rather than to their advantage and you should always consult with a lawyer before making any decision in this regard. Advance planning is essential to ensure that your family is respected and recognised when you need it to be. Litigation can be traumatic at the best of times. Litigation involving children can be devastating.
55. This section deals with the application of the law to you, either as the gay biological father, the lesbian biological mother or gay or lesbian co-parent. It also offers some advice as to how best to protect your interests and the interests of your child(ren).

Custody -- Children from Heterosexual Relationships

56. Where a child is conceived by opposite-sex co-parents, the law considers both the biological mother and father to have parental responsibilities toward the child. This means that both parents have "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children." This parental responsibility does not alter if the parents divorce or separate, or alter their relationship in any way. No aspect of parental responsibility will be diminished or removed unless a parenting order, made by the Family Court, expressly provides for it, or it is necessary to do so in order to give effect to that order.
57. The Family Court can make orders for residence, contact, child maintenance and other specific issues. A residence order determines which parent the child will live with. A contact order will determine the length of time a child will spend with the other parent. A child maintenance order will determine who will pay maintenance for the child and how much will be paid. A specific issues order will determine any other issue such as guardianship.
58. The courts very rarely grant joint residence in disputed residence claims. Usually, sole residence is granted to one parent, as this will ensure that a stable home environment is maintained for the child.

The parent being granted sole residence then has the day to day care and supervision of the child. The non-residential parent is usually granted contact in the form of visiting rights, which allow the child to visit on weekends, school holidays, birthdays or any other significant dates with the other parent.

59. Although one parent may be granted sole residence, the guardianship or parental responsibility of the child remains joint in the absence of any court order. This means that both parents have the right and power to protect the welfare of the child. Therefore, if there are any major decisions to be made with respect to any aspect of the child's life (ie, regarding education, religion etc.), the residential parent has an obligation to consult with the non-residential parent regarding these decisions. However, the court may make use of a specific issues order to remove guardianship or parental responsibilities from a parent if the court deems this to be appropriate in the circumstances.
60. In determining who should be granted residence of a child, the "welfare of the child" is of paramount consideration. This is emphasised in the Family Law Act 1975 (Cth), and it has always been the approach adopted by the Family Court in Western Australia. There have been no cases to our knowledge in Australia that ever viewed a parent's sexuality as a presumption of unfitness. The court has always held that sexuality is not prima facie a negative factor in determining residency and attracts no negative presumptions.
61. While a person's sexual orientation is no longer an acceptable reason to deny residence, it remains the reality for all lesbians and gay men that some people in our society continue to reject and discriminate against us and our relationships. In the eyes of the law, this discrimination may be seen as a factor to be considered in determining a residence order.
62. In the not too distant past, where residence was granted to a homosexual parent, it was sometimes accompanied by discriminatory conditions, which had to be followed by the parent and her or his same-sex partner. For example, it was not unheard of for the courts to insist that same-sex partners not demonstrate affection toward each other in the presence of the child. Although conditions of this sort are no longer imposed, one's sexual orientation may still be considered an issue should the court decide that the child's welfare is likely to suffer due to their parent's sexual orientation. For example, the possibility that the child may be subject to ridicule or abuse at the hands of others due to their parent's homosexuality may be deemed relevant in determining the best interests of the child.
63. While it is difficult to determine how exactly a court of law will view each individual case before it, it is probably safe to say that in deciding who should be granted custody, the courts may consider a number of factors including:
 - o any wishes expressed by the child;
 - o the nature of the child's relationship with the parents and other significant people, (eg. a co-parent or extended family);
 - o the likely effect on the child of any changes in circumstances, such as the separation from either of their parents;
 - o the practical difficulty and financial cost of a child having contact with the parents;
 - o each person's capacity to care for and provide for the emotional, intellectual, and financial needs of the child;
 - o the child's maturity, sex, and background, including culture, connections, and religion;
 - o the need to protect the child from physical and psychological harm caused by abuse, ill treatment, or violence, towards either themselves or someone else in the family;
 - o the attitude of parents toward their child and their parental responsibilities;
 - o family violence; and
 - o any other factor the court considers relevant (for example the child's current living arrangements, as courts are often reluctant to alter these if it can be shown the child is settled and well adjusted where they are, or whether a change of school is likely, and whether the child will be separated from their friends or other siblings).

64. Should you find yourself in a situation in which you fear being denied contact or residence with your child, it is important to keep in mind that, in the eyes of the law, your child's safety and security is paramount. Sexual orientation is becoming less of an issue and lesbians and gay parents should not forgo an application for residence or contact for fear that they will be judged inappropriate parents. There is a wealth of social science data to show that gay and lesbian parents do not differ significantly from heterosexual parents and the court is able to consider and rely on this material. Getting a supportive and non homophobic lawyer who has or will research and present this material is thus vital.

Lesbian Co-Parents

65. Two women who choose to raise a child together, one as the woman who gives birth (the biological mother) and the other as an active parent (the co-parent), may choose to raise the child on the basis that both will have full parenting rights and responsibilities. Unfortunately, as the relationship between the non-biological co-parent and the child is not generally legally recognised, legal difficulties do arise. In the event of a residence dispute, for example, the non-biological parent has the difficult task of proving that a parenting relationship does in fact exist and that she is entitled to residence and contact. She does, however, have legal standing to seek both and should not be persuaded otherwise.
66. In light of these difficulties many parents find it preferable to have some understanding in writing regarding the rights and responsibilities of both parents. This might take the form of a "parenting plan" (ie, an agreement in writing made between the parents of the child) which deals with the following:
- contact between the child and other significant persons;
 - how the parental responsibilities are to be divided; and
 - any other parental responsibilities and how best to deal with them in the event of disagreement between the parties to the agreement;
 - what to do in the event of separation;
 - what to do in the event of disagreement over the agreement to jointly raise a child.

An example of a child parenting plan, prepared by US authors Hayden Curry, Dennis Clifford and Robin Leonard has been provided for you at Appendix B of this paper.

67. According to legal academic Jenni Millbank, who has written extensively on this issue, where a lesbian couple has a child together, only the biological mother has a legal relationship with the child. The Family Court does, however, have the power to grant a "parenting order" in favour of parents and "any other person concerned with the care, welfare or development of the child." These orders can be granted to lesbian couples and have been successfully used in other states. This means that a mother and co-mother may apply jointly to have their parenting agreement recognised and enforced as joint parenting orders by consent. These plans may serve as evidence of you and your partner's intentions regarding your parental roles and expectations. For more information in this regard, you should read Millbank's work as found in volume 1[21] of the 1998 edition of the Australian Journal of Family Law at pages 99 to 139. This work is by far the most comprehensive and accessible survey of the law in this area. It is a must-read for parents and prospective parents alike.
68. With respect to child support in the event of relationship breakdown, recent case law supports the conclusion that a non-biological lesbian co-parent can be required to pay child support to the biological mother, even if not legally recognised as the child's parent. In the 1996 case of *W v G*, two women separated after eight years together. Two children were born to the plaintiff (Wendy) during that time as a result of donor insemination. Wendy asked the court for compensation from her partner on the basis that her partner had always intended to help raise the children. The court agreed and Wendy was granted a lump sum payment of \$150,000 from her former partner.

Lesbian Mother, Gay Male Father

69. It is not uncommon for lesbian mothers to parent a child with a gay man. Often, this is done with the expectation that both parties will share responsibility for raising and supporting the child, even though the parties do not live together or have much to do with each other outside the context of child rearing. While this might seem appropriate for many people, it is important to remember that once a relationship of this sort is entered into, the relationship would legally be seen as ongoing until the child reaches the age of 18. Unless modified by a court of law, both biological parents have full legal rights over the child, regardless of the living or personal arrangements of the parties - unless the gay father is a sperm donor, in which case he is not the legal parent of the child (see below) or unless modified by a court of law.
70. Sometimes this type of relationship can prove difficult and much legal time and effort has been expended by people in these relationships trying to sort out the actual legal rights of all parties concerned. This is particularly the case where both biological parents have partners who wish to share in the raising of the child(ren). It is suggested that before entering into any relationship of this sort, all parties (whether there be two, three or four) carefully consider how they want to divide child rearing responsibilities. Again, it is best to outline these obligations and rights in a formal agreement, which can be then be enforced by the Family Court with consent of the parties in the form of legally enforceable parenting orders.

Testamentary guardians

71. A lesbian or gay parent may appoint their partner (a co-parent) to be the testamentary guardian of their child. This ensures that the partner will become the custodian of their child in the absence of a Family Court order to the contrary if they should die before the child reaches 18 years of age. The appointment may be done by way of a will or deed.
72. Unfortunately, the appointment of a testamentary guardian is not effective unless a surviving biological parent agrees. If the biological parent opposes the appointment, the Family Court must again regard the welfare of the child as being the paramount consideration in determining the matter. In doing so, the court will take into account the level of involvement of the co-parent in raising the child before deciding who should be granted custody.

