

In 2008 the Federal Government changed 85 laws to give same-sex couples in a de facto relationship or registered relationship the same rights as de facto opposite-sex couples, especially in the area of Family Law. Changes to the Family Law Act 1975, mean that now Federal law recognises most same-sex couples and their child/ren as a family.

Even if only one partner in a same-sex relationship is the biological parent of the child/ren, most lesbian co-mums and some gay co-dads are now legally recognised as the parents of their child/ren under Federal law. Your child/ren can also now be legally recognised as being related to other family members like aunts, uncles, grandparents, brothers and sisters.

Families in our community come in many different shapes and sizes. Some families are blended or step families, which is when one person comes into a new relationship with child/ren from a past relationship. Other families are created by adults in same-sex relationships who decide that they would like to raise child/ren together.

It is important to recognise the legal distinction between “parent” and “step-parent” in federal laws. Where a child is born through artificial reproductive technology, both the birth mother and the consenting partner of the birth mother are defined as parents. In the case of surrogacy, the “parents” are determined by the individual state law as surrogacy arrangements are not recognised in some states (see below). A step parent is someone who was not around when the child is born, but is the partner of the parent later in the child’s life. Both definitions of parent and step-parent have been updated to recognise same-sex parents in federal law. Except where specifically stated, this factsheet refers to rights and responsibilities for both types of parent. You can get further information about your rights as a step-parent from your local community legal centre.

There are lots of family issues that are regulated by the federal Government, like parental responsibilities, maintenance and child support. State and Territory governments are responsible for other things, like adoption, surrogacy, access to artificial reproductive technology (assisted reproduction) and who is considered the legal parent of a child. Unfortunately, the recent changes to Federal law don’t affect any State/Territory responsibilities.

This fact sheet gives you important information about that the new federal rights that you and your family have. It also contains some information on differences in State and Territory laws that relate to parenting. Please contact the organisations listed below to find out more about your specific rights under your local State/Territory law.

Parenting Laws - State and Territory Differences

State and Territory Governments are responsible for laws relating to:

- Adoption
 - Child protection
 - Assisted reproduction
 - Surrogacy
 - Parentage of child/ren conceived by assisted reproduction or surrogacy
- The Federal Government has responsibilities concerning:

- Parental responsibilities (e.g. parenting orders by federal family courts)
- Maintenance
- Child support
- Orders relating to who a child lives with or spends time with

Different States and Territories have different laws regarding the recognition of parent/child relationships. This is a complex area of law that is best to seek legal advice on to ensure your family is appropriately recognised and protected in both Federal and State/Territory laws. If you would like more information about your

Need more information?

National Association of Community
Legal Centres
(02) 9264 9595

Child Support Agency
131 272

Further Information about Adoption
in Australia

Rainbow Families Council

Gay Dads Australia

situation, contact your local community legal centre.

Actions you can take

- Contact your local community legal centre to find out about the parenting laws that apply to your particular circumstances in the State or Territory that you live in.
- If you're not automatically recognised as a "parent", consider applying for a parenting order from the federal family courts.
- Make sure you have an updated will, drafted by a lawyer, to ensure your child/ren receive the allocated share of your estate in the event something happens to you and/or your partner.
- Register your family as part of the Medicare Safety Net [<http://www.medicareaustralia.gov.au/public/services/msn/index.jsp>] and the Pharmaceutical Benefits Scheme [<http://www.health.gov.au/internet/main/publishing.nsf/Content/pbs-safety-family-changes>].

Please note: This factsheet provides general information only. It does not constitute legal advice and may not be applicable to your individual circumstances. If you need specific legal advice contact your local Community Legal Centre.

