

About Us: Sexual Orientation, Gender Identity and the Law in New Zealand



INTRODUCTION

This resource provides accessible online information about legal rights and obligations relevant to gay, lesbian, bisexual, transgender, transsexual, takatāpui, fa'afafine, queer and intersex people.

We acknowledge that the interests and issues of concern for all of you are not the same. You will have different experiences and needs, along with differing opinions and perspectives on the law and how it does and should function.

It is hoped that this resource will provide a practical guide to some specific issues of interest, as well as outlining general legal information. There is little point in reinventing the wheel, so where more detailed information is freely available we have chosen to provide an outline of that area and links to other sites and sources where more information can be found. In particular, there is a useful glossary of terms available from the Legal Services Agency's Law Access website at www.lawaccess.lsa.govt.nz

A glossary of sexual orientation and gender identity terms is attached as an [appendix](#) to this resource.

One of the many advantages of having an online resource rather than a printed book is the ability to update it to remain current and relevant. We welcome all feedback to commlaw@wnc.quik.co.nz. Information provided within this resource may not be up to date. Contact a lawyer or Community Law Centre directly for legal advice specific to your particular situation. Don't be afraid to shop around for a lawyer who is approachable and knowledgeable about your problem or situation.

The resource is produced by [Whitireia Community Law Centre](#) in partnership with the [Ministry of Social Development](#).

Current law

The resource is based on the law as at August 2008. The Ministry of Social Development and Whitireia Community Law Centre will make every attempt to keep this web resource current in terms of any legislative changes.

Disclaimer

The information provided is obviously limited. It does not constitute legal advice. No responsibility is assumed for any action taken in reliance on the information provided. The views expressed within this resource, and websites referred to within it, are not necessarily those of the authors or the Ministry of Social Development and are not endorsed in any way. All case studies used in this resource with the exception of those on pages 13 and 65, are fictitious and are for illustrative purposes only.

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Acknowledgements

The Whitireia Community Law Centre Trust Incorporated developed this resource for the Ministry of Social Development. Comments throughout the development were made by the Ministry of Social Development, Human Rights Commission and the New Zealand AIDS Foundation. Thomas Hamilton and JC Tolchard are also acknowledged for their contributions to the resource.

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1 HUMAN RIGHTS

Human Rights

Privacy and Personal Information

Media

Identity



1.1 HUMAN RIGHTS

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 1 of the Universal Declaration of Human Rights

Human rights are afforded to all people, regardless of race, religion, nationality, sex or sexual orientation. These rights are an acknowledgement that everyone is equal and all deserve respect and dignity regardless of sexual orientation or gender identity. Internationally, they are enshrined in agreements such as the Universal Declaration of Human Rights and domestically within such legislation as the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

Human Rights Act 1993

The Human Rights Act 1993 (HRA) deals specifically with discrimination and provides a complaints body, the Human Rights Commission, to oversee the HRA, amongst its other functions. The HRA specifies a number of personal characteristics that are protected from unlawful discrimination in different ‘areas of public life’.

The prohibited grounds of discrimination are:

- Sex;
- Sexual orientation (which means heterosexual, homosexual, lesbian or bisexual orientation);
- Family status;
- Marital status;

- Religious belief;
- Ethical belief;
- Colour;
- Race;
- Ethnic or national origins;
- Disability (which includes the presence in the body of organisms capable of causing illness);
- Age;
- Political opinion;
- Employment status;

Discrimination against transgender and intersex people falls within the grounds of sex discrimination. In particular, the provisions of the HRA apply to a transgender person so long as you have commenced “taking decisive steps to live fully and permanently” in your chosen sex.

The HRA does however provide that it is not illegal to discriminate in some defined situations. For example, there are certain areas in relation to employment and accommodation where discrimination on the basis of sex and sexual orientation are allowed (more information is available in sections three and seven of this resource). It is also not unlawful to discriminate on the basis of sex when offering life or medical insurance or participation in competitive sport.

If you believe that you have been discriminated against on the basis of your sexual orientation or gender identity, you can complain to the Commission.

You must show that there has been discrimination on the basis of one of the above grounds. The discrimination must have occurred within one of the ‘areas of public life’:

- Government or public sector activities;
- Employment;
- Access to education;
- Access to public places, vehicles and facilities;
- Provision of goods and services;
- Provision of land, housing and accommodation;
- Industrial and professional associations, qualifying bodies and vocational training bodies;
- Partnerships.

Can I make a complaint?

1. Is the reason I was discriminated against one of the ‘grounds’?
2. Did it occur in ‘public life’?
3. Was it an exception?

Remember, if you’re not sure if you can make a complaint, it’s better to do it and let the Human Rights Commission decide if your complaint falls within the Act.

For more information on making a complaint, contact the Human Rights Commission.

Links:

The HRA can be found at www.legislation.govt.nz

Human Rights Commission <http://www.hrc.co.nz> or phone 0800 496 877

New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) places limits on the actions of the Government and its related departments, state-owned enterprises and local authorities.

Rights contained in the Act include the right to freedom of expression, the right to refuse medical treatment, the right to freedom of assembly, the right to a fair hearing by an unbiased decision-maker and the right not to be subjected to unnecessary search and seizure.

Section 19 includes the right to freedom from discrimination on the grounds included in the Human Rights Act 1993. However, “positive discrimination” (e.g. assisting or advancing intersex persons who are disadvantaged because of their sex) is not unlawful.

The Government is also required to examine all new legislation to see if it is consistent with the rights and freedoms affirmed by the Bill of Rights Act. Any inconsistencies must be justified or reported to Parliament when the legislation is introduced.

Should you believe that one of your rights under the Bill of Rights Act has been breached, you are able to apply to the courts to have your claim considered. The courts can take into account any reasonable justification that the party may have had for limiting your rights. Sometimes one person’s rights must be balanced against the rights of others (e.g. your right to freedom of speech versus the rights of others to be protected from actions which incite racial hatred or hate crimes).

Links:

<http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>

<http://www.hrc.co.nz/home/hrc/abouthumanrights/humanrightsinnewzealand/billofrightsact.php>

International obligations

New Zealand has a number of international obligations in relation to human rights, but the most relevant international treaty that the government is bound by in this context is the International Covenant on Civil and Political Rights, a treaty enforced by the United Nations.

Article 26 of the Covenant states:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The New Zealand Government is bound to act within the Covenant. Individuals have a right to petition the United Nations Human Rights Committee should they believe the New Zealand government through its actions has violated the treaty. (For example, a complaint was made to a similar committee about the Foreshore and Seabed Act 2004, alleging it discriminated against Maori). All domestic remedies must have been exhausted first.

Links:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm>

1.2 PRIVACY AND PERSONAL INFORMATION

Some aspects of privacy are dealt with in the health section.

Your right to privacy is governed primarily by the Privacy Act 1993 and associated codes. The Privacy Act is overseen by the Office of the Privacy Commissioner, which provides a complaints resolution process amongst other functions.

The Privacy Act applies to almost every person, business or organisation in New Zealand. It sets out privacy principles, which guide how 'personal information' can be collected, used, stored and disclosed. Personal information means any information about an individual so long as that individual can be identified from the information, (e.g. information on application forms, your credit history, medical notes, video or audio recordings, photos and blood and DNA samples).

The media is not subject to the Privacy Act.

Briefly, personal information can only be collected by an 'agency' for a lawful purpose and only where necessary for that purpose. An agency includes any person, business, government department or organisation that collects personal information. In theory, if information about gender is not necessary for the particular purpose, it should not be collected. Generally, the information should be collected directly from you unless you have given permission otherwise. You should be aware that the information is being collected. Information must be stored securely and you have the right to request information that an agency has stored about you. Information should only be used for the purpose it was collected and not kept for any longer than necessary for that purpose. The grounds on which an agency is allowed to disclose your personal information are set out in the Information Privacy Principles.

Personal information held about you should be up-to-date, accurate and relevant. This may be of particular relevance for transgender persons.

If you believe that your privacy has been breached, you may make a complaint to the Privacy Commissioner. In most cases, you will also need to prove that the breach has caused you some harm, loss or detriment. It is arguable that incorrect gender status information allowed to persist in the 'official' record, could be viewed as a very real humiliation and detriment to the individual concerned.

Case Study – Karaina

Karina West goes to live with her aunts and starts at a new school at the beginning of year ten. She had been bullied for being whakawahine at her old school and wants to start afresh where no-one knows her as ever having been a boy.

Karina and one of her aunts meet with the new Principal before term starts. The Principal assures them that the school is very progressive and inclusive and that Karina should have no trouble.

The first day of school begins with a full school assembly. Karina takes a place down the back of the hall with other new students. As the new students names are called out one by one, they stand and join their class mates in the appropriate seating area in the hall.

When the name Kelvin West is read Karina freezes to the spot. No one stands. The hall full of students and staff shuffles and looks towards the back of the hall. The name is read again. Karina stands and runs from the hall.

Should Karina have been protected from this happening?

If Karina with the consent of her guardians has legally changed her name with Births, Deaths and Marriages, the school may have breached the Privacy Act by disclosing her previous name. In this case she could approach the Privacy Commission about making a complaint.

Whether or not Karina has legally changed her name, her aunts or parents can complain to the Board of Trustees if they felt that this was a deliberate or grossly negligent slip up. Schools are obligated under the National Education Guidelines to make the school environment "safe" for all students.

Links:

<http://privacy.org.nz/a-thumbnail-sketch-of-the-privacy-principles/>

http://www.lawaccess.lsa.govt.nz/Lrm_v2.aspx?BookId=46&ChapterId=0

YouthLaw have answers to more privacy questions at http://www.youthlaw.co.nz/default.aspx?_z=61.

1.3 MEDIA

Different segments of the media are regulated by different authorities, each with mandatory standards and relatively user-friendly complaint processes which can be accessed should you believe that those standards have been breached.

The key requirement when complaining about the media is to ensure that your complaint fits within one of their existing standards as none of the following organisations are required to investigate matters which fall outside of the standards or principles they have set down.

Broadcasters

Broadcasters, both on TV and radio, are required to be socially responsible. The Broadcasting Standards Authority (BSA) provides a complaints resolution process in relation to all programming broadcast on free-to-air television, pay television or the radio. Complaints must first be made to the station which broadcast the programme and if you do not receive a satisfactory outcome, then to the Broadcasting Standards Authority (BSA). If your complaint alleges a breach of your privacy, you do not need to complain to the station first.

Links:

The Codes can be found at <http://www.bsa.govt.nz/codesstandards-intro.php>

Advertisers

Advertising is governed by the Advertising Standards Authority (ASA). Codes of Practice provide the rules which all advertisements in all media must comply with. In particular, ads should not portray people in a manner which is reasonably likely to cause serious or widespread offence on the grounds of their gender or sexual orientation. All complaints should be made directly to the ASA.

Links:

<http://www.asa.co.nz>

The Press

The Press Council regulates newspapers and magazines. Specifically, publications should not place gratuitous emphasis on gender or sexual orientation. However, where it is relevant and in the public interest, publications may report and express opinions in these areas. Complaints must first be addressed to the publication concerned, and then to the Council if you are not satisfied with the publication's response.

Links:

The code can be found at <http://www.presscouncil.org.nz/complain.html>

1.4 IDENTITY

An issue that remains a problem for some transgender and intersex people is legal recognition of gender identity. Government-issued documentation can be changed to reflect gender identity in some situations but even then, a record of previous details is usually retained.

