

Australian lesbian, gay and/or transgender people and the law

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Introduction

In this chapter we use the term 'lesbian, gay and/or transgender people' to acknowledge the fact that some transgender people may identify as heterosexual, while others may identify as lesbian or gay. We thus draw attention to the differences between lesbian and gay as categories related to sexual orientation, and transgender as a category related to gender identity. We have chosen not to make explicit reference to bisexual people in this chapter as there is currently no legislation in Australia that specifically pertains to bisexual people. Bisexual people, dependent on the relationship(s) they are in, will likely be covered by existing laws related to heterosexual, lesbian, gay and/or transgender people. We acknowledge that this in itself fails to recognise the specificity of bisexual people's experiences.

In thinking about the relationship between social work, the law, and lesbians, gay men and/or transgender people - as is the focus of this chapter - it is important to understand something of the historical relationship between these populations of people and the law in Australia. For example, and in regards to gay men, laws that rendered sodomy a crime were first repealed in South Australia in 1975, though it took until Tasmania acted in 1997 for this to be the case in all Australian States and Territories. It is of course notable that the repealing of these laws is often referred to as the 'legalising of homosexuality', when in fact their primary relevance is to men who have sex with men. This has much to say about how lesbianism has been understood historically in the law, and about public understandings of women's sexuality more generally. For to transgender people, it is only much more recently, indeed in the second decade of this millennium, that the rights of transgender people in Australia have begun to be acknowledged.

So what do these opening examples have to say about social work and the law? As we argue throughout this chapter, what they demonstrate is the fact that while notionally the law is designed to protect people from harm or stigma (Posner 2002), it can of course do the opposite. While, as this chapter outlines, laws in Australia have increasingly become inclusive of lesbians, gay men

and/or transgender people, this is only a relatively recent development in Australian law, and there is a much longer history of the law endorsing the marginalisation of these populations.¹ For social workers, this means two things. Firstly, given the relationship between the law and social norms (where laws reflect social norms as much as they shape them), it is likely that historically many in the social work profession may have been complicit with the marginalisation of lesbians, gay men and/or transgender people. This might have been implicitly (i.e., by failing to challenge stereotypes or discrimination against lesbians, gay men and/or transgender people) or explicitly (i.e., by endorsing the marginalisation of lesbians, gay men and/or transgender people including in social work practice). Given the relatively slow and recent change in Australian laws related to lesbians, gay men and/or transgender people, it is possible that some social work practitioners continue to hold uninformed or discriminatory attitudes towards these populations, a fact that this chapter attempts to address through the provision of information about current laws and their impact upon these populations.

Secondly, it is likely that people who are members of these populations will have experienced discrimination, which may bring them into contact with social work professionals. It is beyond the scope of this chapter to extensively survey the literature on lesbian, gay and/or transgender issues with regard to service provision, but it should suffice to say that living in discriminatory social contexts gives rise to challenges that can exceed the everyday demands of life. For lesbians, gay men and/or transgender people, this means that the prevalence of mental health issues, for example, is often higher than for the general population. Importantly, this is not because these communities are inherently disordered, but rather because the stress of living in discriminatory social contexts can lead to mental health issues that might not otherwise have existed (Meyer 2003). These issues can be especially compounded for older lesbians, gay men and/or transgender people who might have grown up at a time when homosexuality was illegal, and when homosexuality and gender variance were treated as mental disorders to be treated with incarceration and psychosurgery.

With these above points in mind, this chapter proceeds by both outlining in detail current Australian laws as they pertain to lesbians, gay men and/or transgender people, and highlighting how current laws can function to exclude some segments of these populations while offering inclusion to others. By summarising both existing legislation alongside particular legal cases, the chapter highlights the vexed relationship between Australian lesbians, gay men and/or transgender people and the law, and offers suggestions as to what this might mean for social work practitioners. In so doing, the chapter aims to equip practitioners with knowledge to ensure that their practice is informed about the

1 There is no reliable demographic data on what percentage of the Australian population identify as gay or lesbian. In the 2001 Australian Census 20,000 couples recorded their relationship as being gay or lesbian - see Australian Bureau of Statistics website at <www.abs.gov.au/websitedbs/d3310114.nsf/home/Census+data>.

discriminatory legal and social contexts in which lesbians, gay men and/or transgender people live, in addition to understanding something of the role that the profession of social work can play in advocating for the rights of these populations. Indeed, as the *Australian Association of Social Workers* mandates in its current code of ethics (Australian Association of Social Workers 2010), practitioners must not only do no harm in a legal sense, but must also strive to work towards social change to ensure the full inclusion of all people. Doing so requires practitioners not only to be aware of current laws as they pertain to lesbians, gay men, and/or transgender people, but also to play an active role in addressing on going inequities within the law.