Last updated: January 2010

Things you should know

- A member of a same-sex couple is now eligible to receive child support from their partner if their relationship breaks down. More information about this can be found in the social security factsheet or from the Child Support Agency.
- A member of a same-sex couple who was previously not recognised as the parent of a child and sought parenting orders from the federal family courts (Family Court of Australia and Federal Magistrates Court), for example in relation to who a child lives with or spends time with, may now be recognised as a parent of the child. You should consult a legal professional if you wish to understand the implications of these reforms.
- If your same-sex partner dies, you and your child/ren can now get the same benefits from superannuation as other families.
- Extended family members of both parents are now legally recognised as family members of your child/ren. For example, if you are not biologically related to the child/ren but are considered the child/ren's parent because your partner gives birth to them, your mother will be legally recognised as your child's grandmother.
- Your child/ren are now included as part of your family, so now you can access family benefits under the Medicare Safety Net and the Pharmaceutical Benefits Scheme.
- The tax you may have to pay, benefits you access and the information necessary when filling in your tax return may change as the Australian Taxation Office now recognises same-sex de facto relationships and their child/ren. See more information on our Financial factsheet.
- Both you and your partner are able to sign a memorandum of understanding if you need to get witness protection for your child, no matter who is biologically related to the child.
- Same-sex couples, and their child/ren are now recognised by the Australian Customs and Border Protection Service as a family for the purposes of calculating your tax-free duty allowances.
- Your de facto partner is now consulted and is allowed to give consent to dealing with excess embryos after an IVF procedure.
- Same-sex families are now protected from discrimination on grounds of 'family responsibilities', by the Sex Discrimination Act 1984. (Please note that there is no protection from "marital status" discrimination or equivalent at this time.)
- Your family is now considered when courts are working out if there's a risk of personal harm or property damage to a witness' family before publishing court proceedings concerning a person apprehended and brought before a Magistrate under an interstate warrant, or a review of such proceedings.

Frequently asked Questions

▼ **Does my name have to be on my child's birth certificate for me to officially be considered a parent of my child under Federal law?**

No. Most lesbian mums and some gay dads will be considered a "parent" under Federal law, whether your name is on the birth certificate or not. The major exclusion to this is gay dads who have a child from an overseas surrogacy arrangement. They must apply for a "parenting order" from the federal family courts in order to have parenting responsibilities under Federal law.

Even if you are not legally considered a 'parent' by the updated definitions, if you are providing care for the child you may still apply to the federal family courts for a 'parenting order' (if you are living in Western Australia you may apply to the Family Court of Western Australia). This can provide you with almost all legal rights in relation to a particular child or child/ren until they turn 18 years old.

▼ **What is the difference between a person who has a "parenting order" and a person who is considered to be the "legal parent" of a child.**

A parenting order is only valid until the child turns 18, after which time the orders do not apply. This has an impact in a range of areas including automatic inheritance of a parent's estate. If a same-sex couple only have a parenting order, then their child will not be automatically entitled to inherit their estate if they have not provided for the child in a will.

A 'legal parent' of a child will be legally recognised as that child's parent for their entire lifetime.

You can apply for a parenting order if you are: either or both of the child's parents; a grandparent of the child; the same-sex partner of the child's parent (step-parent) or any other person concerned with the care, welfare or development of the child.

A court does not always grant parenting orders and parenting orders do not have as much weight as legal parent status. However, many same-sex couples who have parenting orders report that they are broadly accepted by places such as hospitals and schools and report little impact on their day to day lives while the child is under the age of 18.

▼ **I have just broken up with my same-sex partner but our son is still living with me. He is my biological son, but he lived with my former partner and I when we were still together. Can I apply for child support from my former partner?**

Yes, you can apply for child support from your former partner. If your child/ren were born through artificial reproductive technology, the birth mother and her lesbian partner at the time of insemination and of the child's birth, will generally be considered as the parents of the child/ren for the purposes of child support. This applies whether the insemination took place at home or in a clinic. If you are the birth mother and you changed partners between insemination and birth, you should seek legal advice about your situation.

Parents who made surrogacy arrangements to have a child and who were issued with a 'parentage order' under a State or Territory law can also apply for child support from their same-sex ex-partner.