While transgender persons are able to update government-issued documentation to reflect their gender identity in certain circumstances, the same opportunities are not usually available to intersex people.

Birth certificates – change of name

Anyone is entitled to change the name which appears on their birth certificate, which then allows you to change your passport and driver's licence as well as other non-government documentation such as bank accounts and education records.

If you are over eighteen, you can make a statutory declaration on the form provided by Births, Deaths and Marriages, pay a fee and your name will be changed, regardless of whether or not your birth was registered in New Zealand. If you are under eighteen, you will need your guardian to sign the declaration. However, your original birth name will remain listed on the certificate.

Links:

www.bdm.govt.nz

Birth certificates – change of sex

The law also allows birth certificates to be amended to show a change of sex. In order to do this, you must first receive an order from the Family Court for a declaration as to sex.

To our knowledge, this process has only been used by people who identify as transsexual to change their sex from either male to female or female to male. There are no reported cases of someone changing their sex to 'indeterminate' and while it is possible to have the sex registered as 'indeterminate' on a child's birth certificate, a sex is usually assigned by the parents and doctors before registration takes place.

Section 29 of the Births, Deaths and Marriages Registration Act 1995 also enables a child's guardian to make an application to the Family Court to change sex details on the child's birth certificate. However, there have been no applications made since this Act came into effect.

You do not need a lawyer to apply to the Family Court for a declaration, although it may help as it is a relatively complex procedure. The 'Application for declaration as to sex to be shown on birth certificate' form is available from your local Family Court. If you have any problems at your local Court, contact the Ministry of Justice directly by email to family@justice.govt.nz or 04 918 8800. You are required to include the Registrar-General of Births, Deaths and Marriages as a party to your application.

You will need to provide expert medical evidence to satisfy the Court that you have "undergone the medical treatment usually regarded by medical experts as desirable for [you] to acquire a physical conformation that accords with [your] gender identity." Your own views are relevant but independent verification (the medical evidence) is also required. You do not need to have full gender reassignment surgery to have a declaration made. The Family Court does not deal with many of these applications and knowledge about the process is limited. If you have previously been advised by Court staff that you are required to have full surgery, this is not true. The Judge dealing with your case is the only person who can determine exactly what level of medical intervention is required.

Case study – Michael's Court Application

A recent 'test case' brought in the Family Court looked at the level of medical intervention required to allow you to change the sex on your birth certificate to reflect your gender identity.

In this case, Michael was registered female on his birth certificate and had lived as a male for at least four years. Throughout high school he believed that he was gay and had several relationships with women. While at university he learned of the transgender community and came to realise that he identified as male. He has since had a mastectomy and has had hormone treatment for four years. He had previously been diagnosed with gender dysphoria.

Michael gave evidence that he did not intend to have genital reassignment surgery as he did not wish to or believe that he needed to. He was supported in this view by his sexual health physician who gave evidence in the Court that Michael had transitioned permanently to the male gender.

The doctor gave evidence of his belief that surgery was not an essential part of gender reassignment therapy, but merely part of the overall treatment. He believed that in all cases, the amount of surgery undertaken is largely dependent on the comfort of the patient, with some requiring more surgery in order to feel they have transitioned to the opposite sex and therefore the amount of surgery must be assessed on a case by case basis.

The Judge agreed with Michael that he had assumed, and intended to maintain, his chosen gender identity. He noted that Michael had been very careful and thorough in the way he had gone about understanding his transsexualism, the early age he identified as male, the period of time that he has lived and been accepted as male, the convincing way he spoke of his determination to live permanently as a male and the professional advice he has taken and acted on. His evidence was corroborated by his father and the medical experts he had worked closely with. A declaration was made.

What do you have to prove?

The test in section 28(3) of the Births, Deaths and Marriages Registration Act 1995 requires that:

1. Your birth registration includes information that you are a person of the sex opposite to your nominated sex (or that you are of “indeterminate sex” or there is no information at all as to sex);
2. You have assumed and intend to maintain (or always have and intend to maintain) the gender identity of a person of the nominated sex and wish that sex to appear on your birth certificate. You must provide evidence of your wishes and intentions. This will include “a review and analysis of historical conduct and other social and psychological factors” i.e. details of how you have assumed your gender identity and for how long, whether you have sought medical care and/or counselling etc.
3. The judge must be satisfied, on the basis of expert medical evidence, that:
 - (a) you have assumed the gender identity of your nominated sex; and
 - (b) you have undergone such medical treatment as is usually regarded by medical experts as desirable to acquire a physical conformation that accords with the gender identity of your nominated sex.

Medical treatment means both surgical intervention and non-surgical measures such as counselling, other psychological treatment and hormonal and pharmacological therapies.

You will need evidence from multiple medical experts, rather than just one. This is a test of what your experts believe is desirable and not what you think is desirable. Desirable does not mean essential or necessary, just what is wished for.

The focus of the assessment is on you as an individual and what is required by you to achieve the ‘desirable objective’ – it is not a test for every person. The assessment should take into account your own unique circumstances.

Your own degree of comfort with, or physical conformity to your nominated gender identity is the proper focus of treatment decisions by medical specialists, and the therapeutic approach taken should be consistent with accepted and recognised treatment options for gender dysphoria of the type affecting you as an individual.

You do not necessarily have to undergo all available surgical procedures to satisfy the test. In some cases it may be, but just how much surgery is required is to be determined on a case by case basis. The Court must

be satisfied that you will continue to maintain the gender identity of your nominated sex in the future. The permanence of the treatment you have already had will likely be relevant.

When you have a declaration

When your declaration has been granted, you will need to contact Births, Deaths and Marriages to 'deposit' your declaration and receive an updated birth certificate.

Once your sex has been changed on your birth certificate, Births, Deaths and Marriages are only allowed to disclose your original birth details in limited circumstances, as set out in section 77 of the Births, Deaths, and Marriages Registration Act 1995. They will provide information only if:

- The person requesting is the executor of an estate and the information is material for their purpose; or
- The person requesting is a celebrant or Registrar and is investigating whether the parties to a proposed marriage are a man and a woman; or
- 120 years has passed since the birth of the person to whom the information relates; or
- The information is required by order of a New Zealand Court.

The purpose is to notify a government agency to ensure that a person does not have more than one identity.

Links:

"Michael v Registrar-General of Births, Deaths and Marriages" available at

<http://courts.govt.nz/family/legislation/births-deaths/Michael.pdf>

<http://www.legislation.govt.nz>

Driver licences

While a New Zealand driver licence doesn't include sex on the licence itself, it is recorded when a person applies for a licence. It will show up when authorities, such as the Police, check licence details. When the sex details on a licence are changed, the original details remain available to Police.

To change the name on your driver licence, you must complete an Application for Replacement Licence and provide evidence of the name change to the licensing authority agent (e.g. AA, VINZ or VTNZ).

You are also able to change your sex on your driver licence if you have a declaration from the Family Court, or can change it to indeterminate if you have done so on your passport. If you have any problems at the AA, contact the Driver Licensing section of the Land Transport Safety Authority directly (phone 0800 822 422).

Links:

<http://www.landtransport.govt.nz/licensing/name-change.html>

Marriage and civil union certificates

The law states that marriage can only take place between one male and one female. Any other combination effectively invalidates the marriage. For this reason, marriage certificates cannot be changed to reflect a change in sex since the marriage took place, regardless of the present gender identity of either party to the marriage. Where one partner to a marriage changes sex and wants this reflected on their birth certificate, they must first dissolve their marriage to avoid a breach of the Marriage Act. A couple may however change their marriage to a civil union. This is done by completing a 'Notice of Intended Civil Union, Change of Relationship from Marriage' form available from Births, Deaths and Marriages. One of the parties must then appear before a Registrar of Civil Unions, make a statutory declaration and pay the required fee. When doing so they will be required to provide evidence of their marriage. The Registrar then issues the person with a civil union licence together with two copies of a document known as a Copy of Particulars of Civil Union. These documents must be given to a civil union celebrant before any civil union ceremony. A ceremony is required.

Links:

<http://www.bdm.govt.nz>

Citizenship certificates

Name and sex details as recorded on a New Zealand citizenship certificate are not able to be changed. The Department of Internal Affairs views the citizenship certificate as an historical document so it is not able to be reissued. The only option available is to request an evidentiary certificate which will confirm your New Zealand citizenship with the updated information displayed.

Contact the Citizenship Office of the Department of Internal Affairs for more information about evidentiary certificates.

Links:

http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Citizenship-Index?OpenDocument

Adult Relationships

Property and Financial Support

Domestic Violence

Wills and Estates

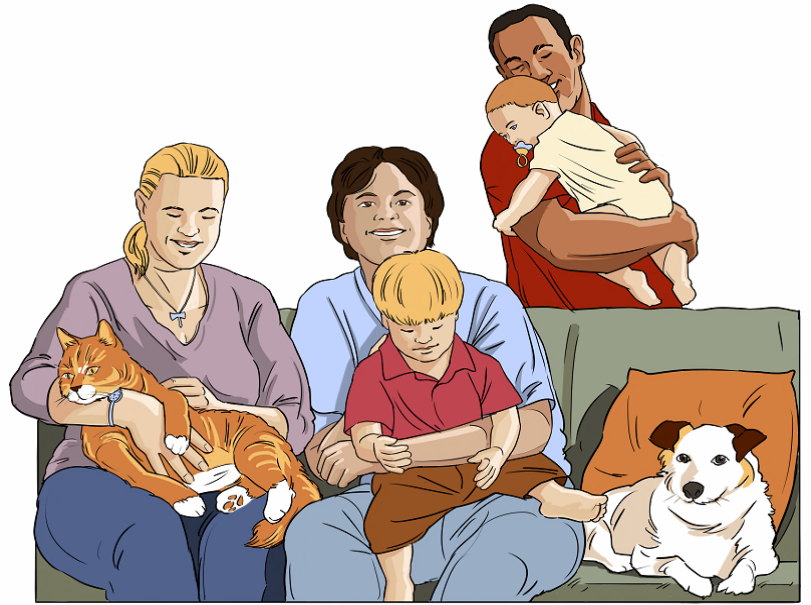
Guardianship and Parenthood

Donor Assisted Reproduction

Step Parents

Adoption

Resolving Parenting Issues



2.1 ADULT RELATIONSHIPS

While you may not view what you have with someone as a relationship, it may be that the law sees things differently. When you enter into a legally recognised relationship, your legal rights and obligations change.

Broadly, there are three types of ‘partner relationship’ in New Zealand. If you don’t fit within one of the categories, you will generally be treated, in the eyes of the law, as being single.

Marriages

Marriage is a formal legal relationship between two persons of the opposite biological sex. Same sex couples cannot marry. If one party is intersex or transgender, the law requires that your birth certificates specify there is one female and one male entering into the marriage. If one person wishes to change their sex after marriage, the marriage will be invalidated. You must apply for a marriage licence from Births, Deaths and Marriages and pay the appropriate fee. There must be a marriage ceremony where, before witnesses, a registered marriage celebrant declares a couple legally married.

Civil unions

Civil unions are another formal legal relationship which is open to all couples, regardless of sexual orientation or gender identity. Not all countries recognise New Zealand civil unions as valid, particularly when it comes to immigration and social security entitlements.

To enter into a civil union, you must also apply for a licence from Births, Deaths and Marriages and pay the appropriate fee. There must be a service of some kind using a registered civil union celebrant. During the ceremony formalising your relationship, at some point, before at least two witnesses, each party must make

a clear statement to the other that names both parties and acknowledges that they are freely joining in a civil union with each other.