Federal laws and legislation

In Australia, as is the case for all citizens, lesbians, gay men and/or transgender people are subject to State/Territory and federal laws. As Millbank (2011) has argued, this divide between laws that are applicable only to residents of a State or Territory, and federal laws that are applicable to all Australians, results in a confusing array of laws that are, at times, contradictory. In this first section we summarise federal laws as they pertain to lesbians, gay men and/or transgender people.

Relationship recognition

In 2008 legislation was passed removing many discriminatory federal laws that related primarily to lesbian and gay couples (*Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation Act 2008*; *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform Act 2008)*).² These reforms related to areas such as income support, taxation, migration, superannuation, educational assistance and family law and child support, each of which is discussed below. Prior to these amendments, attempts to recognise lesbian and gay relationships at a federal level had been rejected, with two exceptions: superannuation and anti-terrorism laws. Superannuation laws were in 2004 extended to include people classified as being in an interdependency relationship (*Superannuation Legislation Amendment (Choice of Superannuation Funds Act) 2004 (Cth)*). While the amended laws did not explicitly include same-sex relationships, gay men and lesbians could take advantage of this notion of ‘interdependency’ to meet the requirements and inherit if their partner died. Similarly, changes made in an anti-terrorism amendment meant that same-sex partners were included in the definition of ‘a close family member’ (*Criminal Code (Cth): s 102(1)*). These changes mean that if

² See also the explanatory memorandum regarding the new legislation entitled ‘Same Sex Reforms – overview of the Australian Government Same-Sex Law Reform’ available at <www.ag.gov.au>

one partner is found to be a terrorist the other cannot be charged with associating with a terrorist (Millbank 2005).

Despite the 2008 amendments, Australia continues to lag behind many countries in the world in recognising the right of lesbian and gay couples to marry. Until 2004 the *Marriage Act 1961* (Cth) did not include a definition of marriage (though in common law marriage had always been interpreted as the voluntary union of a man and a woman). In 2004, however, the then Coalition federal government amended s5 of the *Marriage Act 1961* (Cth) to define marriage as heterosexual: 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. At the same time, the *Family Law Act 1975* (Cth) was amended to introduced s 88EA, which states that a 'union solemnised in a foreign country between a man and another man, or a woman and another woman' will not be recognised as a marriage in Australia.

In 2011 the federal Labor government held a conscience vote on the topic of marriage equality. The two private member's Bills - the *Marriage Amendment Bill 2012* and the *Marriage Equality Amendment Bill 2012* - introduced to parliament to legalise marriage between two men or two women failed to pass. In the same year, however, the then Attorney-General Nicola Roxon asked the Department of Foreign Affairs and Trade to lift the ban on providing same-sex couples a with a 'Certificate of No Impediment' to enable them to marry overseas, although those marriages are still not recognised under Australian law as marriages (see Attorney-General for Australia, 2012).

The successes and ongoing limitations raised above in regards to the recognition of lesbian or gay couples may not have the same significance for many transgender people, although they will be relevant to transgender people who identify as lesbian or gay. For heterosexual transgender people, cases such as *Re: Kevin* (Attorney-General v 'Kevin and Jennifer' 2003) highlight the restrictions that some transgender people face in relationship recognition. In *Re: Kevin*, a heterosexual couple comprised of a cisgendered woman (i.e., a person who was natively-assigned as female and who identifies as female) and a transgender man (i.e., a person who was natively-assigned as female but who identifies as male) had married and sought affirmation that their marriage was legal. The appeal court upheld the decision of the trial judge that the marriage was legal as the male partner was legally recognised as male. Importantly, however, the male partner had previously undertaken 'several medical procedures to remove both primary and secondary female sexual characteristics and to substitute male sexual characteristics', surgery that was deemed to be 'irreversible'. Whether the same outcome would have been achieved had the male partner not undertaken surgery and still had primary or secondary sexual characteristics is untested.

