

**AUSTRALIA/TASMANIA AND WESTERN AUSTRALIA – SOGI LEGISLATION COUNTRY
REPORT
PRODUCED: DECEMBER 2012**

Please note: This document was prepared by law students and highlights publicly-accessible information about legislation available at the time it was prepared. It is not exhaustive, nor is it updated on a regular basis. The information provided here is not a substitute for legal advice or legal assistance, and the International Human Rights program at the University of Toronto Faculty of Law cannot provide such advice or assistance.

Summary

Jurisdiction in Australia is divided between Federal and State levels of government. The examples of Tasmania and Western Australia are illustrative, and not necessarily representative of state-level legislation across the country.

Federal

Following the United Nations Human Rights Committee's finding in [Toonen v Australia](#) (1994) that Tasmania's criminalization of male same-sex sexual activity violated the *International Covenant on Civil and Political Rights*, the federal government passed the [Human Rights \(Sexual Conduct\) Act](#), 1994. This Act legalized sexual activity between consenting adults throughout Australia, and prohibited the making of laws that arbitrarily interfere with the private sexual conduct of adults.

De facto relationships (including same-sex de facto relationships) are treated in the same way as opposite-sex marriages for the purposes of immigration ([Migration Act](#), 1958).

While in practice refugees can claim asylum on the grounds of sexual orientation, this is done through the court system and is not codified in the legislation.

State: Tasmania

Following the Australian High Court case of *Croome v Tasmania* (1997), the [Criminal Code Act](#), 1924 was amended to decriminalize male same-sex sexual activity, and make the age of consent the same for same-sex and opposite-sex sexual activity.

Discrimination is prohibited on various grounds including sexual orientation, relationship status, and association with a person who has any of these attributes ([Anti-Discrimination Act](#), 1998).

“Relationship status” includes both significant relationships and caring relationships; a significant relationship is a relationship between two adults who are a couple and who are not married or related ([Relationship Act](#), 2003).

While no marriage rights exist, same-sex couples in Tasmania have the ability to register their partnership as a “significant relationship,” providing same-sex couples with rights in the areas of superannuation, taxation, insurance, health care, hospital visitation, wills, property division, and bereavement leave ([Relationship Act](#), 2003).

A mother is able to name another woman as a co-parent for a biological child ([Adoption Act](#), 1988).

Artificial fertilization is available for female same-sex couples ([Relationships \(Miscellaneous Amendments\) Act](#), 2009).

Altruistic surrogacy is available for all couples, including same-sex couples; commercial surrogacy is illegal ([Surrogacy Act](#), 2012).

Tasmania recognizes gender reassignment provided that the person in question has gone through sex reassignment surgery ([Births, Deaths and Marriages Registration Act](#), 1999).

State: Western Australia

The age of consent is the same for same-sex and opposite-sex sexual activity ([Criminal Code Act Compilation Act](#), 1913, as amended in 2002).

Discrimination is prohibited on grounds of gender history and sexual orientation in multiple areas, including: employment; education; access to goods, services, and facilities; access to places and vehicles; and accommodation ([Equal Opportunity Act](#), 1984).

For the purpose of anti-discrimination laws, sexual orientation refers to heterosexuality, homosexuality, bisexuality, and transsexuality ([Anti-Discrimination Act](#), 1998; [Equal Opportunity Act](#), 1984).

There is no formal recognition of same-sex relationships, but these relationships can be considered de facto; same-sex de facto partners have the same rights as opposite-sex partners in areas such as transfer of property and inheritance ([Acts Amendment \(Lesbian and Gay Law Reform\) Act](#), 2002).

Western Australia allows joint adoption by same-sex couples ([Adoption Act](#), 1994).

Artificial fertilization is available for female same-sex couples ([Artificial Conception Act](#), 1985; [Human Reproductive Technology Act](#), 1991).

Under the [Surrogacy Act](#), 2008, altruistic surrogacy is only permitted for opposite-sex couples and commercial surrogacy is illegal.

Western Australia recognizes gender reassignment provided that the person in question has gone through sexual reassignment surgery ([Gender Reassignment Act](#), 2000).

In [The State of Western Australia v AH](#) (September 2, 2010), the Supreme Court of Western Australia denied two applications for gender reassignment certificates because the individuals retained female internal reproductive organs and external genitalia. The High Court [reversed this decision](#), holding that for the purposes of the [Gender Reassignment Act](#), the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially visible (October 6, 2011).