Like a marriage, you can only enter into one civil union at a time. Your previous marriage or civil union must be dissolved before you can enter into another and there are restrictions on who you can legal marry or be united with known as the “prohibited degrees of relationship” (e.g. siblings can’t marry each other).

With marriage and civil unions it is quite clear that you have entered into a legal relationship as there is a ceremony required and a clear date on which that your relationship status changed. Whether two people have entered into a de facto relationship however, can be more difficult to establish.

Links:

http://www.bdm.govt.nz/diawebiste.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?OpenDocument

De facto relationships

The Interpretation Act 1999 states that a de facto relationship is a relationship between two people who live together as a couple but are not married or in a civil union with each other. You must both be 16 or over (but if you’re under 18 you must have parental consent).

Determining whether you actually “live together as a couple” may not be easy (e.g. flatmates who have a sexual relationship). The law looks at all the circumstances of your relationship. In most cases, the following factors will be taken into account:

- The length of the relationship;
- Whether the two people are living in one house;
- Whether the two people are having a sexual relationship;
- The degree of financial dependence on each other;
- How property is used, owned and obtained;
- The degree of commitment to a shared life that is shown;
- How any children are cared for and supported;
- How household duties are performed;
- What the ‘public image’ of the relationship is (i.e. are you perceived as living together as a couple).

None of these factors on their own is determinative i.e. just because you’re living in the same house doesn’t mean you’re necessarily in a de facto relationship. But the same applies vice versa – you and your partner may have two separate homes, but you could still be classified as living in a de facto relationship.

However, the test Work and Income uses for benefits is often wider. In the first instance, Work and Income

case managers will deem a couple to be in a de facto relationship if they are:

- committed to each other emotionally; and
- financially interdependent.

This may effect your benefit entitlement as your partner's income will be taken into account when calculating your entitlement. Work and Income's policy manual says that "the commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings living together may do. It must amount to a willingness to support if the need exists, as well as a degree of companionship demonstrating an emotional commitment." Other factors are taken into account.

Some people believe that you aren't in a de facto relationship until you've been living together for three years. This is not true. The three year test is only used when you have separated and determines whether property must be divided between the two people equally or not. (There is more information about this later in this section).

Links:

<http://www.winz.govt.nz/>

2.2 PROPERTY AND FINANCIAL SUPPORT

Dividing property on separation

If your relationship ends, whether it is a marriage, civil union or de facto relationship, one of the steps you and your partner may have to take is to divide your property. The Property (Relationships) Act 1976 (RPA) sets out legal entitlements to property after separation and divides property into two types; "relationship property" and "separate property". What happens to the different property depends on how long you and your partner have been together.

Relationship property is property that will usually be equally split and includes:

- the family home;
- family chattels, such as household furniture and the family car (but not heirlooms or taonga);
- any property acquired when contemplating the relationship and intended for the common use of both partners;
- property owned jointly or in equal shares by the spouses or partners;
- generally, property acquired and debts incurred by either spouse or partner during the relationship;
- salary and wages during the relationship;

- insurance on the partners' lives or on the family property;
- any part of a superannuation scheme or policy attributable to the relationship;
- gifts or inheritances which the owning partner allows to become mixed with other relationship property;
- increases in the value of relationship property, income from it, or the proceeds from sale of it.

Separate property remains the property of the partner who owns it. It is anything that is not relationship property and will usually be whatever property each person brings to the relationship – but will not be the house you share, even if only one person owns it, except in the most extraordinary circumstances.

All property acquired out of separate property, and proceeds from the sale of separate property, is also separate property. Increases in the value remain separate property unless the increase was caused by the actions of the other partner or by the use of relationship property. Gifts and inherited property received during a relationship will be separate property unless it becomes mixed with relationship property.

If you want to protect your separate property, you will need to have made a Relationship Property Agreement (also known as a Contracting Out Agreement) with your partner during the course of your relationship. This agreement must be in writing and you must be witnessed by two lawyers who are responsible for ensuring you understand the consequences of the Agreement.

Property is shared depending on how long you were together.

If your relationship was longer than three years, all relationship property will be divided equally unless the Family Court considers there are extraordinary circumstances that will make equal sharing repugnant to justice. It is extremely rare that a court would find there are extraordinary circumstances.

If a marriage or civil union has lasted less than three years, relationship property will usually be divided equally unless the contributions of each partner to the marriage or civil union are disproportionate or if they were owned by one partner before the relationship began.

Most de facto couples who have lived together in a de facto relationship for less than three years will not be covered by the RPA. However, if your relationship has lasted for less than three years, you may still be covered by the RPA if there is a child, or if you have made a substantial contribution to the de facto relationship.

If the Court is satisfied that failure to make an order would result in serious injustice, it can make an order requiring that relationship property be shared according to the contribution each partner made to the relationship. If you are married or in a civil union, the Court also includes any time you were in a de facto relationship prior to that civil union. For example, a couple who were living together for two years before

entering into a civil union and then separated after two years would be covered by the equal sharing provisions.

When you separate, you are unlikely to need to go to court to decide how to split your property. Most couples are able to resolve this themselves with the help of lawyers. It is important that you seek legal advice as you will need to have a Relationship Property Agreement drawn up that shows what you have agreed. If you do not do this, your ex-partner could choose to challenge the division of property at a later date. Any written agreement you make between yourselves without a lawyer will not be binding.

Links:

<http://www.communitylaw.org.nz/Relationship-pro.228.0.html>

<http://courts.govt.nz/family/what-familycourt-does/relationships/property.asp>

www.cab.org.nz/information/6%20Division%20of%20Relationship%20Property.pdf

Separation Agreements

Separation agreements are an option for couples to record that they have separated. They are not mandatory and simply record the decision the couple has made and records the date that the relationship ended, which can be useful when it comes to dissolve the marriage or civil union.

Links:

http://www.lawaccess.lsa.govt.nz/Lrm_V2.aspx?BookId=67&ChapterId=2

<http://courts.govt.nz/family/what-familycourt-does/relationships/default.asp>

Dissolution

Dissolution is when a marriage or civil union is formally ended by a Family Court order. It's more commonly called referred to as a divorce. You must be separated for two years before you can apply for a dissolution.

Links:

http://www.lawaccess.lsa.govt.nz/Lrm_V2.aspx?BookId=67&ChapterId=3

<http://courts.govt.nz/family/what-familycourt-does/relationships/default.asp>

Child support

Child support is money paid by a parent who is not living with their child, for the financial support of that child. It is administered by the Inland Revenue Department. In cases where both parents share care of the child for at least 40% of the time each, both will be liable to pay child support. In practice this will mean a reduced obligation for the parent having the greater income.

You are liable to pay child support if you are a parent of the child registered on the child's birth certificate, you have adopted the child, have been made a court-appointed guardian of the child or have been declared by the Family Court as a 'step-parent' of the child. More information about child support as a step-parent is in [section 2.8](#).

Case Study – Vita and Tania – Child Support

Vita and Tania separated several years ago and have fifty/fifty shared care of their son Charlie. Both parents are liable in relation to child support, however because Tania earns more than Vita and has no other dependent children, she effectively makes a financial contribution to Vita for Charlie's care.

If they changed arrangements so that Charlie spent five nights with Tania and two nights with Vita, it would mean that Vita is no longer able to claim child support in respect of Charlie as he spends fewer than 40% of his nights with her.

Charlie's donor is not liable for child support payments and would not be liable even if Charlie only had one parent.

Links:

www.ird.govt.nz/childsupport

http://www.lawaccess.govt.nz/Lrm_V2.aspx?BookId=68&ChapterId=5

2.3 DOMESTIC VIOLENCE

The Domestic Violence Act 1995 (DVA) aims to reduce and prevent violence within family and domestic relationships, regardless of sexual orientation or gender identity.

Domestic violence is all physical, sexual and psychological abuse. It includes punching, kicking, any unwanted sexual contact, intimidation, harassment, verbal abuse and threatening behaviour to person or property. One serious incident can amount to domestic violence or it may be that a string of minor incidents that add up to domestic violence when viewed in context of the relationship.

The DVA covers people who are, or were, in a domestic relationship with the person who is committing the violence. The following types of relationship are classed as 'domestic relationships' in the DVA:

- married, civil union and de facto couples;
- parents and children;
- members of the same family, whānau or other culturally recognised family group;
- flatmates and other people who live together in the same household;

- people who have a close personal relationship, even if they don't live together or have a sexual relationship.

If you experience domestic violence, you can apply to the Family Court for a Protection Order to forbid the person from contacting you and committing any further violence. If you have children, you may also be able to get an interim Parenting Order and/or an Occupation Order which will provide you with custody of your children and the use of your house.

Case Study – Dan and Jason – Abusive Partner

Dan is controlling and possessive of his boyfriend Jason. Dan always wants to know where Jason is and who he is with.

Dan has threatened to 'out' Jason to his family if he doesn't do what Dan wants, including making him have unprotected sex even though Jason wants to use protection. When Dan hears that Jason plans to leave the relationship he yells abuse, punches him and shoves him down the stairs.

Jason goes to a friend's place for help and is able to stay there. He reports Dan's violence to Police. The Police investigate and charge Dan.

Dan is placed on bail while he waits for his final court appearance. As a bail condition Dan is not allowed to contact Jason, and will be arrested if he does so.

The bail conditions lapse once the matter has been dealt with by the court so Jason takes out a protection order against Dan to continue the legal protection.

Links:

http://www.lawaccess.lsa.govt.nz/Lrm_v2.aspx?BookId=61&ChapterId=0

<http://courts.govt.nz/family/what-familycourt-does/relationships/domestic-violence.asp>

<http://www.womensrefuge.org.nz>

<http://communitylaw.org.nz/A-Guide-to-Apply.43.0.html#c121>

<http://www.legislation.govt.nz>

Trespass Notices

If you wish to prevent someone from coming into your home or onto your property, you are able to serve them with a Trespass Notice. This applies whether you own or rent your property. Trespass Notices are not valid if they are issued against someone who has a legal right to occupy the property (i.e. you and your partner own the property together, you can't issue them with a Trespass Notice). You should contact the Police for assistance in serving a Trespass Notice.

Links:

<http://communitylaw.org.nz/Free-Downloads.43.0.html>

<http://www.police.govt.nz/safety/home.trespassnotice.html>

2.4 WILLS AND ESTATES

Although everyone should have a will, many people don't. This may be because they think they aren't old enough to need one, or it's too expensive to make one or they don't have any property worth worrying about. However a will ensures that the significance of your partner is recognised when you die, giving them responsibility for making important decisions on what you would have wanted to happen.

If you're over 18 and have children or property you should have a will. You don't always need a lawyer to make a will. Anyone can write a basic will themselves provided they follow a few simple rules. It is not recommended that a person write their own will if they own a significant amount of property. A will may be more easily challenged if it has not been written by a lawyer.

A basic will looks like this:

WILL

This is the last will of Marie Jean Smith of Wellington, Administrator.

1. I revoke all previous wills.
2. I name my partner Sara Emma Smith my executor and testamentary guardian of my children. I direct that she pay all of my debts and distribute the balance in accordance with this will.
3. I direct that my body be cremated and my ashes scattered over Wellington harbour.
4. I give my share of the house at 4 Williams Road, Hataitai, Wellington and all personal effects in it to my partner Sara Emma Smith ("Sara").
5. I give all bank accounts at ANZ to Sara.
6. I give all other bank accounts to my brother Richard Andrew Duncan.
7. I give the balance of my estate to my sister Megan Louise Duncan.
8. In the event of any or all of the gifts above failing to vest, I direct that my estate go to the Mary Potter Hospice at Wellington.