Adoption

73. Adoption essentially means that a child is completely separated from its original family and enters into a new family. Under the Adoption Act 1994 (WA), lesbian and gay couples cannot jointly apply to be prospective adoptive parents as couples have to be lawfully married or co-habiting in a heterosexual relationship for at least 3 years before they can legally adopt.
74. In regard to single persons, the Act does not prevent a gay or lesbian person from applying to adopt a child. This means that one partner from a lesbian or gay couple can apply for adoptive parenthood and thus be legally recognised as the parent of the adopted child. This person is then the only person entitled to all the duties, powers, responsibilities and authority conveyed by law to parents in relation to children.
75. In this situation, the non-parent is placed in a disadvantageous position as, upon separation, residence is immediately granted to the adoptive parent as there is a strong preference to grant residence to parents over non-parents. The non-parent is only awarded residence where there is clear and compelling evidence that the parent who initially adopted the child is unfit.
76. Same-sex partners cannot adopt the children of their partners from a previous marriage. Only people who are married or who live in a heterosexual de facto relationship can do so.
77. As there are very few children available for adoption, it is quite unlikely that lesbians and gay men will be considered eligible for adoptive parenthood. However, the possibility of fostering a child remains, as lesbians and gay men are not excluded by any law from fostering children. Fostering arrangements

are different to those concerning adoption in that fostering does not entail the same legal rights over the child as adoption. As Jenni Millbank explains, foster parents provide residential care for the child and receive some financial compensation from the government. In some cases, a foster placement may lead to adoption, although return to the family is the stated policy goal of foster care. Informal departmental policy in Western Australia is such that the sexuality of foster parents is not reason alone to deny potential foster parents.

Conception

78. Lesbian couples may choose to become pregnant through donor insemination or in-vitro fertilisation (IVF).
79. In WA, the relevant legislation refers to "artificial insemination" as the process of impregnating a woman with sperm through the use of instruments. In-vitro fertilisation involves the process of surgically extracting eggs from the woman which are then placed in a laboratory dish. Semen is later added into the dish to allow fertilisation of the egg. The fertilised egg is then transferred to the uterus to allow conception to take place.
80. The Human Reproductive Technology Act (WA) 1991 restricts the provision of IVF treatment to women who are legally married or in a heterosexual, defacto relationship of at least five years duration. Similar legislation exists in Victoria and Tasmania. In the other States and Territories, guidelines published by the National Health and Medical Research Council restricts the provision of IVF treatment to women in an 'accepted family relationship'. The meaning of 'accepted family relationship' is not provided. Within the context of the guidelines provided, however, the clear focus is on the welfare of the child to be born. Whilst the guidelines are not binding, they are quite influential and funding may be denied to any service providers in breach of the guidelines.
81. As the Human Reproductive Technology Act (WA) 1991 prohibits the provision of clinically monitored donor insemination and IVF treatment to single women, this technology is not an option for most lesbians as one would have to marry a man in order to become eligible for state sanctioned donor insemination services, at least in Western Australia. While one may still attempt to undergo this procedure in another state, in addition to any concerns these clinics may have regarding the appropriateness of assisting lesbians and single women in this regard, you should also note the costs of going through an IVF program are onerous.
82. In light of the above, many lesbian couples choose to rely on anonymous sperm donation with the donor's sperm being administered at home. For many, this raises the question of paternity. What, for example, happens, if the donor later wants to claim visitation or residency with the child. Does he have rights? Similarly, can a donor later be made to pay child support payments etc.
83. This area of the law is complex. As always, any decisions regarding children should be made after consultation with a lawyer. Having said that, some conclusions regarding paternity and rights can be drawn. The best summary in this regard is offered by Jenni Millbank, who notes that, in all Australian jurisdictions, one need not be a biological parent to apply for parenting orders under the Family Law Act. This means that a donor who had an interest in the welfare of the child based upon an ongoing relationship could apply regardless of paternity.
84. Millbank also notes that, in the absence of a legal husband, state statute presumes that the donor is not a father in any legal sense. This is supported from case law in other states and there is no reason to doubt the validity of that law in Western Australia. In the New South Wales case of *W v G*, for example, the court held that a sperm donor known to the mother is not a legal parent. In *Re B and J*, the Family Court was approached by a donor who had provided sperm for two children born into a lesbian relationship in Victoria. The donor was listed on the birth certificates of both children as the father and applied to the court for an order that he was not a parent liable for child support payments. The court held that a donor is not a parent even if the insemination was unlawful (ie, even if the insemination occurred outside the context of the state's prescribed medical obligations). Millbank concludes that donors will not be liable for child support in any state under child support legislation.

Domestic Violence

85. While the topic of same-sex domestic violence remains an issue that many lesbians and gay men do not want to acknowledge, the fact remains that violence amongst lesbians and gay men is very much an issue in need of attention. Recent North American statistics, for example, reveal that domestic violence is the third highest killer of gay men each year in the United States. Australian research reveals that the problem in this country is also serious and in need of urgent community action.
86. In Western Australia, victims of domestic violence can apply to the courts for a restraining order. Lesbians and gay men are also eligible for protection from the courts should they find themselves the subject of harassment or violence.
87. Any person, irrespective of sexual preference, is able to seek a Restraining Order against a violent or abusive partner. A Restraining Order can prevent another person from behaving in certain ways, making contact with you, or coming near your home, work, or any other place regularly attended by you.
88. If a Restraining Order is breached, a criminal offence is committed, attracting a penalty of up to 18 months imprisonment and/or a \$6000 fine.
89. Restraining Orders are available where:
 - o you have been injured or your property has been damaged, by another person; or
 - o you have been threatened with injury or property damage by another person; or
 - o another person has acted provocatively or offensively towards you; AND
 - o there is a likelihood of that behaviour happening again, or the threat being carried out unless the person is restrained by the Court.
90. Problematic for many lesbians or gay men who have obtained a Restraining Order is the lack of assistance sometimes received from the police in enforcing these orders. In an attempt to deal with this and other issues surrounding police-community relations, the WA Police Force has now established a lesbian and gay community liaison office. This office will deal with any complaints from the public regarding police inaction or mistreatment. Liaison Officers can be contacted at the following address:

Lesbian and Gay Liaison Officer
Western Australian Police Service
Community Services Command
8 Burton Street
Cannington WA 6107

Phone: (08) 9356 0555
Facsimile (08) 9356 0506

Employment

Introduction

91. According to a 1994 report compiled by Gay Men and Lesbians Against Discrimination (GLAD), a Victorian-based human rights lobby group, almost one half of gay men and lesbians surveyed had experienced harassment and unfair treatment in employment. Specifically, the Report noted the following types of discrimination:

TYPE OF DISCRIMINATION	WOMEN %	MEN %
Being refused a job	4.9	6.1
Being refused a promotion	6.3	7.5
Being harassed	32.1	31.8
Being pressured out/sacked	14.0	10.8
Breach of confidentiality	20.7	16.9
Experiencing any or all	45.1	45.29

92. Research carried out both by GLAD and the Victorian Equal Opportunity Commission appears to indicate that homosexuality within the context of employment will generally be tolerated provided that gay men and lesbians are prepared to remain "closeted" whilst in the work environment. The Commission Report also found that whilst less than a third of companies had objections or reservations about the employment of homosexuals, this was often qualified with a statement that the situation would be different if the employee was "blatant" about their sexuality.
93. It appears then that the more open lesbians and gay men are about their sexuality, the greater the risk that they will be the subject of workplace harassment, dismissal etc. There is little reason to believe that similar conclusions do not apply to lesbians and gay men in Western Australia.
94. While some might see the "option" of self imposed invisibility as an alternative, it is a profound form of discrimination to assume that silencing of this sort does not impose significant emotional and financial hardship both on the person being discriminated against and that person's partner and family.
95. In a series of interviews conducted in 1992-1993, the "effects of the closet on self confidence, on the perceived (in)ability to reach out to other lesbians and gays in order to develop a support system, on the ability to have and maintain intimate relationships and on productivity", were mentioned in every interview.
96. Results from this and other similar surveys indicate that the reality of those who identify or who are identified as lesbian or gay in our society is a reality very much affected by lost employment opportunities, mistreatment in the workplace, lost promotion in employment and severe strain on personal relationships.

Discrimination in Employment

97. It is clear that much law reform is needed in the area of employment law protections in Western Australia. Lesbians and gay men have no guaranteed equality rights under the Western Australian Equal Opportunity Act. Despite recommendations by the Western Australian Commissioner for Equal Opportunity, June Williams, to include sexual orientation as a prohibited ground of discrimination in the area of employment, the present government has seen fit to ignore the need for protection on the basis of sexuality. Presently, the Act only prohibits discrimination on the basis of sex, marital status,

pregnancy, race, impairment, religion or political conviction, and age.

98. This lack of human rights protections reduces the ability of lesbians and gay men to seek assistance if they are dismissed because of their sexuality. Having said that, there are some legal avenues which you should be aware of. Listed below are some of the options that may be open to lesbian and gay male employees who experience employment difficulties. The information provided is a very brief overview of a quite complex and sometimes confusing area of the law. We have provided a list of contact addresses below and suggest you seek assistance before making any decisions in this regard.

Sexual Harassment

99. Sexual harassment is any uninvited sexual behaviour which is offensive, embarrassing, intimidating or humiliating. According to the Western Australian Equal Opportunity Commission, sexual harassment can take a number of different forms - it can be obvious or indirect, physical or verbal. It includes behaviour which creates a sexually hostile or intimidating environment. For example:
- o unwelcome touching;
 - o staring or leering;
 - o suggestive comments or jokes;
 - o sexually explicit pictures or posters;
 - o unwanted invitations to go out;
 - o unwelcome requests for sex;
 - o intrusive questions about your private life;
 - o insults or taunts based on your sex.