Legal Provisions

SEXUAL ACTIVITY AND AGE OF CONSENT

STATE: TASMANIA

[Criminal Code Act](#), 1924 (as amended by the [Criminal Code Amendment Act](#), 1997):

The 1997 amendment to the *Criminal Code* equalized the age of consent (17) for opposite-sex and same-sex sexual activity.

STATE: WESTERN AUSTRALIA

[Criminal Code Act Compilation Act](#), 1913 (as amended by the [Acts Amendment \(Lesbian and Gay Law Reform\) Act](#), 2002): The 2002 amendment to the *Criminal Code* equalized the age of consent (16) for opposite-sex and same-sex sexual activity.

ANTI-DISCRIMINATION

FEDERAL

[Fair Work Act](#), 2009: This Act prohibits discrimination on the grounds of “sexual preference” in employment.

Section 351: Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

STATE: TASMANIA

[Anti-Discrimination Act, 1998](#): This Act prohibits direct and indirect discrimination on various grounds, including sexual orientation. Discrimination is prohibited in the following fields: employment; education and training; provision of facilities, goods and services; accommodation; membership and activities of clubs; administration of any law of the State; and awards, enterprise agreements or industrial agreements. The Act also prohibits incitement of hatred against individuals or groups on the ground of sexual orientation.

Section 16 (Discrimination on ground of attribute):

A person must not discriminate against another person on the grounds of any of the following attributes:

[...]

(c) Sexual orientation

[...]

(s) Association with a person who has, or is believed to have, any of these attributes.

Section 19 (Inciting hatred):

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

[...]

(c) The sexual orientation or lawful sexual activity of the person or any member of the group;

Note: For the purposes of this act, “sexual orientation” means heterosexuality or homosexuality or bisexuality or transsexuality ([Anti-Discrimination Act, 1998](#)).

STATE: WESTERN AUSTRALIA

Equal Opportunity Act, 1984: Prohibits discrimination based on gender history or sexual orientation in many areas, including: work; education; access to goods, services, and facilities; access to places and vehicles; accommodation; sports; and superannuation.

Section 35AA (Gender history):

- (1) For the purposes of this Part, a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.
- (2) In subsection (1) –
opposite sex means a sex of which the person was not a member at birth.

35AB (Discrimination on gender history grounds):

- (1) For the purposes of this Act, a person (in this subsection referred to as the ***discriminator***) discriminates against a gender reassigned person on gender history grounds if, on the grounds of the gender reassigned person having a gender history, the discriminator treats the gender reassigned person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person not thought by the discriminator to have a gender history.

Section 350 (Discrimination on the ground of sexual orientation):

- (1) For the purposes of this Act, a person (in this subsection referred to as the ***discriminator***) discriminates against another person (in this subsection referred to as the ***aggrieved person***) on the ground of the sexual orientation of the aggrieved person if, on the ground of –
 - a. The sexual orientation of the aggrieved person; or
 - b. A characteristic that appertains generally to persons of the sexual orientation of the aggrieved person; or
 - c. A characteristic that is generally imputed to persons of the sexual orientation of the aggrieved person,the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of that sexual orientation.

Note: for the purposes of this Act, “sexual orientation” means “heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person” ([Equal Opportunities Act, 1984](#)).

PARTNERSHIP RECOGNITION AND BENEFITS

FEDERAL

Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation)

Act, 2008: This Act changes the language of multiple acts to be inclusive of same-sex couples. The amendments reproduced below pertain specifically to superannuation and the implementation of its benefits in multiple acts.

Schedule 1 (Finance and Deregulation amendments), Parliamentary Contributory Superannuation Act 1948, section 3 (Subsection 4(1)):

Insert:

partner: a person is the **partner** of another person if the two persons have a relationship as a couple (whether the persons are the same sex or different sexes).

Note: Every time “marital” relationship is referred to in these acts, the term “or couple” relationship has also been inserted to make the provisions applicable to both same-sex and opposite-sex couples.

STATE: TASMANIA

Relationship Act, 2003: This Act allows for the recognition and registration of same-sex relationships as significant relationships.