Dated 23 May 2008

Signed by the abovenamed)
Marie Jean Smith) *MJ Smith*

in our presence and attested by us in her presence as witnesses:

LJ Hudson	M Jones
Linden Joseph Hudson	Maryanne Jones
Company Director	Mother
Wellington	Porirua

In this will, Sara is the executor. The executor is the person who deals with Marie's affairs after she has died

and makes sure the gifts go to the people named in the will. Sara is also a “beneficiary”, along with Richard and Megan. Sara has also been named “testamentary guardian” which means she will act as guardian for Marie’s daughter.

Wills need to be made in writing and must be witnessed by two people. Those people can’t be people who receive property under the will (the beneficiaries) and to avoid any problems, an executor shouldn’t be a witness. The witnesses need to be over 18. Wills do not need to be recorded anywhere and once you’ve made one you can put it away somewhere safe. If you get married or enter into a civil union you need to update your will as it is automatically revoked after marriage/union. If you’re unsure about making one, it is a good idea to see a lawyer or trustee corporation as many will do a will very cheaply.

Before making a will, think carefully about what you want to happen after you die. Your executor should be someone over 20 who will be capable of dealing with your affairs and who you feel confident will follow your wishes. You should consider carefully who will be the beneficiaries of your property and think about how you want your property to be distributed.

Many people include in their will directions about funeral arrangements and whether they wish their organs to be donated for medical use. These are directions only and are not binding on the executors.

A will can always be challenged by a partner using the Property (Relationships) Act 1976 if they believe they are entitled to more than they have been provided for. Under the Family Protection Act 1955 a will can also be challenged by a family member (usually a child or partner but sometimes grandchildren or a parent if you have no children) if they claim you have failed to provide for their “proper maintenance and support” in your will. If you promised to leave something to someone and didn’t do so, this person may also have a claim under the Law Reform (Testamentary Promises) Act 1949.

If you don’t make a will and have children, it may not be clear who will look after your children, particularly if you are living with a new partner. Where you die without a will the Administration Act 1969 sets out the “rules of intestacy” which govern what will happen to any property that you own after you die. The only exception is if you own property jointly (like a joint bank account or you own your house as joint tenants with your partner) as that property will generally pass to the other co-owner.

Any other property will be divided using the following rules:

1. If you have a husband, wife, civil union or de facto partner but no children or parents – everything will go to your partner.
2. If you have a partner and children – your personal effects will go to your partner. The first \$121,500 will go to your partner. If you own more than that (for example your house is worth \$300,000 after the

mortgage has been repaid) the rest of your property will be divided into three. Your partner will receive one third and your children two thirds.

3. If you have a partner and no children, but one or both of your parents are alive – your personal effects will go to your partner. They will also receive the first \$121,500. The rest of your property is divided into three. Your partner will receive two thirds and your parents will share one third.
4. If you have children but no partner – everything will go to your children and will be held in trust on their behalf until they turn 18.
5. If you do not have a partner or children – everything will go to your parents. If your parents have passed away, your property will be divided between your brothers and sisters. If you don't have siblings, it will get divided between your grandparents and aunts and uncles. Finally, as a last resort if you have no family alive, everything will go to the Crown.

For the purposes of wills and intestacy, you do not have to have been with your de facto partner for three years to be able to claim under the Administration Act. If you were to die without a will and you'd started a de facto relationship only four months earlier, your partner could receive virtually everything.

Links:

<http://www.legislation.govt.nz>

http://www.lawaccess.lsa.govt.nz/view_resources12345.aspx?category_id=171

For more information about what happens after a person has died and probate:

<http://www.communitylaw.org.nz/A-Guide-to-Death.43.0.html#c332>

<http://www.cab.org.nz/information/5%20Dealing%20with%20a%20Death.pdf>

2.5 GUARDIANSHIP AND PARENTHOOD

Many gay, lesbian, bisexual, transgender, transsexual, takatāpui, fa'afafine, queer and intersex people raise children. These families are formed and managed in many different ways. Most of this section looks at different types of parenting/caregiving arrangements and their status in law. It also contains information on child support and parenting orders which can become important if parents/caregivers separate.

If you are raising a child you may be a legal parent and/or a guardian, or you may be neither. While you may consider yourself a parent, you may not be one in law. If you are not, guardianship is an important option to consider.

Links:

<http://courts.govt.nz/family/what-familycourt-does/children/care-of-children.asp>

Guardianship

The duties of a guardian are set out in the Care of Children Act 2004 and exist regardless of who a child lives with. Guardianship is:

- Having a role in providing day-to-day care for the child;
- Contributing to the child's intellectual, emotional, physical, social, cultural and other personal development;
- Determining for or with the child questions about important matters affecting the child, including their name, residence, medical treatment, education, culture, language and religion.

Guardianship creates a legal relationship only until the child turns 18 (or gets married or enters into a civil union or de facto relationship with their guardians' consent), whereas parenthood lasts the child's life. Parents also have financial liabilities until the child becomes an adult, whereas a guardian usually won't. There are many types of guardianship:

- Legal (or 'natural') – those persons who are guardians because of their legal status in relation to a child at birth (which may or may not be the biological mother and father);
- Court appointed – those persons who have been appointed by the Family Court to act as a guardian for a child, based on an application by that person, their partner or another party (such as Child, Youth and Family);
- Testamentary – those persons who have been appointed by the legal guardians to act as guardian for their child should the legal guardian die before the child turns 16. The appointment is done within a will and will still require approval from the Family Court.

The rules around which people are parents where the pregnancy is a result of a donor procedure are

discussed below in section 2.6. If a child has been conceived without these procedures, the rules about who is a guardian are different. If a child is conceived without artificial insemination, the woman who gave birth is both a parent and a guardian. The man will also be a parent and guardian if he was living with her any time between conception and birth or is named as the father on the birth certificate. (Note: These rules changed in July 2005 so if you gave birth before then you need to check with a Community Law Centre or lawyer as to whether the father of your child is also a legal guardian). If the woman has a female partner, that partner will not be a parent in law but may apply to the Family Court to be appointed a guardian.

Case Study – Kate, Mel and James – Guardianship Responsibilities

Kate, Mel and James jointly parent Danni. Danni spends most of her time with Kate and Mel. James (the donor) lives in the same street and is very involved in Danni's life. From the outset all three adults are committed to sharing responsibility for raising Danni.

Kate and Mel are registered as Danni's parents on her birth certificate. James is not a legal parent to Danni but has successfully applied to the court to be a guardian.

As a guardian, James has significant legal responsibilities, ranging from, for example, ensuring Danni's birth is registered (under s9 of the Births, Deaths and Marriages Registration Act), to financial liability for any damage she might cause in future (s283 Children Young Persons and their Families Act).

2.6 DONOR ASSISTED REPRODUCTION

Medical aspects of HART are dealt with in the health section.

The Human Assisted Reproductive Technology Act 2004 (HART Act) regulates assisted reproductive procedures in order to protect the rights of those who use such procedures. HART includes a range of procedures designed to assist a couple or an individual to conceive a child with medical assistance. Procedures may involve the use of donated sperm, eggs or a donated embryo to bring about conception. The HART Act prohibits certain commercial transactions in relation to surrogacy and donation and established an information database so that people born from donated embryos or cells can access information about their genetic origin. Registration is voluntary if a procedure has taken place privately, i.e. outside of a fertility clinic.

Legal parenthood

The Status of Children Act 1969 sets out whether or not parties involved in artificial donor insemination are legal parents or not. It says that if a:

1. Woman in a relationship becomes pregnant, with her partner's consent:

- Using ovum or embryo from her partner: the woman’s partner is a parent “for all purposes” as per s.18(2) of the Status of Children Act. In this case the woman giving birth would be the sole guardian and would need to appoint her partner/parent an additional guardian under s.23 of the Care of Children Act in accordance with s.21(4) of that Act.
 - Using donated ovum or embryo from an outside donor: the parents are the woman and the woman’s partner.
 - Using donated sperm: the parents are the woman and the woman’s partner.
2. Woman in a relationship becomes pregnant, without her partner’s consent:
- Using ovum or embryo from partner: the woman is the sole parent.
 - Using donated ovum or embryo from outside donor: the woman is the sole parent.
 - Using donated sperm: the woman is the sole parent.
3. Single woman becomes pregnant:
- Using a donated ovum or embryo: she is the sole parent.
 - Using donated sperm: she is the sole parent.

Relationship includes marriage, civil union or de facto relationship. The woman’s partner can be male or female. The law assumes that the woman’s partner consented because she is in a relationship with the woman. However the birth registration form is explicit about the partner registering for inclusion only if they have consented to the assisted human reproduction procedure. These rules apply regardless of whether the donor assisted reproductive procedure took place with the assistance of a fertility clinic or occurred privately. If you did not consent to your partner conceiving, it is important that you do not enter your details onto the birth registration form. Consent is assumed for those in a relationship. These rules apply regardless of whether the HART procedure took place with the assistance of a fertility clinic or occurred privately.

Different rules applied before the HART Act came into force in 2005. Prior to this date, partners of mothers who become pregnant using assisted reproductive procedures were not ‘parents’ in legal terms.

Case Study – Moana – Transgender Parents

Moana (female to male trans) and his partner Mereama conceive a child with the assistance of donated sperm used to impregnate Mereama. Because Moana’s own birth certificate shows him as female, it is likely that he will be registered as ‘other parent’ on the child’s birth certificate.

If Moana was male to female trans and parented with Mereama; and if Moana had male on her birth certificate, she will be registered as ‘father’ on the birth certificate.

Moana’s sex can never be changed on the child’s birth certificate, even if Moana amended his/her own birth certificate in future.

Although a donor is not a parent, they can apply to the Family Court to be appointed a guardian of the child and be provided with contact to the child. Partners of people who have children may also apply to the Family Court to become guardians, although this can be a contentious process if there are other legal parents as their input will be sought before any new guardian is appointed by the Court.

Donor agreements

Under section 41 of the Care of Children Act 2004, donors may come to an arrangement with the child's parents as to contact with the child and the role that they may have in the upbringing of the child.

The agreement cannot be enforced by the Family Court but, should all parties consent, the Court will make a consent order that includes some or all of the terms of the agreement. That order may be enforced under the Act as if it were a parenting order ([see section 2.9](#)). If the parties cannot agree on matters which are dealt with in the agreement, they can apply to the Court for a direction.

The agreement doesn't change the donor's legal status – they are not a parent and they cannot become one. An agreement does not grant guardianship status, however the donor could apply for this.

Anonymous donors, i.e. those who donate to a fertility clinic with no direct contact with the recipient, have the right to specify who they would like their donation to go to. They can make this decision on whatever grounds they like.

Case Study – Vita, Mei and Dan - Agreements

Vita and Mei have a one month old baby, Curtis. Both women are listed as parents on Curtis's birth certificate.

Dan, an acquaintance of the couple, donated sperm for Curtis. As a sperm donor Dan has no legal rights or responsibilities in relation to Curtis.

In order to be clear about intentions, the three adults have a written agreement that Vita and Mei are responsible for all parental decision-making and liabilities. Dan has agreed to provide them with any change of address details and intends to visit at least once a year.

They choose to get a lawyer to file the agreement with the Family Court as a 'consent order'. This is useful to do in case they disagree in future and need to seek the direction of the court to assist them in making decisions relating to Curtis's personal care and welfare.