In Western Australia, it is unlawful to sexually harass an employee or a person seeking employment.

Complaints of Sexual Harassment

100. If you feel that you have been sexually harassed you can lodge a formal complaint or simply phone an enquiry officer with the Equal Opportunity Commission in Perth at (0[8] 9264 1933. It is unlawful to threaten or harass anyone because they have made a complaint under the Equal Opportunity Act.

Unfair Dismissal

101. Many employees can seek protection against unfair dismissal under either state and federal law. At the state level, many employees are protected by the WA Industrial Relations Act and the WA Workplace Agreements Act.
102. At the Federal level, many employees can find protection against unfair dismissal under the Federal Workplace Relations Act .

State Acts

103. In Western Australia, you may have legal recourse if you have been dismissed from your job in a way which is "unfair" under the WA Industrial Relations Act or the WA Workplace Agreement Act.
104. According to the WA Legal Aid Commission, the law will view you as have being "dismissed" if:
- o you were forced to resign because your employer was threatening to dismiss you;
 - o you were treated so badly you had to leave;
 - o you were demoted without reason or your wage was significantly reduced.

105. A number of people, including sub-contractors, apprentices, domestic servants and workers who are parties to a Western Australian Workplace Agreement, cannot find recourse under the WA Industrial

Relations Act. People who work under a WA Workplace Agreement may however be able to find recourse under WA Workplace Agreement Act.

106. Under both Acts, a dismissal is unfair if an employee is "harshly, oppressively or unfairly dismissed from her or his employment."
107. As this area of the law can be quite complex, you should first determine which Act applies to you. You can seek assistance in this regard from the following contacts.
108. If you are wondering if you are covered by a West Australian Award, contact:

Western Australian Department
of Productivity and Labour Relations
Dumas House
2 Havelock House
West Perth WA 6005
Phone: (08) 9481 0647

109. If you want to know if you are covered by a Western Australian Workplace Agreement, contact:

Western Australian Workplace Relations Commission
1st Floor
Dumas House
2 Havelock Street
West Perth WA 6005
Phone: (08) 9482 7800

Commonwealth Acts and Their Relation to Western Australian Employees

Human Rights and Equal Opportunity Commission Act 1986

110. The Commonwealth Human Rights and Equal Opportunity Commission ('HREOC') Act is limited in terms of the protection it can offer lesbians and gay men who face employment-based discrimination. Under the Act, the Human Rights Commissioner is empowered to attempt the conciliation of any act or practice which is contrary to any human right. The Commission's jurisdiction to conciliate a dispute arising from discrimination on the basis of sexual orientation in employment commenced in January 1990.
111. Unfortunately, recent court decisions have severely limited the powers of those applying the Commonwealth Act. Specifically, there is now no legally binding way of compelling a party to take part in an inquiry or endeavour to resolve a dispute. Furthermore, the Commissioner's report and recommendations cannot be enforced in a court of law.
112. Since participation in HREOC proceedings is now voluntary (in the sense that an employer cannot be compelled to partake in any inquiry), and given the legally unenforceable nature of any recommendation made by the Commission, it has to be said that relying on HREOC to remedy workplace discrimination is not entirely satisfactory.
113. If you want to contact the Human Rights and Equal Opportunity Commission the address is:

Human Rights and Equal Opportunity Commission
133 Castlereagh St
Sydney NSW
Ph: 1300 369 711

The Federal Workplace Relations Act

114. Under Federal law, employees can find recourse under the Federal Workplace Relations Act for termination that is **unfair** and for termination that is **unlawful**.
115. Termination will be considered **unfair** if it is "harsh, unjust or unreasonable". Persons eligible to make a claim in the Australian Industrial Relations Commission for unfair dismissal are people who are "Federal Award Employees" presently employed by a "constitutional corporation". A constitutional corporation is usually a registered company that earns a substantial proportion of its income from its trading activities. It should be noted that other groups may also be eligible to make a claim under the Act.
116. To find out if your company is a constitutional corporation, call the National Securities Commission on (08) 9261 4200.
117. The following people are excluded from making an **unfair** dismissal claim at the Federal level:
- employees engaged under a contract of employment for a specific period or task;
 - employees serving a qualifying period or period of probation, the duration of which was determined in advance;
 - trainees employed under a traineeship agreement or an approved traineeship for a specific period;
 - employees engaged on a short term casual basis (less than 12 months);
 - employees paid a salary of more than \$68,000 (changes annually); and engaged wholly on commission (per sale) or piece rates (per item produced) and not employed under award conditions.
118. Termination will be considered **unlawful** if a person is terminated because of:
- temporary absence from work because of illness or injury;
 - membership of a union or participation in union activities outside working hours or, with the employer's consent, during working hours;
 - non membership of a union;
 - seeking office, acting or having acted as an employee representative;
 - filing a complaint or taking part in proceedings against an employer for alleged violation of law or regulations or recourse to competent administrative authorities;
 - race, colour, sex, **sexual preference**, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
 - refusing to negotiate in connection with, make, sign, extend, vary or terminate an Australian Workplace Agreement; or
 - absence from work during maternity leave or other parental leave.
119. Even though there are both federal and state awards governing employment matters in Australia, all employees can bring a claim under the Federal Act for **unlawful termination** of employment, as long as they do not fall into one of the categories listed above in reference to unfair termination (ie, you are not a trainee etc.).
120. If you are dismissed because of your sexuality, you may prefer to bring an action for unlawful termination in the Australian Industrial Relations Commission, as "sexual preference" is given as an invalid reason for termination. No recourse is available under the state system for dismissal specifically on the ground of sexuality discrimination, although it might be argued that firing someone because they are lesbian or gay constitutes unfair treatment.
121. Employees of sole traders and partnerships cannot bring an action in the Federal Industrial Relations Commission, instead they must bring an action for unfair dismissal in the WA Industrial Relations Commission. The Western Australian Industrial Relations Commission is available to all employees, regardless of who they are employed by. It is less expensive to bring a claim in the WA Industrial Relations Commission and you also have a longer period of time in which to lodge your claim.

Bringing An Action In The Australian Industrial Relations Commission

122. To make a claim for unlawful termination or unfair dismissal in the Australian Industrial Relations Commission you must lodge your claim no later than 21 days after the dismissal takes place. Claims should be sent to:

The Registrar
Australian Industrial Relations Commission (AIRC) 16th Floor
National Mutual Centre
111 St Georges Terrace
Perth WA 6000

123. Staff are available to help with the paperwork and a fee is payable when the application forms are lodged. The fee is presently \$50. The Commission will usually try to settle the issue by conciliation. If this fails, either the Commission or Federal Court will hear the application, depending on which forum the employee elects.

Bringing An Action In The WA Industrial Relations Commission

124. All employees can make a claim through the WA Industrial Relations Commission if they believe that they have been harshly, oppressively or unfairly dismissed. Claims must be made no later than 28 days after dismissal to:

The Registrar
WA Industrial Relations Commission (WAIRC) 16th Floor
National Mutual Centre
111 St George's Terrace
Perth WA 6000

125. Staff are available to help with paperwork and a fee of \$50 has to be made when lodging the forms.
126. If it is found that the dismissal was unfair, the commission may order:

- o reinstatement or re-employment;
- o that the employer pay any amount that the employee is entitled to such as accrued leave;
- o that the employer pay the employee compensation for any loss of income;
- o any incidental order as it thinks necessary.

Further Information

127. For more information on unlawful termination or unfair dismissal, you should call the Wageline service on 1300 655 266 or e-mail them at wageline@doplar.wa.gov.au. Their website is <http://www.doplar.wa.gov.au>

128. Information and assistance can also be obtained from:

The WA Legal Aid Commission
55 St Georges Terrace
Perth WA 6000

Workers Compensation

129. As a result of Commonwealth Safety and Compensation Act 1988 (Cth), where a person dies as a result of an injury sustained, arising out of or in the course of their employment as a public sector employee, any dependants of the person are entitled to a lump sum compensation payment.

Unfortunately, the definition of dependant does not include a lesbian or gay partner.

130. It is suggested that, in light of this exclusion, lesbians and gay men seriously consider both life and personal injury insurance. Insurance of this sort allows the party injured to continue making mortgage payments etc., thereby offering at least some protection both to themselves, their partner and any children.

Migration

Sponsoring Your Same-Sex Partner to Live in Australia

131. Australia is one of the few countries to provide same-sex immigration rights. Your lesbian or gay partner can apply to live permanently in Australia under one of the following categories:
 - o as someone who is inter-dependant;
 - o as a child of an Australian citizen;
 - o as an aged parent of an Australian citizen, permanent resident or eligible New Zealand citizen;
 - o if sponsored by a relative who is an Australian citizen, permanent resident or eligible New Zealand citizen;
 - o if s/he has maintained close ties with Australia; or,
 - o as a skilled worker nominated by an employer.