Same-sex parents who have a child support case that began before 1 July 2009, can request for a change to be made to the case so that their new status as parents is recognised.

If required, separated same-sex parents may be able to lodge a child support agreement with the Child Support Agency (CSA), to ask the CSA to make a child support formula assessment, or to register a court order with the CSA.

Child support payment obligations do not normally apply to step-parents. However, you can apply to the federal family courts to make an 'order' for 'child maintenance' from a step-parent.

For further information on child support see the contact details for the Child Support Agency in the referrals section of this factsheet.

▼ **I consented to my partner having a child through IVF, but before the baby was born we broke up. Am I still the child's parent?**

Yes. The Family Law Act recognises the partner of the birth mother as the other intended parent, where the partner consented to the artificial conception procedure

and it is carried out while they are in a de facto relationship. If the relationship ends before the birth, the partner would still be the legal parent. You may wish to consider seeking legal advice about your individual circumstances from a Family Law expert or your local community legal centre.

▼ **My boyfriend and I are thinking about having a child together using a surrogate mother. Who would be legally recognised as the child's parents?**

The answer to this question may differ from state to state. For you and your boyfriend to provide day to day care for the child, you could apply for a 'parenting order' from the federal family courts. However, this may not award you full recognition as legal parents, as the surrogate 'mother' and her partner (if any) may remain the legal parents of the child in most states.

In the ACT and Victoria, you and your boyfriend could apply to the relevant State or Territory court for a court order for the child's legal parentage to be transferred from the surrogate 'mother' and her partner to the both of you, as long as the surrogate 'mother' gives her consent.

▼ **I was previously in a different-sex relationship and had a child. Now I'm in a same-sex relationship. Will I be discriminated against in court when applying for parenting orders?**

This is a common fear for many people. Homophobia does exist within our society, however the Family Law Act now recognises most same-sex parents. Over the past decade less and less discrimination has been experienced by same-sex couples appearing before the federal family courts. As in all cases, the best interest of the child is the focus of the court and its staff.

If, however, you believe you have experienced discrimination in a federal family court decision or by staff, please refer to the complaints section below.

▼ **I'm in a same-sex relationship and my partner has child/ren from a previous relationship. What are my legal rights and responsibilities?**

You may be recognised as a step parent. In some states you may be able to apply to adopt the child/ren. If your relationship with your partner ends, the court could order you to pay child maintenance regardless of whether you legally adopted them.

▼ **I have a 'parenting order' for my partner's biological child. My partner and I have broken up. Do I still have a right to apply for orders regarding who our child lives with or spends time with?**

Yes. Anyone concerned with the care, welfare or development of a child is able to apply to the federal family courts for parenting orders. The court will look at the best interests of the child in determining who a child should live with or spend time with.

▼ **Can my partner and I legally adopt a child?**

In some states yes, in other states only as an individual and in a few states – not at all. Currently, same-sex couples are only able to adopt child/ren in the ACT and in Western Australia. Same-sex step-parent adoption is also allowed in the ACT and WA and in certain circumstances in Tasmania.

In all other states and territories, same-sex couples are currently unable to adopt child/ren, however a single gay, lesbian, bisexual or transgender person may be able to adopt depending on the circumstances.

Both same-sex partners within a relationship will be legally recognised by the Federal government as being the parents of a child they adopt together as a couple. If only one member of the couple has adopted the child their partner may be able to apply for parenting orders from the federal family courts or the Family Court of Western Australia if you live in WA). If your child is living with your partner, who is not their parent, your partner may be considered automatically a step-parent.

The Parenting laws that have changed

#19 Law Officers Act 1964

#20 Customs Act 1901

- #21** Service and Execution of Process Act 1992
- #22** Witness Protection Act 1994
- #23** Export Market Development Grants Act 1997
- #24** Family Law Act 1975
- #25** Sex Discrimination Act 1984

Please note: This factsheet provides general information only. It does not constitute legal advice and may not be applicable to your individual circumstances. If you need specific legal advice contact your local Community Legal Centre.