Register

The HART Register holds information about donors, donor offspring and guardians who have been involved in fertility treatment that involves the use of donated embryos, sperm or eggs through fertility clinics. Births, Deaths and Marriages is responsible for maintaining the Register

which has been operational since late 2005.

Fertility clinics are required to notify the Registrar-General of Births, Deaths and Marriages of identifying information about the child and the donor. After the age of 18 years a child may ask the clinic or the Registrar-General for the identity of the donor and this information will normally be given. The child may ask for the identity of other children conceived using the same donor. A donor may also ask for the identity of all persons born as a result of their donation. Consent is required from the person before the information will be released. If the person is under 18, their parents' consent is required instead.

Links:

<http://www.bdm.govt.nz/>

<http://www.courts.govt.nz/family/home.asp>

<http://www.fertilityassociates.co.nz>

Surrogacy

Surrogacy involves a woman agreeing to carry a child for another person or couple on the basis that she will pass the child to them to raise from birth. It is an informal arrangement between the parties not enforceable in New Zealand law. 'Commercial' surrogacy is not allowed in New Zealand and only reasonable and necessary expenses incurred during the pregnancy and birth can be paid to surrogate mothers.

The surrogate mother may or may not have any genetic link to the child, depending on whose ovum is used in conception, but regardless of this she will be the legal parent and guardian of the child. An adoption order is needed to recognise the non-biological parent(s) as legal parent(s).

Note that a man would not be able to adopt a female baby resulting from a surrogacy, unless he was jointly adopting with a woman ([see section 2.7](#)).

Where full medical intervention by in vitro fertilisation is required (i.e. the surrogate will have no genetic link to the child and will have an embryo implanted), the Ethics Committee on Assisted Reproductive Technology must approve an application before a fertility clinic will be able to assist.

Links:

<http://www.acart.health.govt.nz/moh.nsf/indexcm/acart-resources-guidelines-surrogacy-fertilityservices>

2.7 ADOPTION

Legal Adoption

Parental leave in relation to adoptive parents is covered in the employment section.

Adoption is the legal transfer of all parental rights and responsibilities from a child's birth parents to the adoptive parents. When the process is completed, the child's legal status has changed completely and it is as if they were born to the adoptive parents. A new birth certificate is issued in the adoptive name. An adopted person may access their original registration details when they reach 20, but for all legal purposes, they have no acknowledged connection to their biological parents.

In New Zealand, there are restrictions on who can apply to adopt a child. De facto couples (whether same sex or opposite sex) and civil union couples cannot adopt a child as a couple. If they wish to adopt, one person will need to apply to adopt and be the legal parent. The other partner has to apply to the Family Court to be appointed a guardian. Married couples may adopt as a couple so that both people are registered as parents. Single people may also adopt and the child will have one legal parent. However, a female child cannot generally be adopted by a single male.

If you are considering adopting, you can make an application through an Adoption Services office of Child, Youth and Family. You will need to provide references and a medical and police check. You must attend an education programme and attend interviews with social workers to assess your suitability.

Once you have completed your assessment, your profile will be presented to birth parents considering placing their child for adoption. Birth parents ultimately choose the person who will adopt. Their consent is required for the adoption to take place. Once everything is finalised, an Adoption Order will be made stating that the adoptive parents are now the legal parents.

In New Zealand, 'open' adoptions where the birth parents have contact is encouraged.

Whangai Adoptions

Whangai arrangements are treated differently than formal adoptions. Whangai caregivers are not acknowledged as a child's legal parents unless there is an adoption order. Whangai caregivers can apply for guardianship in the Family Court.

Links:

<http://www.cyf.govt.nz/adoptions.htm>

More information about finding out who your biological parents are is at <http://www.youthlaw.co.nz/default.aspx? z=30>

<http://adoptionoption.org.nz>

<http://legislation.govt.nz>

2.8 STEP-PARENTING

Step-parents may have legal rights and obligations in relation to children that they have cared for, both during a relationship and after it has ended. A step-parent may include someone who was married, in a civil union or in a de facto relationship with a child's legal parent.

Additional guardian

Step-parents don't automatically become a legal parent, or legally responsible for a child just because they may be in a relationship with the child's legal parent. If you are a step-parent who wishes to formalise the relationship you have with your partner's child, you may apply to the Family Court to be appointed an additional guardian. [See section 2.5](#) for more on what it means to be a guardian. This can happen in two ways:

- With the consent of all of the child's legal parents (provided you meet the criteria set down in the Care of Children Act 2004, including having cared for the child for more than one year), with the decision to be made by a Registrar on the basis of application forms;
- Without the consent of all the child's legal parents and by order of a Judge who has determined that the appointment is in the best interests of the child, which will usually require a hearing.

Links:

<http://courts.govt.nz/family/pdf-pamphlets/guardianship.pdf>

A self-help resource for those who wish to apply to become additional guardians (where all parents consent) is available from <http://communitylaw.org.nz/A-Guide-to-Appoi.43.0.html#c118>

Case Study – Vita, Mei and Tania - Parenting Status


Nine year old Charlie lives alternate weeks with Vita, Mei, and baby Curtis. He spends the other half of his time living with Vita’s previous partner Tania (his biological mother).

Despite being Tania’s partner at the time of artificial insemination, Vita is not named as a parent on Charlie’s birth certificate because it was not possible to have two female parents registered prior to July 2005. However Vita successfully applied to the court to become a legal guardian for Charlie.

A July 2008 amendment to the law means that after 25 January 2009, Vita will be able to apply to be retrospectively named a parent on Charlie’s birth certificate. A new birth certificate can be issued for Charlie, naming Tania as ‘mother’ and Vita as ‘other parent’.

As Charlie’s step parent, Mei sometimes takes on a parenting role, but has no legal relationship to Charlie. Mei hasn’t thought it necessary to seek guardianship of Charlie, given that both Vita and Tania are in his life. However if it became important Mei could apply to become a legal court-appointed guardian for Charlie.

BDM 107



New Zealand Birth Certificate Te Tohu Whānautanga ki Aotearoa

Child / Tamaiti	
First/given name(s) Ingoa tapa	Curtis May
Surname/family name Ingoa whānau	Smith-Jones
First/given name(s) at birth* Ingoa tapa i te whānautanga mai*	-
Surname/family name at birth* Ingoa whānau i te whānautanga mai*	-
Sex Tāne, wahine rānei	Male
Still-birth/multiple birth (if applicable) I whānau kahu mai i whānau whakareka mai (mēnā e hāngai ana)	-
Date of birth Te rā i whānau ai	1 November 2007
Place of birth Te wāhi i whānau ai	Wellington
New Zealand citizen by birth** He kiritirau nō Aotearoa i te mea i whānau i konei**	Yes
Name changes Ngā whakarerekētanga ingoa	-

Mother / Whāea	
First/given name(s) Ingoa tapa	Vita Marie
Surname/family name Ingoa whānau	Smith
First/given name(s) at birth*** Ingoa tapa i te whānautanga mai***	-
Surname/family name at birth*** Ingoa whānau i te whānautanga mai***	-
Date of birth Te rā i whānau ai	12 December 1983
Place of birth Te wāhi i whānau ai	Wellington

Other Parent / Terā Matua	
First/given name(s) Ingoa tapa	Mei Leilani
Surname/family name Ingoa whānau	Jones
First/given name(s) at birth*** Ingoa tapa i te whānautanga mai***	-
Surname/family name at birth*** Ingoa whānau i te whānautanga mai***	-
Date of birth Te rā i whānau ai	1 December 1978
Place of birth Te wāhi i whānau ai	Wellington

Registration Number / Te Tau ā-Motu
2008123456

* If name has changed / Mēnā kua rerekē te ingoa
 ** As determined under the Citizenship Act 1977 / E ai ki tā te Citizenship Act 1977 whakaritenga
 *** If different from above / Mēnā he rerekē ki tērā o runga ake

Certified to be a true copy of the above particulars included in an entry recorded in this office.
 E pono ana te kī he taurua tūturu tēnei o ngā kōrero o runga ake nei kua tuhia ki tētahi puka i tēnei tari.

Issued under the seal of the Registrar on 22 August 2008
 I tukuna i raro i te maru o te Pourouki i te 22 Heru-turi-kōkō 2008

WARNING: THIS CERTIFICATE IS NOT EVIDENCE OF THE IDENTITY OF THE PERSON PRESENTING IT
 KIA TŪPATO: EHARA TĀ TĒNEI TIWHIKETE I TE TAUNAKI I TE TUAKIRI O TE TANGATA KA TĀPAE ATU

CAUTION: Any person who (1) falsifies any of the particulars on the certificate, or (2) uses it as true, knowing it to be false, is liable to prosecution under the Crimes Act 1961.
 WHAKAHOHITI: Ko te tangata (1) ka whakarerekē i ngā kōrero o tēnei tiwhikete, (2) ka whakamahi anō nei he pono, me te mōhio anō kei te hōri kō, ka taea te whakawhiu i raro i te Ture Takahi Ture, 1961.

Adoption

Step-parents may also be able to adopt their partner’s child, but only if they are married to the legal parent. The current adoption laws prevent those who are in a same-sex partnership or de facto relationship from adopting their partner’s child. Consent will also be required from any other legal parent before the Family Court will approve an adoption.

Parenting Agreements and Orders

Step-parents and wider whanau can be parties to parenting agreements and parenting orders under the Care of Children Act 2004, to ensure there is continued contact for example. However, they will need to get permission from the court before applying.

Links:

<http://courts.govt.nz/family/what-familycourt-does/children/care-of-children.asp>

Child Support

The former partner of a parent is liable to pay child support upon separation when the Family Court has declared that person a 'step-parent' for the purposes of section 99 of the Child Support Act 1991.

The Family Court has found that a former partner in a long-term same sex relationship was a 'step-parent' and liable under the Child Support Act 1991. The woman had financially supported the three children of the relationship for nine years since the birth of the first child. The Family Court ruled that she must continue to support them.

The criteria for determining step-parenthood places considerable emphasis on the extent to which a person has assumed responsibility for the maintenance of the child. The existence of a relationship is only one of the factors to be taken into account.

The Court must have regard to the following circumstances when determining if someone is a step-parent for child support:

- The extent (if at all) to which that person has assumed responsibility for the maintenance of the child, and the basis on which that person assumed that responsibility, and the length of time during which that person has discharged that responsibility; and
- Whether that person assumed or discharged any responsibility for maintenance of the child knowing that that person was not the natural parent of the child; and
- The liability of any other person to maintain the child; and
- Whether or not that person was ever living with a parent of the child in a marriage, civil union or de facto relationship; and
- Whether that person has at any time been a guardian of the child.

This is to be determined from the circumstances that exist at the date of the Family Court hearing, not the date of separation.

The case referred to above is *T v T [child support] (1998) 17 FRNZ 387; [1998] NZFLR 776*. It is not available online but your lawyer should be able to provide you with a copy if necessary.

2.9 RESOLVING PARENTING ISSUES

The Care of Children Act 2004 aims to help parents come to good decisions about how they'll work together to look after their children when they have separated. It also regulates guardianship which is dealt with above in [section 2.5](#).

The Act recognises that it's better if separated parents decide for themselves about care arrangements for their children. Free counselling and mediation is available to help parents having trouble reaching agreement. A Family Court hearing before a Judge is a last resort if the parents can't agree. Same sex couples can apply for counselling through the Family Court to resolve issues around parenting.