Another issue of concern for transgender people and federal relationship recognition pertains to transgender people who are heterosexually-married prior to transitioning. Given the fact that marriage between two men or two women in Australia is not currently legal, the 'choice' facing transgender people who are married prior to transitioning is whether they remain in their marriage

and don't have their affirmed gender legally recognized via their birth certificate (so they, in effect, remain in a heterosexual marriage at law), or whether they transition and have their affirmed gender legally recognised and thus their marriage voided. This situation therefore represents an issue between both State and Federal legislation. This is noted in the Law Council of Australia's 2013 response to the *Australian Government Guidelines on the Recognition of Sex and Gender* (discussed in more detail below) which notes that while there is some suggestion that a marriage may remain valid after sex reassignment surgery (Law Council 2013):

...no such confirmation of this policy position is provided in the Guidelines. It is likely that without such confirmation, if married persons were to seek a change in sex or gender in Commonwealth documents or records, government officials would consequently change their status from "married" to (same-sex) "couple", due to the restriction of marriage under the *Marriage Act 1961 (Cth)* to the union of a man and a woman. This would have the practical effect of ending the recognition of their marriage by the Australian Government.

Indeed, this was the case in *AB v Registrar of Births, Deaths and Marriages* (2006). In this Victorian case one partner in a heterosexual marriage transitioned, and sought legal recognition of their transition in the form of a re-issue of their birth certificate. Births Deaths and Marriages refused this given the individual was still married. The complainant took this to the Federal Court, alleging discrimination on the basis of marital status. The federal court granted this, but on appeal by Births, Deaths and Marriages this was overturned, meaning that in order for the individual to receive a reissued birth certificate they must divorce their partner.

Gender recognition

The above points about transitioning and marriage highlight the conflicts between State and Territory legislation and federal legislation. While an individual cannot have their birth certificate reissued with their affirmed gender identity unless they have undertaken surgery, changes to federal policy in 2012 mean that transgender people who have not had surgery but *have* had clinical counselling towards transitioning can now carry a passport in their affirmed gender³ (Rudd and McClelland 2011). This is also reflected in *AB v. Western Australia* in 2011, where the High Court focused on social acceptance of gender transition rather than surgery in its decision, adding impetus to the move away from requirements for surgery to establish gender transition. This approach to supporting transgender people at a federal level was further endorsed in 2013, via amendments to the *Sex Discrimination Act* that protect transgender people - as well as intersex, gay and lesbian people - from

³ For further information see the Australian Passport Office <https://www.passports.gov.au/web/sexgenderapplicants.aspx>

discrimination (*Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*).

It is worth noting that in 2013 the Australian Government published the *Australian Government Guidelines on the Recognition of Sex and Gender*. In brief, these Guidelines state their intention to provide consistency for recognition of gender in Australia, protection from discrimination, and a requirement for all departments, agencies and business to adopt the Guidelines by 1 July 2016. While this could be seen as a positive move and a response to the Australian Human Rights Commission's 2011 Consultation Report *Addressing Sexual Orientation and/or Gender Identity Discrimination*, areas of the Guidelines remain ambiguous in terms of their implications in some areas – as indicated in the section above concerning marriage and birth certificates.

Gender transition for children was also until recently a federal concern, due to the fact that until August 2013 any parent who wished to allow their child to commence hormone blockers had to prove to the Family Court that this was in the best interests of their child. The case of *Re: Jamie* (2013) found that for stage one treatment (hormone blockers) parents and medical practitioners do not need the approval of the court as the treatment is reversible.

Immigration

Until 2008, lesbian or gay couples were excluded from the entitlement to migrate as a couple, and from the arrangement that allowed the non-Australian partner of an Australian citizen to migrate. These restrictions changed in 2008 with an amendment to the *Migration Act 1958* (Cth) that extended the definition of 'defacto partner' to include same-sex relationships.

Of course this applies only to lesbians or gay men who apply to migrate to Australia; lesbians or gay men who arrive in Australia seeking asylum seeking protection on the basis of persecution related to sexual orientation in their home country are subject to mandatory detention and must argue for recognition of their right to refugee status. The case of *SZQYU and SZQUV v Minister for Immigration* 2009 demonstrates how Australian law continues to differentiate between claims for asylum made by lesbian or gay applicants, and claims for asylum made by heterosexual couples. In this case, two applicants claimed to be in a homosexual relationship that was long-standing and pre-dated their arrival in Australia from Bangladesh. They sought asylum in Australia on the basis that they would be persecuted due to their sexual orientation if they were to return to Bangladesh. The Refugee Review Tribunal refused the application, on the assessment that there was not sufficient evidence that the two men were in a relationship or were indeed gay. This was despite evidence submitted to the Tribunal from a mental health social worker who stated he had seen photographs of the men engaged in sexual activities. The men appealed to the Federal Circuit Court, which acknowledged that due consideration had not been given to all evidence. A comparative case with a heterosexual couple demonstrates how this burden of proof upon the gay couple in question