Sponsoring Your Partner - Inter Dependency

132. You can sponsor your gay or lesbian partner to live permanently in Australia because the Migration Regulations include a concept referred to as "inter dependency". You are able to rely on this category if you are an Australian citizen, permanent resident or eligible New Zealand citizen. An "eligible New Zealand citizen" is someone who holds a special category visa, is a resident of Australia and has met any health and character requirements specified.
133. In the event of a successful application, you and your partner are essentially treated like heterosexual de facto couples. The two of you must have been living together for at least one year immediately preceding the date of your application in order to show a "genuine relationship and mutual commitment to a shared life."
134. The first thing to note with respect to this visa, the one most commonly used by lesbians and gay men and their partners, is that there are limits placed on the number of visas within this category per year. In 1996/97, for example, the number of places made available under this category was set at 100. Once this limit has been reached, no more are issued for that financial year. Applications are then placed in a queue until the following financial year. This means, of course, that there may be substantial delays.
135. Applicants who want to apply under this category must apply for two visas as there is a 2-year provisional visa requirement before a permanent visa can be granted. All applicants must thus apply for both a provisional and a permanent visa at the same time. Unless the relationship is "long term", applicants are initially assessed under the rules for the provisional visa. Once this is granted the applicant can travel to Australia. Two years after the initial application, they are then assessed under the rules of the permanent visa. This means that if the relationship breaks down whilst the person holds the provisional visa they will not get permanent residence (unless they fall within one of the exceptions to that rule as outlined below).
136. For the interdependency **provisional** visa the **applicant** must:
 - a. be sponsored by an Australian citizen, permanent resident or eligible New Zealand citizen;
 - b. be at least 18 years old;

- c. be in a genuine continuing interdependent relationship with the sponsor;
- d. have an exclusive relationship;
- e. meet all health, public interest and special return requirements.

137. For the interdependency **permanent** visa the **applicant** must:

- a. continue to be sponsored;
- b. hold an interdependency provisional visa;
- c. still be living with their partner in a genuine, continuing interdependent relationship;
- d. unless they are in a "long-term" relationship with their sponsor, have applied for the provisional visa at least two years ago; or
- e. hold an interdependency visa and be in a situation in which:
 - the sponsor has died and the applicant has close business, cultural or personal ties with Australia
 - the sponsor has committed domestic violence;
- f. meet all health and public interest requirements.

138. The **sponsor** must:

- a. be approved as a sponsor;
- b. be at least 18 years old;
- c. not be subject to any restriction on sponsoring an interdependent partner;
- d. arrange an assurance of support if one is required.

139. A sponsor must also undertake to assist the applicant (to the extent necessary) financially and in respect of accommodation in the two years following entry.

140. The sponsor is required to complete a form 1036 and lodge it prior to or when the application is lodged. In assessing the sponsorship, the Department of Immigration and Multicultural Affairs (DIMA) requires documentary evidence to establish the age and migration status of the sponsor and the relationship of the sponsor to the applicant.

141. The sponsor's ability to honour the undertaking is assessed by an assessment of the information provided regarding accommodation, employment and financial status. If the sponsorship is rejected the application fails. If the sponsor is in Australia a right of review exists to the Migration Review Tribunal (MRT).

Assurance of Support

142. An assurance of support may be requested. In assessing whether an assurance should be requested DIMA assess the applicant's skills, age and employability. The assurance is normally requested where DIMA considers that the applicant may seek Government support in the form of social security benefit during their first two years in Australia. A form 28 A is required and represents a legal undertaking to refund any of the specified social security benefits that the applicant obtains during the first two years of residence. The person supplying the assurance of support need not be the sponsor but must be over 18, be an Australian citizen, permanent resident or eligible New Zealand citizen.

Evidence of Cohabitation

143. Interdependent relationships must be genuine and continuing. The couple must show that they have a "mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships." The factors which Immigration officers will look for when assessing whether or not your relationship is "genuine" include:

- o joint financial arrangements (eg. joint loans, investments, trusts, bank accounts utilised with

- reasonable frequency for a reasonable time);
- joint household arrangements (eg. joint ownership of real estate, joint utility accounts, joint responsibility of housework);
- joint social activities (eg joint membership or participation in social, sporting or other organisations);
- joint travel;
- knowledge of personal details (family background, terms of your wills, future intentions).

Waivers

144. Sometimes the government will waive the cohabitation requirement. The types of things the government will consider before doing so are:
- compelling or compassionate circumstances (which takes into account any children in the relationship). If cohabitation was contrary to law in the applicant's country of residence (for example, if homosexuality is illegal in the applicant's country) this may also constitute a compelling or compassionate circumstance;
 - if your partner is already eligible to live in Australia because of his/her skilled occupation;
 - if your partner is a former resident or citizen who has maintained close ties with Australia;
 - if your partner arrived in Australia before January 1 1975, has not departed since then but does not hold a substantive visa.

Required Application Forms

145. Your partner can apply for a permanent visa on inter-dependency grounds if she or he currently holds a visa. Most visa holders are eligible to apply. The permanent residency visa can only be granted to your partner, at the earliest, two years from the date of application. There is an exception to this two year waiting period if you have been in the relationship for five or more years.

If partner is overseas - Application for a Visa class BI, Subclass 1[10] Inter-dependency, Subclass 310 Interdependency (provisional) visa Form. The sponsor completes a form 1036.

If the partner is in Australia - If the partner is in Australia they apply for a two-year extended eligibility temporary visa Subclass 826 interdependency extended eligibility visa. If at the end of the two-year period the relationship is genuine and continuing they will be granted permanent residence.

146. DIMA's West Australian contact address is:

Australian Taxation Office Building
45 Francis St
Northbridge WA 6003

Office Hours:

0900 - 1600

Monday, Tuesday - Friday 0900 - 1400

Wednesday

or

Locked Bag No. 7, Northbridge, WA 6865

Tel: (08) 9261 2222 Fax: (08) 9228 0009

Inquiry Unit: (08) 9261 2266, Toll Free (available only in Australia): 131 881
24 hour Interpreting Service 13 14 50
Non Metropolitan Freecall 1800 193 346

Application Costs

147. The cost of the application is approximately \$1570. Once the application is filed, your partner will be given a bridging visa while her/his application is being processed. This visa will remain current until a decision is reached.

The Application Process

Stage One

Medical Examination

148. A medical examination is necessary to determine whether your partner is in good health. It will, among other things, require your partner to undergo an HIV test, chest X-ray and possibly a hepatitis test.

Federal Police Clearance

149. Your partner must be of good character. To determine this, the Australian government may request your partner to provide a police certificate from each country s/he has lived in for one year or more during the last ten years.
150. Stage one also requires you to attend an interview with your partner.

Stage Two

151. During stage two, DIMA will ask for declarations and other evidence supporting your claim that your relationship is genuine and ongoing. Declarations will be required from you and your partner, and from two people who know both of you well.
152. If your partner passes stage two, s/he will receive a permanent visa.

Change Of Circumstances

153. If the relationship ends, DIMA must be informed. The partner requesting permanent residency may still be eligible for a permanent visa. DIMA does have the authority to exempt her/him from the ongoing relationship requirement, the requirement that the Australian spouse need to continue to nominate her/him, or the two year temporary residence requirement. This can occur, for example, if there is violence within the relationship and it is unsafe for the immigrant partner to remain in the relationship.

Limitations Of Sponsorship

154. You can only sponsor one partner at a time. There is a limit to two partners, a minimum of five years apart. Your sponsored partner cannot sponsor a spouse until five years after the date from when they themselves were sponsored.

Appeals

155. If your partner's application is rejected, she or he may be entitled to seek review of the decision. She or he may also, at a later stage, choose to lodge another application. However, this will require another application processing fee.

Assistance

156. For further assistance in same-sex immigration matters, you should contact the Gay and Lesbian

Immigration Taskforce. This group provides support and assistance to lesbian and gay couples making Australian permanent residency applications, where one partner is not an Australian citizen or permanent resident. They can be contacted at:

PO Box 23
Applecross WA 6153
Telephone: (08) 9364 1797

Government Financial Support

Social Security Payments

157. The Law Institute of Victoria explains that social security payments can be divided into two types of benefits. There are general economic benefits (like retirement and unemployment benefits) and special health related benefits (like disability allowance and carer pensions). These benefits are government allowances designed to assist us when we age or when we are in need.
158. A same-sex relationship is not recognised as a "couple" under federal legislation. This means that the assets and incomes of lesbian or gay couples are individually assessed. A person in a heterosexual marriage or de facto relationship has his or her assets assessed as part of a relationship (ie, on the basis of two incomes). A heterosexual partnership is considered a "couple" and both people in the heterosexual relationship have their assets and income combined, and jointly assessed.
159. Lesbians and gay men in relationships are not jointly assessed. Each person in the relationship is thus entitled to apply for a separate pension or benefit. This means, for example, that one partner can apply for a sole parents pension (if they have dependant children) even though there are two people raising the child, while the other, if unemployed, is entitled to receive the single rate unemployment benefit, even though living with a same-sex partner. The total amount paid in this situation is more than the married rate, ie, the amount that would be paid to a married or de facto heterosexual couple.
160. As the Law Institute of Victoria explains, while lesbians and gay men may benefit in some social security situations because of the non-recognition of their relationship, there are other situations where disadvantage will arise. For example, a gay or lesbian partner cannot receive a supporting allowance from their disabled partner's disability benefit, unlike a partner in a heterosexual relationship. Same-sex couples are also not entitled to the Wife's Pension and the Home Child Care Allowance. This arises because same-sex partners are not legally recognised as a couple.
161. All couples, regardless of the sexual orientation of the parties can receive the Carer's Pension, which is paid to a person who lives with (and who provides constant care to that person) someone who is disabled.
162. If you are unsure as to what you are and are not entitled to claim in the area of social security, you should direct any queries to the Centrelink Information Service in your local area or call the following phone help lines:

Appointments	13 10 21	Employment Services	13
28 50 Pensions		13 23 00 Family Payments	
13 13 05 In languages other than English		13 12 02	

Health Issues

163. Some of the most distressing times in the shared lives of lesbians and gay men involve the ill health of our partners and children. Because our relationships are not legally recognised, this can cause considerable stress if our partners become ill or die and we have not taken adequate care to ensure that we are prepared to deal with issues like exclusion from hospital visits, medical confidentiality,

funeral arrangements etc.