The Care of Children Act makes the child's welfare and best interests the first and most important factor when the courts are deciding issues to do with the child's care. The Act also recognises that in New Zealand today there are many different types of family arrangements a child might grow up in.

Links:

<http://courts.govt.nz/family/what-familycourt-does/children/care-of-children.asp>

Parenting Agreements

Parents who separate are encouraged to reach their own arrangements as to the care of their children. Parenting agreements usually deal with who will provide day-to-day care for the children. If only one parent has day-to-day care, decisions on when and how the other parent will have contact with the children and other issues such as a child's school or religion can be detailed in the parenting agreement.

Having day-to-day care of a child means they live with you and you're responsible for everyday things like making sure they're safe, that they get to school or preschool, and that they're properly fed and dressed. Parents are encouraged to share this responsibility. Contact refers to how and when a child gets to spend time with a parent who doesn't have day-to-day care of them. Day-to-day care used to be called "custody", and contact used to be called "access".

A parenting agreement can't be enforced in the Courts in the way that other agreements and contracts dealing with property can. However, parents and guardians can apply to the Family Court to have a parenting agreement made into a Court order. The agreement can then be enforced through the Family Court.

Parenting Orders

Parenting orders are made by the Family Court to decide issues over contact and day-to-day care of a child. They're made as a last resort when parents haven't been able to agree on these things themselves or with the help of counselling and mediation arranged by the Family Court.

Usually parenting orders involve disputes between a child's parents. Other people in a child's life, such as guardians, step-parents, grandparents and wider whānau members can apply for a parenting order too, although they generally need permission from the Court to do so.

Regardless of who has day-to-day care and contact under a parenting order, both parents continue to be guardians of their children, if they were guardians before they separated. This means they both continue to be responsible for making important decisions about the children's upbringing .

When the Family Court is deciding about care arrangements for a child, the first and most important factor is always the child's "welfare and best interests". The Court will also take into account the child's views, but will give different weight to their views depending on their age and the situation. The Court will usually appoint a lawyer to act for the child and to find out the child's views.

The Family Court must consider the following factors when it's deciding what's best for a child –

- the child's parents and guardians should take the main responsibility for looking after the child and making arrangements for their care, development and upbringing;
- there should be continuity in the arrangements for the child's care, development and upbringing;
- links between the child and their whānau or other wider family group should be preserved and strengthened, and this wider family should be encouraged to be involved in the child's care and upbringing;
- there should be co-operation between parents, guardians and others who are involved in looking after the child;
- the child must be kept safe and protected from all forms of violence; and
- the child's identity should be preserved and strengthened, including their culture, language and religion.

The Court will not assume that a child will be better in a family with two heterosexual partners. The issue which must be determined is which arrangement will best meet the child's welfare and best interests, based on the evidence available to the Court. In the past the Court has adopted the view that homosexuality in itself has no particular significance and that any consequences which flow from a homosexual relationship, to the extent that they are established by evidence, may be relevant to the child's welfare in the same way as the consequences that flow from a heterosexual relationship.

Information about child care after separation is available from the Family Court.

Links:

<http://courts.govt.nz/family/what-familycourt-does/children/care-of-children.asp>

http://www.lawaccess.govt.nz/Lrm_V2.aspx?BookId=68&ChapterId=2

Case Study – Terry, Mike and Tina – Parenting Order

Terry and Mike arrange with their friend Tina to create a child and raise it together. The three write up an agreement to share parenting rights and responsibilities. The agreement states that Tina is to be primary caregiver for the first 10 months of the child's life, and by 18 months the child is to have begun a permanent arrangement whereby two-thirds of his/her time is spent with Terry and Mike.

Tina conceives after insemination.

The three parents adore baby Kyle and manage shared parenting reasonably smoothly for the first eight months. However at that stage Tina starts a relationship with a new partner who resents Terry and Mike's involvement in their lives. As a result, Tina cuts the amount of contact she has with Terry and Mike and their relationship as co-parents begins to deteriorate.

After several months of tension, Tina announces that she is moving to another city with her partner and intends to take Kyle with her.

When the men seek legal advice they learn that any person can apply for a parenting order in respect to any child (regardless of whether or not there is a biological or existing legal relationship), with the leave of the Family Court. The Court decides whether or not to make the order, based on what it believes is in the best interests and welfare of the child. An ongoing parenting relationship is a factor that is always seriously considered.

Rights as an employee

Parental Leave

Benefits and Superannuation

Tax



3.1 RIGHTS AS AN EMPLOYEE

Employment rights

There are a number of Acts that regulate an employee's working conditions, pay, leave and safety at work. Some of your minimum entitlements as an employee are briefly outlined here. More information is available from the Department of Labour.

Holidays

All employees are entitled to twenty days of paid annual leave at every 12 month anniversary of their employment. This applies whether you're permanent or casual, full-time or part-time (although part-timers are only entitled to the pro rata rate e.g. if you normally work twenty hours a week, you will be entitled to two weeks' leave which is the equivalent of 20 days of 4 hours). Casual employees can be paid their annual leave as 8% extra on their wages, rather than being entitled to any days off.

Sick leave

After the first six months of employment, you are entitled to five days of sick leave. There is an additional five days after each subsequent 12-month period. You may take sick leave if you, your partner or your dependant (a person who needs your care, usually a child but it could be an elderly relative) are sick or injured.

Bereavement leave

Three days of bereavement leave is available if you have worked for six months and an immediate family member has died. This is defined as your partner, child, parent, sibling, grandparent, grandchild or your partner's parent. In the event of a death outside the immediate family that causes you to suffer a bereavement (i.e. a close friend or other whanau member), up to one day of paid leave may be taken if the employer accepts that you have suffered a 'bereavement', taking into account your closeness and responsibilities in relation to the deceased.

Minimum wage

The minimum wage is currently \$12.00 per hour. Employers must pay at least the minimum wage, even if you are paid by commission or by piece rate. The minimum wage applies to all workers aged 16 years or older, including home workers, casuals, temporary and part-time workers. There is a different minimum wage for people “new entrant” worker who are under 18 – see section 8.2 for more information about this.

You must receive a written employment agreement from your employer. Even if your employer doesn't provide you with one, you will still be covered by all the minimum rights contained in the Employment Relations Act 2000 and other employment legislation.

Links:

<http://www.ers.govt.nz/>

<http://www.legislation.govt.nz>

Problems at work

'Personal grievance' is the legal term used in the Employment Relations Act 2000 to describe situations where you feel you have suffered:

1. an unjustifiable dismissal;
 - the reason you were dismissed wasn't sufficient to justify dismissal;
 - the correct process was not followed;
 - constructive dismissal – you were forced to resign due to your employer's behaviour e.g. bullying or being told that unless you quit you would be fired.
2. an unjustifiable action which has disadvantaged you, such as;
 - demotion;
 - suspension without pay;
 - withdrawal of work;
 - transfer;
 - unjustified warnings;
 - removing a benefit.
3. discrimination; or
4. racial harassment; or
5. sexual harassment (unwelcome or offensive behaviour of a sexual nature from an employer, colleague or customer, and includes same sex harassment); or
6. duress in relation to membership or non-membership of a union.

If you feel you have a personal grievance or other concerns related to your employment, you should first bring it up with your employer. If they don't take steps to resolve your concerns, you have a choice as to what to do next.

If your concern isn't a personal grievance and is related to minimum employment entitlements, such as holidays and wages, you should contact a Labour Inspector. Inspectors can investigate breaches of the law and can be contacted through the Department of Labour.

Links:

<http://www.ers.dol.govt.nz/problem/legislation.html>

If you are being sexually or racially harassed or subjected to discrimination, you may complain to the Human Rights Commission or take an action through the Employment Relations Authority. You cannot complain to both.

For all other grievances, you can apply to the Department of Labour for mediation in the first instance, and then action in the Employment Relations Authority and Employment Court if mediation is unsuccessful or inappropriate. Most problems are resolved at mediation.

Links:

<http://www.ers.dol.govt.nz/problem/>

http://www.lawaccess.lsa.govt.nz/Lrm_v2.aspx?BookId=59&ChapterId=0

Human Rights Act 1993

It is unlawful to discriminate in employment on the basis of sex or sexual orientation in most situations. Employment includes advertising for employment, pre-employment questioning, conditions, training opportunities, promotion, benefits, termination and retirement.

It is not a requirement that you must advise a potential employer of your sexual orientation or gender identity, although the way that Police checks are carried out presently means that the employer will receive details of any names you may previously have been known by. For example this means an employer will know that job applicant "Mark Smith" was previously known as "Mary Smith".

The Act does provide exceptions where it is not unlawful to discriminate in relation to employment matters. The relevant exceptions are:

1. Disability
 - If the person requires special services or facilities and it is not reasonable to provide them, or
 - Employment represents a risk of harm to the person or others that is not reasonable to take.
2. Work involving national security
 - Discrimination on the basis of disability and family status is allowed.

3. Authenticity and privacy

- Discrimination on the basis of sex is allowed where for 'reasons of authenticity' being a particular sex is a genuine occupational qualification for the position.
- Where the position is domestic employment within a private household, discrimination on sex, disability or sexual orientation is allowed.
- If the position needs to be held by a particular sex to ensure reasonable standards of privacy, discrimination on the basis of sex is allowed.
- Where the nature of the employment makes it impracticable for the employee to live elsewhere than in premises provided by the employer, and the only premises available are not equipped with separate sleeping accommodation for each sex, and it is not reasonable to expect the employer to provide separate premises, discrimination on the basis of sex is allowed.

A transgender person who has taken decisive steps to live fully and permanently as a woman (or man) can apply for a job where being female (or male) is a genuine occupational qualification.

Links:

<http://www.hrc.co.nz/>

3.2 PARENTAL LEAVE

There is paid and unpaid parental leave available if an employee or their partner is pregnant, or formally adopting a child under six and the employee is able to answer yes to each of these questions:

1. Have you worked for the same employer for the six months up to the baby's expected due date or the date you intend to take over care of the child?
2. Have you worked at least one hour in every week (or forty hours in every month) in that month period?
3. Have you worked for your employer at least ten hours a week (on average over the period)?

For a partner to receive parental leave, they must also satisfy the test.

Paid entitlements

One parent is entitled to paid *parental leave* of 14 continuous weeks. This may start up to six weeks before the expected date of birth or adoption. This can be split between two parents, so long as they both satisfy the test above. The rate paid is determined by the Parental Leave and Employment Protection Act 1987 and is paid by the government, not your employer.

Unpaid entitlements

Unpaid *Maternity leave* of 14 continuous weeks may start up to six weeks before the expected date of birth or adoption. If you plan to take maternity leave, you must write to your employer at least three months before your expected date of birth.

There is also *special leave* of up to 10 days available to the mother before maternity leave for reasons connected with pregnancy (e.g. antenatal checks).

Partner's/paternity leave is available depending on the eligibility of the partner. If you have been working for the same employer for at least six months for an average of at least ten hours a week, and at least one hour in every week or forty hours in every month you are entitled to one week unpaid leave. If you meet the criteria for twelve months, you are entitled to two weeks' unpaid leave.

Extended leave of up to 52 weeks is available for employees with 12 months eligible service. It can be up to 52 continuous weeks, less any maternity leave taken, and is available in the 12 months after birth, or the date the employee assumes the care of a child they intend to adopt. Extended leave may be shared by both eligible parents, but the total leave taken must not be more than 52 weeks (including maternity leave and paid parental leave). However, the one or two weeks' partner's/paternity leave entitlement is additional to this 52 week period. Both partners can take their leave at the same time or they can take it one after the other.