(including having to give visual evidence of their intimacy) does not occur for heterosexual couples in similar positions. In *SZNAV & Ors v Minister for Immigration 2009*, a heterosexual married couple from Bangladesh sought refuge in Australia on the basis of religious persecution where he, as a Hindu, had married a Muslim woman and faced persecution by the Muslim community. While the case was rejected by the Refugee Review Tribunal on the basis of this claim to religious persecution, at no point was the marriage itself questioned, nor were the couple questioned about their heterosexuality or expected to provide proof of their sexual orientation. There are differences between these two cases, but they highlight how a homosexual orientation may be seen by the court as requiring proof (which is a separate issue from ascertaining whether there is a real fear of persecution on the basis of sexual orientation), while a heterosexual orientation is not seen as requiring proof.

Superannuation

Since amendments to federal laws in 2004, the definition of 'interdependency relationship' has not referred to the sex of the people in the relationship, enabling lesbian and gay relationships to be included in superannuation arrangements (*Income Tax Assessment Act 1997* (Cth): s 302.200). Superannuation arrangements for government and public sector employees were not amended to include lesbians and gay men and their children in these fields until 2009 (*Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*; *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*; and *Family Law Amendment (de Facto Financial Matters and Other Measures) Act 2008*).

Tax reform

In 2008 the definition of 'spouse' in s 995.1 of the *Income Tax Assessment Act 1997* (Cth) was amended to refer to an individual's partner 'whether of the same sex or a different sex', so that gay and lesbian couples have access to benefits for which only heterosexual couples were previously eligible, such as pensioner and low income earner rebates; rebates for dependent spouses, housekeepers, child-housekeepers, superannuation, and medical expenses; and the decrease in the Medicare levy which applies when there is a dependent partner.

Employment

Because of the definition of 'de facto partner' in s 12 of the *Fair Work Act 2009*, minimum statutory employment entitlements such as carer's leave,

compassionate leave and parental leave are available to gay and lesbian couples in the same way as they are to heterosexual couples.

In 2013 the *Paid Parental Leave Act 2010* implemented 'Dad and partner pay' for couples, including gay and lesbian couples under the definition in the *Social Security Act 1991* noted below.

Centrelink and health insurance

Of the 2008 changes to federal legislation that recognised lesbian or gay couples, those related to Centrelink benefits were perhaps the most contentious. A number of Centrelink pensions, benefits and allowances are paid when people are ill, unemployed or full-time students, and the rate of payment varies depending on whether the recipient is single or a 'member of a couple'. The *Social Security Act 1991* (Cth) previously excluded lesbian or gay couples, because 'couple' was defined as a relationship between a man and a woman. As a result, even if partnered, lesbians and gay men were classified as single rather than a couple; they were assessed individually, and were eligible only for benefits and allowances which were available to single people.

The 2008 amendments changed the definition of a couple in s 4(2)(b) of the *Social Security Act* to include when a person has 'a relationship with another person, whether of the same sex or a different sex'. While this has been positive in terms of relationship recognition, it has had negative effects for many low-income households, because the payment rate for a couple is typically less than twice the single rate. This has been an issue especially for older gay and lesbian couples, who typically do not stand to reap the benefits of these legislative changes: many older lesbians and gay men have planned their lives, retirement, and financial commitments around access to a continuing pension or benefit paid at the 'single' rate. Most significantly, previous legislative changes to benefits and pensions have been accompanied by a 'grandfather clause' to protect existing recipients of pensions and benefits for a period of time. This was not the case for the 2008 changes to legislation, meaning that no protection was offered to those already in receipt of Centrelink benefits and who, in a very short window of time, had to adjust to a significantly reduced income.

Since 2009 Medicare has recognised lesbian and gay couples, so they no longer pay more for government health cover as they did previously when regarded as two 'single' persons. The higher income threshold at which the Medicare levy and surcharge commences also now includes lesbian and gay couples. Similarly, since 2009 lesbian and gay families have been recognised as a 'family unit' in relation to Medicare and the Pharmaceutical Benefits Scheme.

Family Court

In terms of general legislation relating to families, one of the main areas to consider is legislation relating to the Family Court. Until 2009 gay and lesbian couples were unable to use the Family Court for the resolution of property

disputes and child support matters, and had to use State and Territory jurisdictions instead. State and Territory Supreme Courts operate under different legislation. They do not, for example, have the same privacy protections as the Family Court, they are more expensive and time-consuming than the Family Court where the majority of matters are settled by mediation, and they do not have the same expertise in dealing with children as the Family Court. The 2009 reforms brought the separation of de facto (including same-sex) couples under the *Family Law Act 1975*, so that lesbian and gay couples are now subject to the same provisions after a separation as married couples (with the exception of Western Australia, where the break up of de facto couples remains under State law).