Hospital Visitation Rights

164. The question sometimes arises as to whether or not it is legally possible for the family of your same-sex partner to exclude you from visiting your partner in the hospital. In Western Australia, hospitals impose restrictions regarding visiting hours and restrictions based solely on medical reasons. If any hospital visit is deemed detrimental to your partner's health, you may be denied visiting rights by the hospital.
165. If your partner's immediate family attempts to deny you access, you can lodge a complaint to the hospital in question. The hospital then has an obligation to forward your complaint to the Hospital Board for review. Here, both parties are given an opportunity to present their side of the argument as to why visitation rights should be granted or denied.
166. Experience in Western Australia indicates that the Hospital Board is unlikely to deny your right to visit solely on the basis of your sexual preference or relationship status. There usually have to be valid medical reasons for denial. Recall that the hospital's main interest is the patient's health and comfort. Having said that, as in all family related matters, next of kin will sometimes be seen to take precedence over persons not legally recognised as family. Should this arise, your partner does have the right to apply for a **Guardianship Order**. This Order, if granted, will allow him or her to make any medical decisions on your behalf that you yourself might make.
167. In granting an Order of this sort, the State Guardianship Board will often try to determine what the person who is incapacitated would have wanted. It is suggested, therefore, that you write down what you would like to see happen in the event of incapacity and have this document witnessed by persons willing and able to speak out on your behalf should your wishes be challenged. This is discussed in more detail later in this Paper.

HIV Testing And Confidentiality

168. Confidentiality regarding one's HIV status is always a serious issues for anyone concerned about the effects of disclosure on employment opportunities, safety, discrimination etc. Because one's HIV status is often a matter for both the person with the virus and his or her partner(s), some of the issues relevant to testing and confidentiality are discussed below.
169. For the most part, your HIV status is confidential. There are, however, some exceptions to this general rule.
170. Royal Perth and Fremantle Hospitals have Communicable Disease and Sexual Health Clinics which have free and highly accessible HIV testing facilities. All testing procedures are strictly confidential. All test results are kept in a separate computer system, which is different from the hospitals' main computer system. Your results are not accessible to anyone, including medical practitioners, without your consent.
171. You do not need a doctor's referral to be tested for HIV or STDs at either of these clinics. When you go for a test at either of these clinics, you are required to disclose information regarding your name, address, date of birth and contact number so that you can be contacted regarding test results. Test results will not be disclosed over the telephone.
172. There is no duty on anyone to disclose positive testing HIV results to a family member, spouse, or a same-sex or opposite-sex de facto. Under the Health Act 19[11] (WA), however, clinics and medical practitioners have a duty to inform the Health Department when positive HIV and STD (Sexually Transmitted Diseases) test results have been obtained. Notification is to be forwarded to the Executive Director of Public Health which is used for surveillance of HIV/STD only.

173. The only patient information any medical practitioner is required to disclose to the Health Department is the first two letters of your family name and given name. Clinics and medical practitioners must complete appropriate notification forms for all patients diagnosed with STD/HIV as soon as practical. A new notification form must be completed for each change of a patient's medical status; ie, HIV infection, AIDS diagnosis, death.

Hospital HIV/AIDS Policies

174. A hospital may request a laboratory test, designed to detect whether you have HIV infection for medical purposes. It is, however, the policy at many hospitals not to request a laboratory test without your consent if you are a legally competent patient who is able to appreciate the significance of a positive result.
175. Consent to such a test at Sir Charles Gardiner Hospital will not be sought without pre-test and post-test counselling advised from time to time as appropriate by the Communicable Disease Branch of the Health Department of WA.
176. A competent patient declining to be tested may be treated as if infected with HIV, but will not be declined treatment solely on that basis.

Contact Numbers

177. For more information, contact these centres.

Royal Perth Hospital: Communicable Disease Service
(08) 9224 2178
(Appointment necessary)

Fremantle Hospital: Sexual Health Service (Clinic K)
(08) 9431 2149
(Appointment necessary)

Western Australian AIDS Council: AIDS line
(08) 9429 9944
664 Murray Street West Perth

Family Planning Association
(08) 9227 6177
70 Roe Street, Northbridge

Women's Health Care House
(08) 9227 8122
100 Aberdeen Street, Northbridge

Men's Health Care House
(08) 9429 9902
664 Murray Street, West Perth

Aboriginal Medical Service
(08) 9328 3888
154 Edward Street, East Perth

Affected Persons HIV/AIDS Support Group
(08) 9429 9900
PO Box 993 Canning Bridge 6153
(08) 9417 5131 a/h

HIV/AIDS Pastoral Care
(08) 9470 4931
Community Centre. 31 Stiles Ave Burswood

Privacy And Health Records

178. Keeping records about individuals is often necessary for providing better services - for example, for paying health benefits. This does not mean, however, that your private health information or health status can be freely released to the public, without your consent.
179. In 1988, the Federal government introduced the Federal Privacy Act. The Act lays down strict privacy guidelines which Federal government agencies and departments must observe in collecting, storing and using personal information. It covers agencies such as departments of Social Security, Immigration, Local Government, the Federal Police and Bureau of Statistics.
180. People who believe that their privacy has been infringed because of a breach of the Information Privacy Principles may complain to the Privacy Commissioner, who will then initiate an investigation.
181. For more information, contact:

Privacy Commissioner
GPO Box 5218
Sydney 2001
Phone: 008 023 985

Disability Discrimination

182. If you are HIV+ or have AIDS, you are entitled to protection under the impairment provisions of the Western Australian Equal Opportunity Act. The Act makes it unlawful to discriminate against a person with a disability. That includes people with a physical or intellectual disability, a person who has had a disability in the past or who is assumed to have a disability. You may also be covered by the Disability Discrimination Act 1992(Cth). Legal rights under this legislation are often more favourable than state legislation.
183. Under the Western Australian Equal Opportunity Act it is against the law to discriminate against a person because of a disability in the following areas of public life:
 - o work;
 - o public accommodation;
 - o education;
 - o provision of goods and services;
 - o memberships in clubs.
184. There are, however, certain instances in which it is not unlawful to discriminate against a person because of impairment. Exceptions include:
 - o unjustifiable hardship;
 - o where the person with a disability cannot reasonably carry out the work or activity;
 - o domestic workers in private households;
 - o superannuation and insurance based on statistical evidence;
 - o accommodation in private households.
185. For more information on your rights and obligations under the Equal Opportunity Act, call or write to:

Commissioner for Equal Opportunity

2nd Floor
Westralia Square
141 St Georges Terrace

Perth WA 6000
Telephone: (08) 9264 1930
Country Callers: 1 800 198 149 (free call)

186. For information on your rights and obligations under the Disability Discrimination Act 1992 (Cth), call or write to:

Human Rights and Equal Opportunity Commission
133 Castlereagh St
Sydney NSW
Ph: 1300 369 711

Incapacity of a Partner

187. What is the legal position if a lesbian or gay man, due to an accident or illness, loses the capacity to handle their own affairs? Who makes decisions for you if you are comatosed as a result of a car accident or if you are suffering from HIV dementia? Normally, the right to make these decisions will be left to your immediate family. This excludes your same-sex partner and means that your family can exclude your partner from any decisions in this regard.
188. The only way to make certain that your affairs are managed in the way you want them to be should you become incapacitated, is by granting an Enduring Power of Attorney to a person you trust, who is aware of your wishes and who will carry them out.

Enduring Power of Attorney

What is it?

189. An Enduring Power of Attorney is, in essence, a living will. It is created under the Guardianship and Administration Act and is basically a document which gives you power to delegate legal authority to someone you trust, to act on your behalf regarding your financial matters. You may want to delegate this power if you are ill, incapacitated or disabled and unable to make sound decisions on your own behalf.
190. When you delegate power for someone to act on your behalf, you must have the mental capacity to understand both of the following:
1. the act of the appointment;
 2. the nature of the transactions the attorney is to carry out under the delegated power.
191. An Enduring Power of Attorney may be created in favour of another person at all times (including any period of incapacity of the person granting it) or only during a period the Guardianship Board declares the person to lack incapacity. The person appointed on behalf of another may be given authority to make any financial decision on their behalf or their authority may be limited. If there are to be limitations, they must be specified. Some limitations could include, for example, limitations on investment decisions, using only specific monies in certain bank accounts, and a limitation on the power to sell your home.
192. In the absence of an Enduring Power of Attorney, a same-sex partner may apply to the Guardianship Board to be appointed the legal guardian if their partner becomes incapacitated. Relatives of the incapacitated party may also make such an application. The Board is given a discretion to appoint the

person they deem most suitable. Factors the Board will take into account include:

- o the desirability of preserving existing relationships within the family of the person;
- o the compatibility of the proposed appointee with that person and with the administrator (if any) of that person's estate;
- o the wishes of the person in need of a legal Guardian;
- o whether the proposed appointee will be able to perform the functions required.