Adoptive parents

Adoptive parents who are assuming care of a child under six years may receive parental leave. The adoption must be lawful in New Zealand so there will need to be an adoption order or the overseas equivalent. Whangai adoptions are not covered unless there is a formal order.

Adoptive parents must choose which parent will be the primary carer, but the primary carer can transfer some or all of the payment to their partner if they are adopting jointly, providing both partners are eligible using the criteria outlined above. If the adoption is by one person alone, only that person can apply for paid parental leave. Civil union and defacto couples (irrespective of gender) are not able to adopt together. See section 2.7

You will need to provide the following evidence that you are assuming the care of a child under six, and that you intend to legally adopt the child:

- a letter from a social worker saying you will be keeping a child in your home with a view to lawful New Zealand adoption; or
- a certified copy of an interim order of a court confirming the proposed adoption; or

- a copy of a statutory declaration saying you have assumed the care of a child you plan to adopt and that the proposed adoption will be lawful in New Zealand.

You must write to your employer advising that you intend to take parental leave, and attach your evidence of adoption to the letter. Once you and your employer have agreed on your leave arrangements you should apply for paid parental leave as soon as possible. You will need to give your employer notice within 14 days of receiving notice that a child will be placed with you or receiving the court order.

Case Study – Kate and Mel

Prior to Danni being born, Kate and Mel agree to share the unpaid extended parental leave allocation between them.

To apply for leave as partner to the mother, Mel follows usual procedure and writes to her employer requesting parental leave. In her letter Mel provides:

- the amount of unpaid parental leave (and dates) she is applying for
- Kate's full name, employer and the amount of leave Kate is applying for
- a declaration from Kate that Mel is her partner
- a medical certificate showing the due date of the baby
- a statement about Mel's intention to help care for the baby.

If Mel is applying for paid parental leave (as opposed to unpaid parental leave), she and her employer need to fill out an additional form.

Because James (Danni's dad/donor) isn't Kate's partner, he is ineligible for paid or unpaid parental leave.

Mel is concerned about her employer's reaction because up until this point she had not been out at work and had never talked about wanting to become a parent. Because Mel meets the eligibility criteria in relation to numbers of hours worked for her employer in the past twelve months, Mel's employer must grant the leave application.

If the disclosure of her sexual orientation does lead to discrimination at work, Mel's first legal option is to lodge a personal grievance with her employer. If she is unhappy with her employer's response to the personal grievance she can take the matter to the Employment Relations Authority. Alternatively, she can make a complaint to the Human Rights Commission.

Links:

<http://ers.govt.nz/parentalleave/>

View the Parental Leave and Employment Protection Act 1987 at <http://www.legislation.govt.nz>

Benefits are administered by the Ministry of Social Development, through Work and Income. Up until April 2007, Work and Income couldn't treat de facto same sex relationships in the same way as de facto heterosexual relationships and applicants in a de facto same sex relationship were assessed as if they were single.

If you are applying for a benefit you must declare your relationship and your entitlement will be assessed taking into account your partner's circumstances, including their income. For more information on what Work and Income classify as a de facto relationship, [see section 2.1](#).

Assistance available

There are a number of benefits available and information should be sought from Work and Income directly.

As well as the main benefits available if you are unable to work through illness or unemployment, there is some assistance available to those already in work. It is worth checking with Work and Income if you are receiving a low income to see if you are entitled to further assistance for medical costs, accommodation, child care costs or if you have an emergency need.

Work and Income has guidelines about how you must be treated and the financial assistance you receive. If you feel you are entitled to assistance which hasn't been granted, you are able to appeal that decision. Work and Income's policies are available online so you should first check these out. If you feel you need a support person to assist you, contact your local Community Law Centre or Family Budget Advisor. They should be able to refer you to an advocacy service in your area.

Case Study – Gemma and Aroha

Gemma and Aroha have been in a de facto relationship for several years. Gemma lives with her two dependent children. Aroha lives separately. Gemma is made redundant from her job and applies to Work and Income for the Domestic Purposes Benefit.

At Work and Income, Gemma answers a series of questions aimed at establishing whether or not Work and Income will take the relationship into account. Gemma and Aroha's relationship had not been recognised by Work and Income when Gemma last received social assistance in 2006. A major factor in Work and Income's decision is that Aroha stays with Gemma several nights a week. Other factors also taken into account in their case are:

- they often socialise together
- they identify as a couple and others perceive them as a couple
- on occasion Aroha has contributed financially to Gemma's household eg helping pay the children's school expenses.

Work and Income advises Gemma that she is not eligible for a domestic purposes benefit; she is not recognised as a sole parent because of her relationship with Aroha. Her eligibility to unemployment benefit is measured against Aroha's income, which is found to be above the threshold. However they are jointly entitled to a Working for Families tax credit.

If Gemma believes the decision is wrong she can challenge it before the Benefit Review Committee.

Links:

<http://www.workandincome.govt.nz>

<http://www.cab.org.nz/information/2%20Benefit%20Reviews%20and%20Appeals.pdf>

www.communitylaw.org.nz

www.familybudgeting.org.nz/

[WINZ Helpline - 0800 559 009](http://www.winz.govt.nz)

3.4 TAX

Same sex relationships are treated in the same way as heterosexual relationships by the Inland Revenue Department. You will need to declare your de facto relationship if it is relevant to your tax affairs.

Links:

<http://www.ird.govt.nz>

Code of Health and Disability Consumers' Rights
Health Information
Mental Health
Enduring Powers of Attorney and Advance Directive:
ACC
Accessing Human Assisted Reproduction Services
Gender reassignment surgery



4.1 HEALTH AND DISABILITY CONSUMERS' RIGHTS

Aspects of healthcare which relate to prison inmates are dealt with in [section 5.4](#).

The Code of Health and Disability Consumers' Rights underpins discussions on health and the law (including mental health) and is relevant to any complaints that a consumer of a health service wants to make, particularly in regards to discrimination.

Every user of health services has rights under the Code of Health and Disability Consumers' Rights. There are duties imposed on a health provider to inform health consumers of their rights and enable them to exercise those rights. The Code applies to all health and disability services - whether public or private, paid or unpaid, and includes GPs, dentists and naturopaths.

The Code provides for ten rights:

1. You should always be treated with respect;
2. No one should discriminate against you, pressure you into anything or take advantage of you;
3. Services should help you live a dignified, independent life;
4. You should be treated with care and skill and receive well co-ordinated services;
5. Service providers should listen to you and give you information in a way you can understand;
6. You should have your condition fully explained to you, and any questions answered honestly;
7. You can make your own decisions and are free to change your mind;
8. You can have a support person with you at most times;
9. All these rights apply if you are asked to take part in research or teaching;
10. Your right to make a complaint about services must be taken seriously;

Complaints

If you are unhappy with the treatment or service you have received from a health provider you can make a complaint. The Health and Disability Commissioner Act 2000 provides for an advocate to be available to support people in upholding their rights under the code. These advocates are free, independent and confidential. They are on the side of the consumer and should support them through the complaints process. Advocates can be contacted by ringing 0800 555 050.

If the complaint with the provider is not resolved, a complaint can be made to the Health and Disability Commissioner. This is an independent agency that exists to promote and protect consumers of health and disability services and also to help resolve problems between consumers and providers. When the Commission receives a complaint it may refer the matter on to another appropriate body, refer it to advocacy, call a mediation conference, take up an investigation or take no action. Compensation cannot be awarded or ordered by the Commissioner but if an investigation is undertaken this may result in recommendations being made to the provider.

In some cases the Commissioner will inform relevant professional bodies, ask Ministry of Health to take steps to improve the service or may ask the Director of Proceedings to look at whether the provider should be disciplined, taken to court or the Human Rights Review Tribunal.

Links:

A full copy of the code is available on the Health and Disability Commissioner's website at www.hdc.org.nz

Information about self-advocacy and complaints is available at <http://www.hdc.org.nz/advocacy/self-advocacy/self-advocacy>

Information about advocates is available at <http://www.hdc.org.nz/advocacy/>

4.2 HEALTH INFORMATION

The Health Information Privacy Code sets out specific rules that cover privacy rights in the health sector. It exists to ensure the protection of personal privacy and covers information collected, used, held and disclosed by health providers or agencies. This can include things like prescriptions, notes, diagnoses, test results, records of conversations and anything else that is on a medical file.

There are very limited circumstances where a health provider can disclose personal information. Because of the importance of confidentiality, the Privacy Code imposes an obligation on health providers to have reasonable security safeguards for patient information. This may mean security measures such as secure computer records, locked filing cabinets, and confidentiality agreements with staff and cleaners.

Everyone has a right to know who will have access to their information, and to see their own information. Once a request to have a copy of a medical file has been made the health provider has 20 working days to supply the information or explain why it has not been provided.

A complaint can be made to the Privacy Commissioner if personal health information has been wrongly disclosed to someone, been used inappropriately, not been safely stored or access to the information has been refused. If a privacy breach of any kind occurs there are various ways of addressing the breach. Depending on the circumstances, complaints to the health provider themselves, to the Privacy Commissioner, the Health & Disability Commissioner or the Human Rights Commission are all possibilities.

Health providers are not required to keep information indefinitely and generally will destroy records after ten years.

Case Study – Ana-Marie

Ana-Marie encounters gynaecological issues in early adulthood which lead to medical tests and the discovery that her reproductive organs are not conventionally female. Her GP informs Ana-Marie that she has AIS (Androgen Insensitivity Syndrome), which is an intersex condition. The doctor does not tell her much about her particular medical condition but does inform her that she had genital surgery in infancy.

Ana-Marie's mother is deceased and her father refuses to discuss her intersex condition.

Ana-Marie contacts the hospital where she was born, in the hope of accessing medical records of her birth and any subsequent surgery. The hospital advises her that they periodically destroy old medical records to make room for new ones, and hold no information about her.

Ana-Marie is devastated that her only source of information has been destroyed. She seeks legal advice as to whether copies of her records should be held somewhere, but learns that medical records can be destroyed after ten years.

Links:

<http://privacy.org.nz/>

Privacy and HIV testing

Deciding to have an HIV test (sometimes called an AIDS test) is a personal decision with possible legal implications. For example under the doctrine of utmost good faith you must disclose to an insurance company the result of any HIV test when applying for life cover. An overriding concern for many when contemplating having an HIV test (for whatever reason) is confidentiality of the process and the results.

Even with privacy laws and Codes of Rights, people still have concerns about this information not being treated with the utmost respect and confidentiality. It is important to note that the efficacy and ethics of how this process is managed has proven to be secure in relation to a person's HIV status remaining confidential. The New Zealand AIDS Foundation believes this process has not been breached in 23 years. The HIV notification code on a person's case file, as well as when reporting results to laboratories, must be based on an anonymously coded case report template which protects individuals from case identification.

4.3 MENTAL HEALTH

There are many types of mental health services in New Zealand. Most are provided in the community, outside formal medical settings. The Code of Health and Disability Consumers' Rights will apply to these health providers. The majority of mental health services will be voluntarily used by those who need them. Sometimes a compulsory treatment order is needed when there is "mental disorder" as defined by the Mental Health (Compulsory Assessment and Treatment) Act 1992. A compulsory treatment order is a court order requiring someone to have treatment for his or her mental disorder. It can be either a community treatment order or an inpatient order (at a hospital specified in the order). The purpose behind compulsory treatment is to ensure that both proper care is given to patients, and the public are protected from possible harm. There are very specific steps to take before a compulsory treatment order will be made.