Section 4 (Significant relationships):

- (1) For the purposes of this Act, a significant relationship is a relationship between two adult persons –
 - (a) Who have a relationship as a couple; and
 - (b) Who are not married to one another or related by family.
- (2) If a significant relationship is registered under Part 2, proof of registration is proof of the relationship.
- (3) If a significant relationship is not registered under Part 2, in determining whether two persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
 - (a) The duration of the relationship;
 - (b) The nature and extent of common residence;
 - (c) Whether or not a sexual relationship exists;
 - (d) The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) The ownership, use and acquisition of property;
 - (f) The degree of mutual commitment to a shared life;
 - (g) The care and support of children;
 - (h) The performance of household duties;
 - (i) The reputation and public aspects of the relationship.

- (4) No finding in respect of any of the matters mentioned in subsection (3)(a) to (i) or in respect of any combination of them, is to be regarded as necessary for the existence of a significant relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Section 11 (Application to register deed of relationship):

(1) Two adult persons –

- (a) Who are domiciled or ordinarily resident in the State; and
- (b) Who are not married or a party to a deed of relationship; and
- (c) Who are in a significant or caring relationship –

may apply to the Registrar, in a form approved by the Registrar, for registration of a deed of relationship in relation to that significant or caring relationship.

Relationship Act, 2003: This Act outlines the property rights available to persons who are part of a significant relationship that has ceased to be a significant relationship (defined to include same-sex relationships; see *Relationship Act 2003* above).

Section 36 (Application for adjustment or maintenance):

- (1) A partner may apply to a court for an order for the adjustment of interests with respect to the property of either or both of the partners or for the granting of maintenance, or both.

Section 37 (Prerequisites for making of order):

- (1) Subject to subsection (2), a court is not to make an order unless satisfied that the partners referred to in an application under section 36(1) have been in a personal relationship for a continuous period of not less than 2 years.

Note: For the purposes of this Act, a “personal relationship” refers to anyone who is in a “significant relationship” or a “caring relationship” (Relationship Act, 2003).

STATE: WESTERN AUSTRALIA

Acts Amendment (Lesbian and Gay Law Reform) Act, 2002: This Act defines the concept of de facto relationship in sexuality-neutral terms for the purpose of all other Western Australian Acts.

Section 85 (Section 13A inserted):

After section 13 the following section is inserted –

13A. References to de facto relationship and de facto partner

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential –
 - (a) The length of the relationship between them;
 - (b) Whether the 2 persons have resided together;
 - (c) The nature and extent of common residence;
 - (d) Whether there is, or has been, a sexual relationship between them;
 - (e) The degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (f) The ownership, use and acquisition of their property (including property they own individually);
 - (g) The degree of mutual commitment by them to a shared life;
 - (h) Whether they care for and support children;
 - (i) The reputation, and public aspects, of the relationship between them.
- (3) It does not matter whether –
 - (a) The persons are different sexes or the same sex; or
 - (b) Either of the persons is legally married to someone else or in another de facto relationship.
- (4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or where the context requires, has lived, in a de facto relationship.
- (5) The de facto partner of a person (the “**first person**”) is the person who lives, or lived in the de facto relationship with the first person.”

Acts Amendment (Lesbian and Gay Law Reform) Act, 2002: This Act amends the language of multiple acts (including the *Inheritance (Family and Dependents Provision) Act 1972* and the *State Superannuation Act 2000*) to include same-sex de facto relationships on a par with opposite-sex couples.

Section 81 (Section 7 amended):

Section 7(1) is amended as follows:

- (a) By deleting paragraph (a) and inserting the following paragraph instead –
 - (a) A person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person.

ACCESS TO REPRODUCTIVE TECHNOLOGY, ADOPTION, AND PARENTING

STATE: TASMANIA

Relationships (Miscellaneous Amendments) Act, 2009: These amendments permit artificial insemination/in vitro fertilization procedures for female same-sex couples only. In the case of female same-sex couples, both women are considered parents of the child born using artificial insemination.

Section 3 (Miscellaneous Amendments):

"Status of Children Act 1974

(1) Section 10C is amended by inserting after subsection (1) the following subsections:

(1A) Where a woman is in a significant relationship, within the meaning of the Relationship Act 2003, with another woman and, with the consent of that other woman, undergoes a fertilization procedure as a result of which she becomes pregnant, the consenting woman is, for the purposes of the law of the State, to be treated as if she were the parent of any child born as a result of that pregnancy.

(1B) Subsection (1A) is taken to have commenced on the day on which the *Relationships Act 2003* commence."

Adoption Act, 1988: This Act permits a same-sex partner to adopt his or her stepchild (the biological child of the other member of the same-sex couple), and the naming of another female as the co-parent of a child by the biological mother if there is no man required to give consent. However, adoption of non-biological and non-related children by same-sex couples is prohibited.