193. The powers granted under a **Guardian Order** include not only the powers conferred by an Enduring Power of Attorney (ie, those with respect to financial decisions) but also those related to health matters. Hence, if you are incapacitated and medical decisions need to be made for you, your partner will need to apply for a Guardianship Order in order to do so. Note that the Board will look at the wishes of the person needing representation. It is suggested that if you do want your partner to have the right to make such decisions in the event of your incapacity, you should outline this request in writing prior to any incapacity and have it legally witnessed by persons willing to state this to the Board should the need arise.
194. If you are adamant that your same-sex partner have the right to make financial decisions on your behalf in the event of incapacity, you must ensure that they are given an Enduring Power of Attorney. Medical decisions can only be made by your partner on your behalf once the power to do so has been granted by the Guardianship Board.
195. It is advisable to discuss your specific needs with a lawyer. They will assist you with the drafting of a document that protects you and your partner and which suits your specific needs.

Why is an Enduring Power of Attorney Necessary?

196. Same-sex de facto relationships in Western Australia are not recognised by the law. "Spouse" and "de facto" only include partners of a heterosexual relationship. Your partner therefore has no legal authority to make necessary decisions on your behalf or implement decisions you have already made if you become incapacitated.
197. If you want your partner to control your affairs during this distressful time, you must create an enduring power of attorney. You must expressly give your partner the authority s/he needs to make decisions on your behalf.

Can I Appoint More Than One Person?

198. You can appoint one or two persons to make decisions on your behalf. If you appoint two people then you can decide that they must both make the decision or that one can make the decision.

Who Can I Appoint to Make Such Decisions on my Behalf?

199. You can appoint anyone. However, that person must be capable of making decisions on your behalf. If, for example, someone is suffering from a mental disability, you cannot appoint them.

What are the formalities which I must comply with in order to create an Enduring Power of Attorney?

200. In order for an Enduring Power of Attorney to be created it must be in the form, or substantially in the form, of Form 1 in Schedule 3 to the Act. A copy of Form 1 appears at the end of this Paper in Appendix D. In addition, the person or persons to whom the power is given must execute a Statement of Acceptance in the form or substantially in the form, of Form 2 in Schedule 3 of the Act. A copy of Form 2 appears in Appendix D of this Paper.

201. The Enduring Power of Attorney must be witnessed by two persons who are not the proposed Attorneys. The two persons must be persons authorised by law to take declarations (e.g. a Justice of the Peace, a Commissioner for Declarations, a doctor, a lawyer). A complete list of suitable persons is available from the Public Guardian's Office or from Sands & McDougall stationery shops. Each of the witnesses should state their address and occupation and print their name in addition to signing the document.

Will I need more than one copy?

202. You should make sure that you keep a copy for your records. One original should be given to the donee. If you own land then you will need to sign two originals since the Land Titles Office requires an original of the Enduring Power of Attorney in order to register transfers or other dealings on land. You will need two original copies of Form 1 and Form 2.

Can I place any restrictions on the decisions which the donee can make on my behalf?

203. Form 1 permits you to authorise the person, or persons, appointed as your attorney, to do anything on your behalf that you can lawfully do by an attorney. You can limit their authority. If there are limitations on the authority then those limitations must be stated in the Enduring Power of Attorney.

When does the Enduring Power of Attorney come into effect?

204. Form 1 gives two options. The first option is that the power of attorney takes effect from when it is signed and accepted. The second option is that it take effect only when there is a declaration made by the Guardianship & Administration Board that you do not have legal capacity.

How do I end an Enduring Power of Attorney?

205. An Enduring Power of Attorney can be terminated at any time when you are mentally capable of terminating the Enduring Power of Attorney. If you decide to revoke (end) an Enduring Power of Attorney, you will need to notify the donee and anyone who has been informed of its existence (e.g. banks, the Office of Titles).

206. It should be noted that an Enduring Power of Attorney terminates on the death of the donor.

207. The Guardianship and Administration Board may order that the Enduring Power of Attorney be revoked in a situation where you have lost capacity and cannot revoke on your own behalf (S.109(a)).

Is the person to whom I give an Enduring Power of Attorney subject to any obligations?

208. The person to whom an Enduring Power of Attorney is given, is bound to:-

- a. exercise his or her powers as attorney with reasonable diligence to protect your interests and if he or she fails to do so they may be liable to you for any loss occasioned by the failure;
- b. keep and preserve accurate records and accounts of all dealings and transactions made under the power; and
- c. not renounce a power during any period of legal incapacity of the donor (ie, if you are no longer capable of making decisions then they may not free themselves of the obligations imposed by the power of attorney unless they apply for an order from the Guardianship & Administration Board to release them).

What happens if the person to whom I grant the Enduring Power of Attorney misuses the power when I am not legally capable?

209. In these circumstances a person who has in the opinion of the Board a proper interest in the matter may apply to the Board for an order revoking or varying the terms of the Enduring Power of Attorney or appointing a substitute donee of the Enduring Power of Attorney.

What happens if the person to whom I give the Enduring Power of Attorney is unsure as to how to make a decision?

210. The person to whom you give the Enduring Power of Attorney may make an application to the Guardianship & Administration Board for directions as to matters connected with the exercise of the power or the construction of its terms.

Do I have to pay stamp duty on the Enduring Power of Attorney?

211. No.

Where can I get the forms?

212. The forms are available from Sands & McDougall stationery stores.

Where is the Office of the Public Guardian and the Board?

213. 111 St George's Terrace
PERTH WA 6000

PO Box 7669
Cloisters Square
PERTH WA 6850

Tel: (09) 261 7620
Fax: (09) 261 7673

Wills, Death and Inheritance Matters

214. It is probably safe to say that no one issue has caused more grief for lesbians, gay men, bisexual and transgendered people and their partners than that of disagreement between family members about how best to deal with a person's estate when that person dies. Because lesbian and gay male same-sex relationships are still offered only limited protection in law, it is **essential** that **all** lesbians and gay men take steps to ensure that their wishes and the best interests of their partners are protected in the event of death.

What is a will?

215. A will is a legal document which specifies to whom and what possessions you want to leave certain people upon your death. These people are referred to as the beneficiaries of your will. Any person aged 18 or above who is of sound mind can create a legally binding will.

What is an executor?

216. You must appoint an executor when you draw up your will. An executor is the person you appoint to carry out the terms of your will. It is usually a person who you trust and who receives the most from your will. Anyone can be your executor, and you may have more than one.
217. Upon your death, the executor should obtain your will and obtain permission from the Supreme Court

to do as the will instructs.

218. You may want to appoint your partner as the sole executor of your will. She or he will then have the authority to carry out your wishes as outlined in the will. In some cases, you may want to appoint a professional executor, such as a trustee company, or the Public Trustee.
219. If you don't appoint an executor, the court may appoint one for you.

Why is a will essential?

220. The law does not regard a gay or lesbian partner as a spouse or next of kin. If you want your partner to control your affairs and to receive most of your possessions upon your death, you must expressly state this in a will. If you do not, the law will most often look to your family when appointing an executor, or divide your possessions according to the law.
221. Further benefits of creating a will include:
 - o your choice of who should benefit from your property, how and what each beneficiary should receive;
 - o your choice of an executor/trustee who will look after your property and distribute it according to your will;
 - o your ability to name a guardian for your children, which may be your partner, and make arrangements for their maintenance and education;
 - o providing security for your loved ones;
 - o ensuring a more speedy distribution of your property;
 - o reducing expensive and time-consuming legal battles over your possessions between family members and your partner;
 - o a say in how you want your body to be disposed of upon death.
222. A sample will can be found at Appendix C.

Disposal of the Deceased's Body

223. Under the common law, lesbians and gay men were able to name their partner as the executor of their will, and thus confer on her/him the control of their funeral arrangements and the disposal of their body. Now, the executor's discretion is limited by the Human Tissue and Transplant Act.
224. Under this Act, the "senior available next of kin" is given the authority to make decisions about tissue and organ donations if the deceased has not explicitly, during her/his lifetime, expressed the wish for, or consented to, the removal, after, her/his death, of tissue from her/his body.
225. "Senior next of kin" does not include lesbian and gay partners. Hence, if you want to ensure that your body tissue can be used after your death, you must expressly say so during your lifetime. If you do not, your partner will not be entitled to make this decision for you.
226. Similar difficulties arise with respect to the Coroner's Act (WA), which allows for the holding and examination of a deceased's body for the purpose of investigating the reasons for death. Under the Act, the police or "senior next of kin" of the deceased can require a post mortem examination of a deceased's body if it appears the death may have arisen in suspicious circumstances and not as a result of natural causes. Should this occur, the state coroner would hold the body until such time as her or his investigation is completed. "Senior next of kin" does not include lesbian and gay partners unless no biological family is surviving and the deceased has nominated in her or his will that her or his same-sex partner is to be the person to be contacted in the event of a death.
227. With respect to burial arrangements, all burial arrangements, including who should make them in the event of death, will be arranged by the executor of your will. It is thus essential that you make your

partner the executor in your will if you want her or him to make these decisions.