Unlike courts in other countries (for example, the US, UK and Canada) the Family Court has never taken account of a parent's being gay or lesbian as relevant to the ability to parent, and it has been argued that on the basis of 'available case law it seems that in Australia a lesbian mother has about a 50-50 chance of winning a contested custody case' (Millbank 2002; see also Millbank 2000). The Family Court has been accessible to gay and lesbian parents who wish to resolve a dispute around the residence and contact arrangements for a child, as there is no requirement for a person to be the biological parent to apply for parenting orders (*Family Law Act 1995* (Cth): s 64C). While these provisions make it possible for gay men and lesbians to seek contact and residence orders, Millbank (2006) argues that the court personnel (judges, counsellors, lawyers) who make these decisions take on the prevalent beliefs and attitudes about gay men and lesbians, including fears for the wellbeing of children who are parented by lesbians and gay men.

State or Territory-Specific Laws and Legislation

Relationship recognition

While federal law prohibits marriage between men or between women, some Australian States or Territories have legislated for other forms of relationship recognition for lesbian or gay couples. The first recognition of gay men and lesbians' relationships in Australia was in 1994, when the Australian Capital Territory introduced the *Domestic Relationships Act 1994* (ACT). Section 3 defined 'domestic relationship' broadly as one that involved 'personal or financial commitment and support of a domestic nature for the material benefit of the other [party]'. This definition, although not specifically identifying lesbian or gay couples, was nevertheless inclusive of them. The table below provides an outline of the relevant State or Territory legislation as it existed at the time of writing, as well as providing a simple guide as to whether each State or Territory has a registered partnership system which allows lesbian or gay couples to register their relationship. In States or Territories where this system does not exist, lesbian and couples are required to 'prove' their relationship, for

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example by accessing the relevant Court or living together for a certain number of years.

State/Territory	Ability for Registered Partnership?	Legislation	Implications of Current Legislation (see below for further details concerning parenting)
New South Wales	YES	<i>Relationships Register Act 2010</i>	Allows two adults 'who are in a relationship as a couple, regardless of their sex' to apply to register their relationship, and recognises interstate registered relationships.
Victoria	YES	<i>Relationships Act 2007</i>	Without regard to the sex or gender identity of the parties, allows for: registration of domestic relationships and caring relationships; relationship agreements; adjustment of property interests and rights to maintenance
Australian Capital Territory	YES	<i>Civil Unions Act 2012</i>	Allows civil unions between couples who cannot marry under the <i>Marriage Act</i> . The ACT currently has the <i>Marriage Equality Bill 2013</i> under consideration.
Queensland	YES	<i>Relationships Act 2011</i>	Previously named the <i>Civil Partnerships Act</i> ; allows registered relationships between Queensland residents 'regardless of their sex'.
Tasmania	YES	<i>Relationships Act 2003</i>	Without regard to the sex or gender identity of the parties, allows for registration of 'significant' and 'caring' relationships, which are defined to include personal and family relationships
South Australia	NO	<i>Domestic Partners Property Act 1996</i>	Does not allow for formal recognition of relationships, but allows for two adults in a 'close personal relationship' - 'irrespective of their gender' and whether or not a or not a sexual relationship exists - to make a 'domestic partner agreement'

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			about any matter.
Western Australia	NO	<i>Interpretation Act 1984</i>	Does not allow for formal recognition of relationships. Include same-sex couples in the definition of de facto relationships for purposes of that term wherever it appears in other WA legislation.
Northern Territory	NO	<i>De Facto Relationships Act</i>	Does not allow for formal recognition of relationships. Include same-sex couples in the definition of de facto relationships for purposes of that term wherever it appears in other NT legislation.

While it is positive that the majority of States and Territories legislate for some form of relationship recognition (even if this is not in the form of ‘marriage’), and positive that this legislation is, by default, inclusive of transgender people and their relationships, the legislation is still limited in being restricted to two people. Lesbian, gay and/or transgender people who are in polyamorous relationships (where there may be more than two partners) are denied legal recognition which, given the number of benefits accrued to legally-recognised relationships as summarised above in the section on federal legislation, can have significant consequences in terms of both broader social recognition and protection for individual relationships.