Section 20 (Persons in whose favour adoption orders may be made):

[...]

(2A) The court may not make an adoption order in favour of a person who is in a significant relationship, within the meaning of the *Relationships Act 2003*, unless –

(a) The other party to the relationship is the natural or adoptive parent of the child proposed to be adopted; or

(b) Either party to the relationship is a relative of the child proposed to be adopted.

[...]

(4) Subject to this section, where the court is satisfied that exceptional circumstances exist in relation to the welfare and interests of the child which make it desirable to do so, the court may make an adoption order in favour of one person.

(5) The court shall not make an adoption order in favour of one person –

- (a) If that person is married or in a significant relationship referred to in subsection (1), unless that person is living separately and apart from his or her spouse; or
- (b) If that person is married or in a significant relationship referred to in subsection (1) and is living with his or her spouse, except with the consent of that spouse.

Section 29 (Consents required to adoption):

(4A) In the case of a child whose mother was in a significant relationship, within the meaning of the *Relationships Act 2003*, with a woman at the time of the child's birth or at or after the time of its conception but before its birth and the child has not previously been adopted, the appropriate persons are the parties to that relationship if –

- (a) The child was born as a result of a fertilization procedure to which the female partner in the significant relationship with the mother had given consent; or
- (b) There is no man required to give consent under subsection (3).

Surrogacy Act, 2012 (No 34 of 2012): This Act makes altruistic surrogacy available for all couples, including same-sex couples.

Section 14 (Persons who may apply for parentage orders)

(3) If there are, under a surrogacy arrangement in relation to a child, 2 intended parents who were, at the time the arrangement was made, and are, at the time of the application, spouses of one another; an application under section 13(1) for a parentage order in relation to the child may only be made by both intended parents jointly.

STATE: WESTERN AUSTRALIA

Human Reproductive Technology Act, 1991: This Act permits the use of artificial fertilization procedures by women who are in a same-sex de facto relationship.

Section 21 (The Code and directions, generally):

- (i) The means of identifying, for the purposes of sections 24 and 26, the person or persons on behalf of whom any human gametes, human eggs undergoing fertilisation or human embryos are stored, kept for implantation or developed which, in accordance with consents given, may be –
 - (i) A woman or man; or
 - (ii) A couple who are married, or in a de facto relationship with each other whether they are different sexes or both female.

Artificial Conception Act, 1985 (as amended in 2002): The 2002 amendments permit a woman in a same-sex de facto relationship to undergo artificial fertilization; her partner will be presumed to be the parent of her child.

Section 6A (Rule relating to parentage – same sex de facto relationships)

- (1) Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the de facto partner of the pregnant woman –
- (a) Shall be conclusively presumed to be a parent of the unborn child; and is a parent of any child born as a result of the pregnancy.

Adoption Act, 1994: This Act now permits the adoption of a child by one person and joint adoption by two persons in a de facto relationship (as defined in the **Acts Amendment (Lesbian and Gay Law Reform) Act, 2002**, see above), which can include same-sex partners.

Section 39 (Criteria for application):

- (1) A person cannot apply under section 38(1) unless at the time of the application, he or she –
- (a) Subject to subsection (2), is an Australian citizen;
 - (b) Is 18 or more years of age;
 - (c) Is resident or domiciled in this State or, if applying to adopt a child in a Convention country, is habitually resident in this State;
 - (d) If married to, or in a de facto relationship with, another person, applies as a joint applicant with that person; and
 - (e) If applying as a joint applicant –
 - (i) Has been married to, or in a de facto relationship with, the other applicant for at least 3 years; and
 - (ii) Is not married to, or in a de facto relationship with, any other person.

GENDER IDENTITY RECOGNITION

STATE: TASMANIA

Births, Deaths and Marriages Registration Act, 1999: This Act regulates births, deaths and marriages in Tasmania, and the registration of these events. It permits the reissuance of birth certificates in the event of a change of sex markers. In order for an adult person to register a change of sex on his or her birth certificate, the person must have undergone sex reassignment surgery and must not be married.

Section 28A (Application to register change of sex):

- (1) An adult person –
- (a) Whose birth is entered in the Register; and

(b) Who has undergone sexual reassignment surgery; and
(c) Who is not married –
may apply to the Registrar, in a form approved by the Registrar, to register a change of the person's sex.