Changing your will

228. You can change your will at any time. You can do this by:

- creating a new will and expressly stating that you intend all pre-existing wills to be revoked;
- employing a codicil (ie, a document used to make a minor change to a will). A codicil must be made in the same way as a will to be valid.
- destroying it by yourself or by getting another person to destroy it in your presence.

Dying without a will

229. If you do not have a will, an "intestacy" arises. Your estate may, as a result, be left to your relatives and not your partner. The Administration Act 1903 provides for this situation. It sets out who is entitled to your property if no will exists.

230. Where a heterosexual partner dies, his or her partner automatically becomes entitled to exercise certain benefits and rights. The Act does not cover same-sex couples. Hence, the only way you can ensure that your partner and friends receive your property is to make a valid will.

231. Your will should be prepared or checked by a lawyer. This can be done for a relatively small cost.

Problems of Dying Intestate

232. Same-sex partners of a deceased gay or lesbian partner do not share the same rights that a heterosexual partner enjoys upon their heterosexual partner's intestacy.

233. Some examples include body disposal, funeral arrangements, organ donations and post-mortems which are usually made by the executor of the estate or the "senior available next of kin". In WA, same-sex partners are not automatically recognised as a possible executor or a possible next of kin.

234. The WA Administration Act 1903 excludes same-sex partners being recognised on intestacy. Therefore, unless you create a will, you will create difficulties for your partner should she or he want to claim a share of your estate.

235. Under the Motor Vehicle (Third Party Insurance) Act 1943, the Fatal Accidents Act 1959, the Worker's Compensation and Rehabilitation Act 1981 and the Criminal Injuries Compensation Act 1985, a same-sex partner who dies from a motor vehicle accident, work accident or an act of violence will not be able to receive compensation to cover economic loss for their same-sex partner. You must therefore ensure that your intentions to provide financial support to your gay or lesbian partner are expressed in a will.

Payment of debts

236. Where you have outstanding debts on your death, the payment of such debts will be attended to by the executor of the estate once probate has been granted. If your debts are numerous and large, payment of the estate could severely disadvantage your partner. You should seriously consider life insurance as an alternative to cover these liabilities.

Can a Court Change My Will? - The Inheritance (Family and Dependents Provision) Act

237. A person may make a will disposing of their estate as they choose. However, the courts may change

the distribution of the property if they consider the will is unfair or unjust in its treatment of relatives and other people who were dependent on the deceased. Persons eligible to make an application under this Act include:

- the widow or widower;
- a person married to the deceased and who was, at the date of death, receiving or entitled to receive, maintenance from the deceased, whether pursuant to an order of any court, or to an agreement otherwise;
- a child;
- grandchildren who at the date of death were being wholly or partially maintained by the deceased or where the parent of the grandchild had died before the deceased;
- a parent of the deceased;
- a defacto widow or widower of the deceased who at the time of the death of the deceased was being wholly or partly maintained by the deceased, who was ordinarily a member of the household of the deceased, and for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.

Why you need both a Power of Attorney and a Will

238. As mentioned previously, an Enduring Power of Attorney is a legal document which appoints a person to act on your behalf. The document allows the attorney to make decisions just as you would. The attorney is able to look after your financial and personal affairs during your life. The difference between a Power of Attorney and an Executor of a will is that a Power of Attorney ceases upon death. Your will takes effect upon your death and your executor will be able to look after your affairs after your death.
239. You must create both documents to ensure that those you trust make decisions on your behalf and have the authority to do so.

Superannuation

240. Most superannuation schemes recognised by the Commonwealth Government allow a spouse, children and financial dependants to be paid either a lump sum payment in the event of death or disablement of the contributor before the contributor reaches the maximum retiring age.
241. If you want your partner to be able to collect the lump sum payment in the event of your death, it is extremely important that you state this in your will. You should also list your partner as the beneficiary in your superannuation plan. Under the Commonwealth Superannuation Schemes Amendment Act 1992, a "spouse" is defined as someone "living as either the husband or wife of the contributor".
242. In a recent case before the Commonwealth Administrative Appeals Tribunal, the Tribunal held that the definition of "spouse" in the Superannuation Act 1976 (Cth) s.8A, which also required the parties to be living as husband or wife, did not include a same-sex partner. Similarly, a recent Senate Select Committee report on Superannuation stated that a same-sex partner is usually not considered a dependant under section 10 of the Superannuation Industry (Supervision) Act 1993.
243. If your partner is not listed as the beneficiary of your superannuation, it may also be difficult for her or him to claim payment as someone who is financially dependant. A dependant is normally considered to include a "spouse" and "child." If your partner works, it may prove difficult to argue/prove financial dependence and thus persuade an adjudicator to look beyond this definition.
244. It is important to keep in mind that even in those situations where you have listed your partner as the beneficiary, the administrators of your particular superannuation scheme have the right to alter your request if, upon your death, you have any children or other financial dependants which the administrator feels should receive payment. These people would have to prove that they have a claim

for financial dependence that requires the administrator to ignore your wishes. If they can prove dependence, the administrator may distribute the money as she or he sees fit, taking into account both your request and the needs of proven dependants.

245. In the event that you do not have a will, the administrators are free to distribute your superannuation to members of your biological family. It is thus important that you list your partner as the beneficiary in both your will and the actual superannuation policy in question. If you do not, biological family members may take precedent.
246. Some superannuation plans allow for the death benefit to be paid as a pension. Where the contributor dies prior to retirement, that person's "spouse" may be paid a reversionary pension. Again, this is problematic because same-sex partners are not recognised as spouses.
247. In the event that your plan requires the payment of a pension, and you are concerned for the continued support of your partner, you should seriously consider life insurance as a means of ensuring support after death. Again, all recipients of life insurance policies should be listed in your will and on the actual insurance plan in question.

Appendices

Appendix A: Sample Cohabitation Relationship Agreement

The Agreement offered here is one that is commonly used in Canada. It is provided in and discussed in more detail in Laurie Bell, *On Our Own Terms: A Practical Guide for Lesbian and Gay Relationships* (Toronto: Coalition of Lesbian and Gay Rights, 1991). Bell's book offers an exceptional comparative analysis for persons wanting more information on the use of cohabitation agreements, sperm donation agreements and same-sex relationship rights generally.

Agreements of this sort have not been used all that often in Australia. They are, however, recommended as a means of outlining for the court your personal arrangements and wishes in the event of relationship breakdown. For similar agreements and further discussion of this issue from a comparative perspective, we strongly recommended the use of Laurie Bell's insightful text.

NOTE: This document is provided for information purposes only. You should always discuss agreements of this nature with a lawyer before relying on them.

Linda Lover and Pam Partner make the following agreement:

All property owned by either Linda Lover or Pam Partner as of the date of this agreement remains her property and cannot be transferred to the other unless the transfer is made in writing.

The income of each person, as well as any accumulations of property from that income, belongs absolutely to the person who earns the money. Joint purchases are covered under the provisions of clause 7.

If Linda Lover and Pam Partner separate, neither has a claim against the other for any money or property, for any reason, with the exception of property covered under clause 7 below (the joint purchase clause), or unless a subsequent written agreement specifically changes this contract.

Linda Lover and Pam Partner will keep separate bank accounts, etc, and neither is responsible for the debts of the other.

Living expenses, which include groceries, utilities, rent, and day to day household upkeep, will be shared equally. Linda Lover and Pam Partner agree to open a joint bank account into which each agrees to contribute \$500 per month to pay for living expenses.

Linda Lover and Pam Partner may make joint purchases (such as a house, car, boat). The joint ownership of each specific item will be reflected on any title to the property. If no title slip exists, or if it is insufficient to record all the details to their agreement, Linda Lover and Pam Partner will prepare a separate, written, joint ownership agreement. Any such agreement will apply to the specific jointly owned property only and will not create any implication that any other property is jointly owned.

This agreement sets forth Linda Lover and Pam Partner's complete understanding concerning real and personal property ownership and takes the place of any and all prior contracts or understanding, whether written or oral.

This agreement can be added to or changed only by a subsequent written agreement.

Any provision in this agreement found to be invalid shall have no effect on the validity of the remaining provisions.

Attested _____ Signature _____

Attested _____ Signature _____

Appendix B: Agreement to Jointly Raise a Child (Child Parenting Plan)

The Child Parenting Plan provided below is discussed in more detail in an excellent legal guide written by US attorneys Hayden Curry, Dennis Clifford and Robin Leonard. Entitled A Legal Guide for Lesbians and Gay Couples (8th ed.) (Berkeley: Nolo Press, 1994), this book is exceptional in its scope, content and discussion of many of the issues now facing same-sex couples.

Although this Agreement was drafted for an American audience, it offers an excellent example for couples wanting to use such an agreement in Western Australia for the purpose of seeking a court ordered parenting plan with consent. Whilst these agreements have not been tested to any great degree in Australia, they do offer some guidance to the court when asked to determine parental rights and obligations.