Gender recognition

Birth certificates come under State or Territory legislation. Currently, all States and Territories require transgender people to have had sex affirming surgery before they are able to obtain a new birth certificate. It is worth noting that State and Territory legislation concerning gender recognition is either under review or frequently changing as this chapter is being written. For example, the *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT Report*, published by the ACT Law Reform Advisory Council in 2012, recommended several changes to ensure equality and flexibility in relation to transgender people, including the ability to issue a birth certificate with the gender ‘unspecified’, and the abolishment of the requirement for a person to undergo sexual reassignment surgery in order to change their sex legally. The ACT

Legislative Assembly's Hansard records from the 19 March 2013 indicate that the ACT government is likely to adopt 16 recommendations from the Report.

Assisted Reproductive Technologies

As of 2012, in all States and Territories lesbian women have been able to access donor sperm through clinics. This is of course dependent on the availability of donor sperm within clinics and the ability of women to pay for services (which are not covered under Medicare), but it represents a significant change from the situation a decade ago, when laws in most States and Territories prevented lesbian and/or single women from accessing donor sperm in clinics (with each of the following allowing discrimination on the ground of sexuality in ART: s45A Qld *Anti-Discrimination Act*; s4(8) NT *Anti-Discrimination Act* and s5(2) SA *Equal Opportunity Act*). This change is important not only as it means that the sperm that women access is screened since it has been deposited at a clinic, but also because it potentially avoids disputes with donors that have at times occurred, as outlined below in relation to *Re: Patrick*. In addition to being able to access donor sperm, in all States and Territories it is now the case that if a child has two mothers at birth then both can be named on the birth certificate as parents. (In South Australia this is currently limited to women who had been in a relationship for three years prior to conception, and who conceived via a clinic).

While in cases where a child is conceived through donor sperm and artificial insemination the sperm donor is not recognised as a parent, in some cases a donor might seek a legally-recognised relationship to a child conceived of their donations. In some cases, such as *Re: Patrick* (2002), courts have implicitly recognised a donor as in some ways akin to a parent. In this case, a lesbian couple negotiated to receive donor sperm from a gay man they had known socially for some time. The parties agreed that the man would have 'some involvement' in the child's life, which would be negotiated between the parties. During the insemination process things went relatively well between the parties, but when the woman was pregnant the relationship between the mothers-to-be and the donor broke down. It was alleged that this was because the donor desired some form of parenting rights to the child, while the lesbian mothers did not want this degree of contact between the donor and the child. When the donor learnt of the child's birth, he applied to the court to be given joint responsibility and contact rights in relation to the child. Limited contact arrangements were granted, but after a period of time the mothers became concerned about how the donor was representing himself to the child (e.g., as his 'dad'), and the mothers prevented the child's contact with the donor and applied to the Court for an order formally ceasing contact. The court decided that contact between the donor and the child should occur, and to increase as the child grew older. While the degree of contact ordered was less than would typically be granted to the 'father' of a child after heterosexual separation, it was still considered high in light of the fact that the child already had two

parents and a family. The court also decided that while, at law, the donor was not a parent, the judge expressed dissatisfaction with this, stating that “given the father’s active involvement in Patrick’s conception, and his ongoing efforts to build a relationship with his son, it is a strange result that he is not Patrick’s parent” (*Re: Patrick* 2002: [301], and see Kelly 2005). Although the donor was not legally a ‘parent’, for all intents and purposes the court treated him as the child’s father.

Adoption

Generally speaking, laws covering adoption and adoption practices in Australia are oriented towards heterosexual couples. Although these laws are the responsibility of each State and Territory, in 2007 then Prime Minister John Howard - prompted by the Victorian Law Reform Commission recommendation that gay and lesbian couples be allowed to adopt (Victorian Law Reform Commission 2007) - argued that limiting adoption to heterosexual couples was a benchmark which Australia should maintain (e.g., news Ltd 2007). Since then, however, onshore adoption by gay and lesbian couples has become legal in Western Australia, the ACT, New South Wales, and Tasmania (see *Adoption Act 2000* (NSW); *Adoption Act 1993* (ACT); *Adoption Act 1994* (WA); *Adoption Act 1988* (Tas)). Adoption by gay and lesbian couples remains prohibited in South Australia, Queensland, the Northern Territory and Victoria, with South Australia even banning adoption by single gay or lesbian people (*Adoption Act 1988* (SA)).

In relation to offshore adoption, adoption by single gay and lesbian people or gay and lesbian couples remains the prerogative of the country of origin of the child in question. Currently it is the case that no countries with whom Australia has an overseas adoption arrangement allow adoption by gay or lesbian couples (see Attorney-General Department ‘Country Programs’ for a list of the countries with whom Australia currently has adoption agreements). As a result, adoption by gay or lesbian couples is restricted to the very small number of children available for adoption within Australia.