(2) The parents of a child whose birth is registered in the State may apply to the Registrar, in a form approved by the Registrar, for registration of a change of the child's sex.

Section 28D (Issue of birth certificate after change of sex):

(1) If a change of sex is registered under this Part in respect of any person, a birth certificate issued by the Registrar for the person is to show the person's sex as registered with a notation that the person was previously registered as of the other sex.

(2) If requested by the person, the Registrar may issue an extract from the Register which does not include the notation referred to in subsection (1).

Note: In this context, "sexual reassignment surgery" means "a surgical procedure involving the alteration of a person's reproductive organs carried out – (a) for the purpose of assisting the person to be considered to be a member of the opposite sex; or (b) to correct or eliminate ambiguities relating to the sex of the person" (Section 3, Births, Deaths and Marriages Registration Act, 1999).

STATE: WESTERN AUSTRALIA

Gender Reassignment Act, 2000: This Act permits the registration of a change in gender from the gender specified on the person's original birth certificate. In order for a person to register a change in gender, the person must have undergone a reassignment procedure.

Section 14 (Applications for recognition certificates):

(1) When a person has undergone a reassignment procedure (before or after the commencement of this Act and within the State or elsewhere), application may be made to the Board in accordance with this section for the issue of a recognition certificate.

Section 15 (Issue of recognition certificates):

(1) When an application under section 14 relates to an adult, the Board may issue a recognition certificate if –

(a) One or more of the following applies –

- (i) The reassignment procedure was carried out in the State;
- (ii) The birth of the person to whom the application relates is registered in the State;

- (iii) The person to whom the application relates is a resident of the State and has been so resident for not less than 12 months;
- and
- (b) The Board is satisfied that the person –
 - (i) Believes that his or her true gender is the gender to which the person has been reassigned;
 - (ii) Has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
 - (iii) Has received proper counselling in relation to his or her gender identity.

Section 16 (Effect of recognition certificate):

- (1) A recognition certificate is conclusive evidence that the person to whom it refers
 - (a) Has undergone a reassignment procedure; and
 - (b) Is of the sex stated in the certificate
- (2) An equivalent certificate issued under a corresponding law has the same effect as a recognition certificate under this Act.

Section 18 (Issuing of new birth certificate):

- (1) After the reassignment of gender is registered by the Registrar and the register altered accordingly, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person or permitted by the regulations, show the person's sex in accordance with the register as altered.
- (2) Any such birth certificate must not include a statement that the person has changed sex.

Note: In this Act, "reassignment procedure" means "a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics (Section 3, [Gender Reassignment Act, 2000](#)).

IMMIGRATION

FEDERAL

[Same-Sex Relationships \(Equal Treatment in Commonwealth Laws – General Law Reform\) Act, 2008](#): This Act changes the language of multiple other Acts to be inclusive of same-sex relationships. These amendments include changes to the [Migration Act](#), 1958,

which now permits immigration and sponsorship of same-sex partners in the same manner as opposite-sex couples.

Schedule 10, Part 2 ([Migration Act](#) 1958), Section 20 (After 5C):

“Insert: ...

5CB De facto partner

De facto partners

(1) For the purposes of this Act, a person is the ***de facto partner*** of another person (whether of the same sex or a different sex) if, under subsection (2) the person is in a de facto relationship with the other person.

De facto relationships

(2) For the purposes of subsection (1), a person is in a ***de facto relationship*** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:

- (a) They have a mutual commitment to a shared life to the exclusion of all others; and
- (b) The relationship between them is genuine and continuing; and
- (c) They:
 - (i) Live together;
 - (ii) Or do not live separately and apart on a permanent basis; and
- (d) They are not related by family (see subsection (4)).”

Schedule 10, Part 2 ([Migration Act](#) 1958), Section 21 (After 5E):

Insert:

[...]

5G Relationships and family members

(2) For the purposes of this Act, the members of a person’s family and relatives of a person are taken to include the following:

- (a) A de facto partner of the person;
- (b) Someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in section 5CA;
- (c) Anyone else who would be a member of the person’s family or a relative of the person if someone mentioned in paragraph (a) or (b) is taken to be a member of the person’s family or a relative of the person.”

Note: For the remainder of the Act, “the spouse or a dependant of” is replaced by “a member of the same family unit as” and “spouse” (wherever occurring) is followed by “or de facto partner,” so that immigration laws apply equally to opposite-sex and same-sex couples.