NOTE: This document is provided for information purposes only. You should always discuss agreements of this nature with a lawyer before relying on them.

We, Anne Parent and Martha Jones, make this agreement to set out our rights and obligations regarding our child who will be born to us by Anne Parent. We realise that our power to contract, as far as a child is concerned is limited by State law. With this knowledge, and in the spirit of co-operation and mutual respect, we state the following as our agreement:

It is our intention to parent jointly and equally. We will do our best to share jointly the responsibilities involved in feeding, clothing, loving, raising and disciplining our child.

Anne Parent will seek a Temporary Guardianship giving Martha Jones the power to make medical decisions she thinks are necessary for the child in Anne's absence.

Our child will be given the last name of Parent.

Anne Parent agrees to designate Martha Jones as guardian of Anne Parent's estate, and of the child, in her will. We understand that naming Martha Jones legal guardian of the child isn't legally binding, but believe it should be persuasive in court.

Because of the possible trauma our separation might cause our child, we agree to participate in a jointly agreed upon program of counselling if either considers separation.

If we separate, we will both do our best to see that our child grows up in a good and healthy environment. Specifically, we agree that :

We will do our best to see that our child maintains a close and loving relationship with each of us. We will share in our child's upbringing and will share in our child's support, depending on our needs, our child's needs and on our respective abilities to pay. We will make a good faith effort to make jointly all major decisions affecting our child's health and welfare. We will base all decisions upon the best interest of our child. Should our child spend a greater portion of the year living with one of us, the person who has actual custody will take all steps to maximise the other's visitation and help make visitation as easy as possible. If we disagree about what is in the best interests of our child, we will undergo jointly agreed upon counselling with the hope that we will work out our differences and avoid taking our problems to court. If either of us dies, our child will be cared for and raised by the other, whether or not we were living together. We will each state this in our wills.

We intend that this agreement be binding not only between ourselves, but between each of us and our child.

Should any dispute arise between us regarding this agreement, we agree to submit the dispute to binding arbitration, sharing the cost equally.

Executed at :

City of Perth

Dated _____ Signature _____

Dated _____ Signature _____

Appendix C: Sample Last Will and Testament

NOTE: This document is provided for information purposes only. You should always discuss agreements of this nature with a lawyer before relying on them.

THIS IS THE LAST WILL AND TESTAMENT OF me, [Full Name, Address and Occupation].

1. I HEREBY REVOKE all former Wills and other testamentary dispositions made by me at any time heretofore made.
2. I NOMINATE, CONSTITUTE AND APPOINT [Full name of Executor and Trustee], to be the Executor and Trustee of this my Will. In the event that she/he should predecease me or be unable or unwilling to be my Executor and Trustee then I NOMINATE, CONSTITUTE AND APPOINT, [Full Name of alternate Executor and Trustee], the Executor and Trustee of this my Will. I hereinafter refer to my Executor and Trustee for the time being as my "Trustee".
3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind whatsoever and wheresoever situate, including any property over which I may have a general power of appointment, to my said Trustee upon the following trusts, namely:
 - a. To use her/his discretion in the realisation of my estate with power to my Trustee to sell, call in and convert into money any part of my estate not consisting of money, at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my said Trustee may in her/his uncontrolled discretion decide upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as she/he may think best, and I hereby declare that my Trustee may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which trustees are authorised to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my said Trustee may in her/his discretion deem advisable and my Trustee shall not be held responsible for any loss that may happen to my estate by reason of so doing;
 - b. To pay out of the charge to the capital of my general estate my just debts, funeral and testamentary expenses and all estate inheritance and succession duties or taxes whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever that may be payable in connection with any property passing (or deemed so to pass by any governing law) on my death or in connection with any insurance on my life or any gift or benefit given or conferred by me either during my lifetime or by survivorship or by this my Will or any Codicil thereto and whether such duties or taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorise my Trustee to commute or prepay any such taxes or duties;
 - c. I give to [Full name] my [state any specific gift e.g. my car, the sum of \$5,000.00]
 - d. To transfer and deliver the residue of my estate to [Full name of person or persons who is or are to receive estate] for her/his own use absolutely [If more than one person is to receive residue of estate state respective portions].
 - e. If my friend, [any of those named to receive the residue of the estate], should predecease me, or survive me but die within thirty days from the date of my death, then I direct my Trustee to transfer and deliver the residue of my estate [or their share of the residue of the estate] as follows:
 - i. To transfer and deliver one-half of the residue of my estate to [Full Name], for her/his own use absolutely. If [the person named] should predecease me without issue or survive me but die within issue within thirty days from the date of my death, then I direct my Trustee to transfer and deliver the share of my estate to which that deceased person would have been entitled to receive from my estate to their issue in equal shares for his or her own use absolutely;

ii. To transfer and deliver the remaining one-half of the residue of my estate to the brothers and sisters of [Full Name] in equal shares per stirpes for their own use absolutely.

4. I WILL AND DIRECT that if any person becomes entitled to any share or interest in my estate (whether of income or of capital and whether by way of direct gift or discretionary payment) before attaining the age of majority my Trustee shall hold and invest the share or interest of such person until she/he shall accumulate the income derived therefrom by investing the same and the resulting income therefrom and such accumulations shall be added to the share or interest from which they arose and shall devolve therewith PROVIDED that my Trustee shall have power and I HEREBY AUTHORISE him or her to apply such part or parts of the income and capital of such share or interest as in her/his absolute discretion may consider necessary or advisable for or towards the care, maintenance, education, advancement in life or other benefit of such person until she or he attains the age of majority.
5. I AUTHORISE my Trustee to make any payments for any person under the age of majority to a parent or legal or de facto guardian of such person or to anyone to whom my Trustee in her/his discretion deems it advisable to make such payments, whose receipt shall be a sufficient discharge to my Trustee.
6. MY Trustee when making investment for my estate shall not be limited to investments authorised by law for trustees but may make any investment in which in her/his uncontrolled discretion she/he considers advisable and my Trustee shall not be liable for any loss that may happen to my estate in connection with any investment hereby authorised and made by him in good faith.

IN TESTIMONY WHEREOF I have to this my last Will and Testament, written upon this and four preceding pages of papers, subscribed my name this [Date].

SIGNED, PUBLISHED AND
) _____
) as and for her/his last Will and
) _____
) request in her/his presence and in the
) presence of each other, have hereunto
) subscribed our names as witnesses.
)
)

) DECLARED by the said Testator, [Full
) _____
) Testament, in the presence of us, both
) present at the same time, who at her/his
) presence of each other, have hereunto
)
)

NAME of Witness:

ADDRESS of Witness:

NAME of Witness:

ADDRESS of Witness:

Appendix D: Enduring Powers of Attorney

Required Forms under the Guardianship and Administration Act 1990

Note: These documents are intended only as a general guide. While you must complete both forms, you should always consult with a lawyer before relying on them as your particular personal circumstances may require more thought and analysis.

**Schedule 3
Form 1**

Enduring Power of Attorney

This Enduring Power of Attorney is made on the date day of... 19... by (name) of ... under section 104 of the Guardianship and Administration Act 1990.

1. I APPOINT (name) of city of residence ... (or name of city of residence and name of city of residence.... Jointly) (or name of city of residence and name of city of residence Jointly and severally) to be my attorney(s).
2. I AUTHORISE my attorney(s) to do on my behalf anything that I can lawfully do by an attorney.
3. The authority of my attorney(s) is subject to the following conditions or restrictions -

4. I DECLARE that this power of attorney -
 - a. will continue in force notwithstanding my subsequent legal incapacity; or
 - b. will be in force only during any period when a declaration by the Guardianship and Administration Board that I do not have legal capacity is in force under section 106 of the Guardianship and Administration Act 1990.

SIGNED AS A DEED by _____

WITNESSED by:

		(Signature of Witness)
(Signature of Witness)		
		(Name of Witness)
(Name of Witness)		(Address of Witness)
(Address of Witness)		

**Schedule 3
Form 2**

Acceptance of Enduring Power of Attorney

I/We....., the person(s) appointed to be the donee(s) of the power of attorney created by the instrument on which this acceptance is endorsed [or to which this acceptance is annexed] accept the appointment, and acknowledge:

- a. that the power of attorney is an enduring power of attorney; and
 - i. will continue in force notwithstanding my subsequent legal incapacity of the donor;
 - ii. will be in force only during any period when a declaration by the Guardianship and Administration Board that I do not have legal capacity is in force under section 106 of the Guardianship and Administration Act 1990; and
- b. that I/we will, by accepting this power of attorney, be subject to the provisions of Part 9 of the Guardianship and Administration Act 1990.

Signed
(Donee(s) of the Power of Attorney)

Notes

[1] The material in this paper is intended only as a general guide and brief introduction to the state of the law in Western Australia. It is not intended to replace or be legal advice. You should always consider seeking professional legal advice so that your particular circumstances can be judged objectively and taken into consideration before taking any legal action. The authors expressly disclaim any liability to any person in respect to anything done or not done in reliance on any of the contents of this publication.

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Document author: Kendall, Leishman, Rogerson and Walker

Document creation: December 2000

HTML last modified: December 2000

Authorised by: [Archie Zariski](#), Managing Editor, E Law

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