Foster care

No law in Australia explicitly prohibits lesbians, gay men and/or transgender people from becoming foster parents. This does not mean, however, that the law comprehensively *protects* lesbian and gay foster parents. Only New South Wales child protection laws explicitly include a ban on discrimination on the basis of sexual orientation: s 202 of the *Children and Young Persons (Care and Protection) Act, 1998* (NSW) states that “Children's services must also have regard to the provisions of the *Anti-Discrimination Act, 1977*” which prohibits (in Part 4C) ‘discrimination on the grounds of homosexuality’ in the provision of a service. Other States and Territories, while offering coverage by relevant equal

opportunity laws, require that a complainant first prove they were the recipient of a good or service, and then prove that they were discriminated against in the good or service provision.

Yet even when legislation exists, the case of *OW & OV v Members of the Board of the Wesley Mission Council* in NSW in 2010 demonstrates that allegations of discrimination may not be upheld. In this case a complaint was brought before the court by a same-sex couple who had been rejected by a foster care agency, which the couples argued was on the basis of the agency’s religious values. The Tribunal dismissed the claim of discrimination, thereby indicating the difficulty in actually determining cases where discrimination on the basis of religious doctrine exists for same-sex couples seeking to foster children through foster care agencies, particularly given the fact that most of these agencies are run by religious bodies (see Australian Council of Human Rights Agencies, 2012, for a discussion of this issue).

In addition to such difficulties in determining where discrimination occurs, sections of the *Equal Opportunity Act 2010* (Vic) provide opportunities for exemption from anti-discrimination legislation. For example, s 82 allows religious bodies to defend claims due the need to conform with their beliefs, and s 89 allows any organisation or body to seek an exemption from the Act in advance. This may mean that religious based foster care agencies have the provisions to legally refuse to assess lesbian, gay or transgender applicants, as in the case noted above. Such refusal is indicative of broader issues associated with the right to religious exemption from anti-discrimination legislation.

Surrogacy

Legislation for surrogacy arrangements vary, as outlined in the table below. Broadly speaking, onshore commercial surrogacy within Australia is banned in all States and Territories, however altruistic surrogacy arrangements may be entered into provided particular requirements are met. For further information about the legislation in each State and Territory, refer to the Table below (derived from Nicole’s Family Lawyers n.d. and the relevant State and Territory Acts).

State/ Territory	Offshore Commercial Surrogacy	Onshore Commer cial Surrogac y	Altruistic Surrogacy	Requirements before entering onshore altruistic surrogacy arrangement, and obtaining a Parentage Order	Relevant Act(s)

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New South Wales	NO	NO	YES	Counselling Legal advice Written agreement	<i>Surrogacy Act 2010 (NSW)</i>
Victoria	YES	NO	YES	Counselling Legal advice Written agreement Permission from State regulator	<i>Status of Children Act 1974 (VIC)</i>
Australian Capital Territory	YES	NO	YES	Counselling Legal advice Written agreement	<i>Parentage Act 2004 (ACT)</i>
South Australia	YES	NO	YES	Counselling Legal advice Written agreement	<i>Family Relationships Act 1975 (SA) and Assisted Reproductive Treatment Act 1988 (SA).</i>
Western Australia	YES	NO	YES	Counselling Legal advice Written agreement Permission from State regulator	<i>Surrogacy Act (WA)</i>
Northern Territory	YES	Technically YES - see requirements information	YES	No laws, concerning commercial surrogacy, meaning both commercial and altruistic surrogacy are legal by default (including commercial surrogacy). However, in practice it is not possible due to availability of IVF clinics and the	

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				licensing to which those clinics are subject by the federal government.	
Tasmania	YES	NO	YES	Counselling Legal advice Written agreement	<i>Surrogacy Act 2012 (Tas)</i>
Queensland	NO	NO	YES	Counselling Legal advice Written agreement	<i>Surrogacy Act 2010 (QLD)</i>

It is important here to mention presumption of parentage in relation to surrogacy, for both onshore altruistic and offshore commercial arrangements. Technically, the *Family Law Act 1975 (Cth)* presumes the parents of the child to be the surrogate mother and her partner, even though the child may not be genetically related to either person⁴ (i.e., if a woman carries a child born of a donor egg and fertilised with the sperm of one of the intended parents). For onshore altruistic surrogacy, State and Territory legislation has provisions for the transfer of parentage to the intended parents via a court or parentage order.

In relation to offshore commercial surrogacy arrangements, the situation is somewhat more complicated and will depend on the country in which the surrogacy arrangement took place (Millbank 2011). For example, in some places (such as some states in the US), intended parents will be named as parents of the child on the birth certificate, whereas in other countries it may be that only the person whose sperm is used is named as a parent, and the woman who acts as the surrogate may be named as the mother. Furthermore, while one or both intended parents may be named on the child's birth certificate in the country where the arrangement took place (meaning that the child is legally a citizen of Australia), s 60H of the *Family Law Act* indicates that there is a need for transfer of parentage through the Family Court of Australia, as without such a transfer the parents will legally remain the birth mother and consenting partner (see Millbank, 2011, for more information about this).

Intimate Partner and Domestic Violence

Laws that allow courts to issue protection orders have been introduced progressively in all States and Territories, and all jurisdictions now make protection orders available for lesbian or gay couples as well as for intimate

⁴ See 'Surrogacy: The Emerging Alternative to Starting a Family' by Nichole's Family Lawyers at <<http://www.nicholeslaw.com.au/articles/Surrogacy.pdf>>

partner and domestic violence more generally. These changes took place relatively recently in South Australia with the *Intervention Orders (Prevention of Abuse) Act 2009*. Previously, South Australia only allowed for restraining orders under the *Summary Procedure Act 1921 (SA) Div 7* (and see also *Domestic Violence Act 1994 (SA) s 3*); a much more time consuming and complex process than for those in heterosexual relationships.

Conclusion

While there has been considerable positive change in regards to Australian laws in relation to lesbians, gay men and/or transgender people over the past decade, issues still remain with regard to the full legal recognition and protection of these populations. Furthermore - and as has been suggested in regards to some of the case examples - while legal protection may be offered to lesbians, gay men and/or transgender people, in practice this may not always occur, and certainly at a societal level discrimination against these populations continues.

The information outlined in this chapter provides clear guidance for social work practitioners who engage with (or who are members of) lesbian, gay and/or transgender communities, and also highlights the need for on going advocacy to ensure not only that full legal protection is offered, but that all people are in the position to be able to take up such protection. As some of the case examples in this chapter highlight, social workers can play a vital role in providing evidence to court cases to support lesbian, gay and/or transgender clients, in addition to undertaking advocacy work to support the work of law reform.

Questions for consideration

1. What are some of the important differences between the protection offered by the law to lesbians and gay men in Australia (including those who are transgender), and the protections offered to heterosexual transgender people? How do issues of gender and sexual orientation complicate the needs of these different groups?
2. What are some of the factors that prevent people enacting the rights that they have? How do factors such as age, income, race and ability mean that some people are more likely to be able to access legal resources or take up the opportunities provided by state protection than may other people?

Suggested websites

No claim is made as to the accuracy or authenticity of the content of the sites suggested in this chapter. Site addresses change – if the address is no longer accurate search using keywords or the title of the organisation concerned.

Gay and Lesbian Rights Lobby <<http://www.girl.org.au>>

Australian Human Rights Commission <<http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity>>

Australian Gay and Lesbian Law Blog <<http://lgbtlawblog.blogspot.com.au>>

Gender Identity Australia <www.genderidentityaustralia.com>

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De Facto Relationships Act (NT)

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Domestic Violence Act 1994 (SA).

Fair Work Australia < <http://www.fairwork.gov.au/leave/parental-leave/pages/paid-parental-leave.aspx>>

Family Court website <www.familycourt.gov.au> particularly Annual Reports.

Family Law Act 1995 (Cth)

Family Law Amendment (de Factor Financial Matters and Other Measures) Act 2008

Gay and Lesbian Immigration Task Force Australia <www.glitf.org.au>.

Human Rights Committee *Young v Australia* CCPR/C/78/D/941/2000 18 September 2003 <www.unhchr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034?OpenDocument>.

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- Statutes Amendment (Equal Superannuation Entitlements for Same-sex Couples) Act 2003*
- Summary Procedure Act 1921* (SA)
- Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) Sch 2
- SZNAZ and Ors v. Minister for Immigration & Anor [2009] FMCA 693
- SZQYU v Minister for Immigration & Anor and SZQYV v Minister for Immigration & Anor [2012] FMCA 1114 (3 December 2012)
- Tax Assessment Act 1997* (Cth) s 995-1.

IN THE SHADOW OF THE LAW

The Attorney-General for the Commonwealth v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission [2003] FamCA 94

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