In the past, people with same sex attractions have been subjected to compulsory detention and treatment because homosexuality was regarded as grounds for a diagnosis of mental illness. Today the Mental Health (Compulsory Assessment and Treatment) Act 1992 specifically states that the provisions of the Act cannot be invoked by reason only of "that person's sexual preferences".

Links:

www.mhc.govt.nz

<http://www.moh.govt.nz/moh.nsf/f872666357c511eb4c25666d000c8888/5545ddd31cae4bcacc256d7e0077407e?OpenDocument>

4.4 ENDURING POWERS OF ATTORNEY AND ADVANCED DIRECTIVES

Whanau Involvement

Changes in New Zealand law over the last decade to ensure that same sex partnerships have the same legal status as married spouses have had a positive influence on the policies of hospitals and other health care providers. These changes along with the Code of Consumers' Rights, mean that health consumers should now be able to have confidence that hospital policies will not prevent same sex partners visiting freely, being kept informed of progress and participating in decision making where appropriate.

There is a growing awareness among New Zealand health service providers that the patient's needs can be better met when whanau (or elected support people) are involved in the process. It used to be that the 'next of kin' was the person identified by health service providers as having authority to visit the patient, receive information and possibly authorise treatment. Now the health service is much more inclined to ask the adult patient themselves to define who their family is – which may not be limited to blood relatives. There is now a wide approach to what constitutes "family". It could be married partners, de facto or civil union couples, or other family units. It could even consist entirely of close friends. This empowers the patient to elect as their support people, those who will most assist the treatment process.

Enduring Powers Of Attorney

There is no law in New Zealand that says a person's spouse, partner or next of kin can give consent for medical treatment on behalf of adults who are unable to give consent themselves. However, the Protection of Personal and Property Rights Act 1988 provides a way to give another person authority to act when you become incapable of making decisions yourself.

An Enduring Power of Attorney (EPOA) enables the person making it (the donor) to elect someone (the attorney - who does not need to be a lawyer) to act on their behalf in relation to their property and/or personal care and welfare. The donor can give general authority or restricted authority to make decisions when they are no longer able to decide themselves.

It is important to note that you can only make an EPOA when you are still of sound mind. A Family Court order will be required if you are already incapable of making decisions for yourself. You can revoke or change an EPOA at any time while you have capacity.

Only one attorney can be appointed by an EPOA for personal care and welfare for a person (the donor). This type of EPOA enables the attorney to make decisions on matters of personal care, after the donor loses mental capacity to make these decisions themselves. This may mean deciding whether the donor goes into care, where they will live and what treatment they receive. There are limitations on what the

attorney can and cannot consent to. They are not allowed to consent to certain medical treatments, or to refuse treatment intended to save the donor's life or prevent serious damage. They cannot sign divorce papers or agree to adoptions on behalf of the donor.

An EPOA for Property can appoint more than one attorney. It can either take effect immediately, or when the donor loses capacity to make decisions themselves. (This is best decided by the donor in the EPOA). The property can include real estate, bank accounts, businesses and anything else the donor owns. It also includes debts and bills. The donor can choose to limit the power (e.g. let the attorney for property deal with everything except the family home) or detail special conditions on the attorney when making decisions (e.g. consult with the donor's children before exercising their power).

Being an attorney is a big responsibility and the donor must trust whomever they appoint as their attorney.

From 26 September 2008 extra protections will apply in respect of the setting up and operation of EPOAs. This includes the requirement that a donor get independent legal advice before the EPOA is signed. After this date a lawyer or other suitably qualified person will need to be engaged to make a legally binding EPOA.

Case Study – Eva and Marion

Eva and Marion have been in a relationship for twelve years. Eva distanced herself from her family once she met Marion because she sensed her family's disapproval of the relationship. Eva and Marion had a civil union two years ago.

When Eva unexpectedly becomes critically ill, her mother arrives at the hospital and starts consulting with doctors about Eva's treatment. Marion tells the hospital that she is Eva's life partner and is the one who should be consulted.

In this situation Marion and Eva need to have signed an enduring power of attorney agreement prior to Eva's illness. This is to ensure that should Eva lose capacity to act for herself at some stage in the illness there is no doubt as to who she wants to act on her behalf and make decisions about her welfare.

However, the hospital is most likely to follow Marion's wishes as her partner. They will attempt to involve as many family members as necessary in Eva's care given the particular situation. Should any critical treatment be required, Eva's doctors are able to make those decisions on her behalf as to the necessary care and will do so.

Links:

<http://www.communitylaw.org.nz/A-Guide-to-Makin.43.0.html#c324>

<http://www.ageconcern.org.nz/?/enduringpowersofattorney/doyouhaveanenduringpowerofattorney>

Advance Directives (Living Wills)

An advance directive (also known as a living will or statement of wishes) is a written or oral instruction that is made while someone is of sound mind. It is not an alternative to an EPOA. The advanced directive gives loved ones and health providers an indication of wishes in terms of future health treatment should this be unable to be communicated at the relevant time.

The Code of Health Consumers' Rights refers to the ability to make an advance directive. The best directive will be a clear and unambiguous statement that sets out the particular medical circumstances for that person and their wishes as to future treatment. Consultation with medical staff would be advisable. Circumstances where a living will is needed will always be stressful, but it can help knowing that a loved one has made their wishes clear.

People use living wills to indicate if they don't want to be resuscitated or the level of intervention they would like to receive. They are also used by mental health consumers to cover periods when the consumer isn't able to make decisions about their own treatment.

Living wills aren't binding and at best provide an indication to medical professionals and your family about your wishes. You can have a lawyer draw one up, or you can do it yourself. In either case it is useful for your doctor and family members to have a copy. You need to keep it updated as your situation changes and technology progresses.

Links:

www.nzma.org.nz/patient-guide/Advance%20Directive.pdf

<http://www.hdc.org.nz/publications/presentations?Advance%20Directives,%20Living%20Wills%20and%20Questions%20of%20Competence>

4.5 ACC

New Zealand's accident compensation scheme (ACC) provides no-fault insurance cover for personal injury to New Zealand citizens and residents and to temporary visitors to New Zealand.

The ACC scheme pays for treatment and other types of rehabilitation, and provides compensation for loss of income (through weekly compensation). The scheme also focuses on preventing injuries.

In return for giving no-fault accident cover, the ACC scheme takes away the right to sue for personal injuries covered by the scheme (except for "exemplary" damages which are directed at punishing wrongdoers rather than compensating victims).

Costs covered under the accident compensation scheme include –

- treatment
- social rehabilitation (aimed at restoring your everyday independence outside the workplace) and vocational rehabilitation (aimed at restoring your independence in your working life)
- loss of earnings (weekly compensation)
- lump sums for permanent impairment (disability).

Links:

http://www.lawaccess.lsa.govt.nz/Lrm_v2.aspx?BookId=62&ChapterId=0

<http://www.acc.co.nz>

4.6 ACCESSING HUMAN ASSISTED REPRODUCTION SERVICES

If you are intending to access the services of a fertility clinic ([see section 2.6](#)), depending on the nature of the procedure, the fertility clinic may have to apply for permission to have the procedure carried out. It can be a complex and lengthy process. The most common practices, including surrogacy, are assessed and decided on based on the guidelines issued by ACART (Advisory Committee on Assisted Reproductive Technology) and ECART (Ethics Committee on Assisted Reproductive Technology).

Links:

www.ecart.health.govt.nz

www.acart.health.govt.nz

4.7 GENDER REASSIGNMENT

The Human Rights Commission in its recent inquiry into discrimination experienced by transgender people found that:

“There is no comprehensive New Zealand information available explaining health issues for trans people, including medical options for someone who wants to physically transition. Trans people, their families and health professionals themselves struggle to find out what, if any, gender reassignment services are available within the public health system. Currently very few trans people are able to access all of the gender reassignment services necessary for them to live and work in their gender identity and appropriate sex. Typically these requirements include at least an assessment by a mental health professional, hormone

treatment, chest surgery for trans men and electrolysis for trans women.”

District Health Boards commonly require a diagnosis of the mental illness, “Gender Identity Disorder”, before a referral to appropriate secondary health services, such as hormone specialists is made. However there is absolutely no legal requirement for a mental illness diagnosis.

Most services are unavailable under the public health system, including hair removal and gender reassignment surgery. This is despite some of the surgical procedures (e.g. hysterectomies, orchidectomies and mastectomies) being available for other patients within the public health system. Practice varies depending on which health district you live in.

The Ministry of Health’s view on access to services is that legally, all district health boards must ensure there is appropriate access to services, and that if those services are not available within the particular district, transgender patients need to be referred to another DHB where those specialist services are available.

Some gender reassignment surgeries are available upon application to the Ministry of Health, which administers a Special High Cost Treatment Pool of funding for specialist services which are not available in the New Zealand public health system. The Pool is for one-off treatments and specialists need to apply on the patient’s behalf to the Ministry of Health. There is a maximum of only four surgeries funded every two years, three for male to female, one for female to male. The costs of travel to the surgeon may be covered by the Ministry of Health’s National Travel Assistance Policy.

Links:

<http://www.hrc.co.nz>

<http://www.moh.govt.nz/moh.nsf/indexmh/gender-reassignment-surgery>

Police and the Criminal Justice System

Legal assistance

Victims' Rights

Prisoners' Rights



5.1 POLICE AND THE CRIMINAL JUSTICE SYSTEM

Dealing with the Police

Diversity Liaison Officers within the Police have received specialist training in crime and victimisation issues relating to sexual orientation and gender identity. If you are concerned about contacting the Police you may prefer to speak to a Diversity Liaison Officer.

Information about dealing with the Police generally is available from the New Zealand Law Society and the Coalition of Community Law Centres. Their websites are below.

Links:

<http://www.lawyers.org.nz/PDFs/LAP/15YouPolice.pdf>

<http://www.lawyers.org.nz/PDFs/LAP/14MotorVehicles.pdf>

<http://www.police.govt.nz/contact/>

<http://communitylaw.org.nz/A-Guide-to-deali.43.0.html#c333>

Searches

All searches conducted by the Police are guided by *Police General Instruction S102: Treatment and Rights of People Being Searched*. Generally body searches should be carried out by an officer of the same gender as the person being searched.

The basic principle guiding all searches is that “persons who are being searched must be treated with such dignity, privacy and respect that the situation and the safety of people dealing with them will permit.” In particular, “when searching transsexuals, consideration should be given to the view of the person as to the sex of the [person] who will conduct the search. The transsexual’s expression of preference should be witnessed by more than one member.” Police are encouraged to ask the transgender person to write and sign their gender identity in the officer’s notebook and once gender identity is established, to be searched by a person of that gender.

Police Complaints

If you have a complaint about the Police, you can complain to the Independent Police Conduct Authority (previously the Police Complaints Authority). The Authority is independent of the Police and was created to receive complaints about the conduct of officers and undertake an investigation if necessary. It attempts to resolve complaints by conciliation if possible but has the power to recommend disciplinary action.

You can complain to the Authority personally or on behalf of someone else. You are also able to complain directly to the Ombudsman – [see section 7.4](#) for more information about this process.

Links:

<http://www.ipca.govt.nz/>

The Court System

Detailed information about the criminal justice system and what happens if you are charged with an offence is contained in the web resource *A Guide to Sentencing and the Criminal Justice System* from Whitireia Community Law Centre.

Links:

http://communitylaw.org.nz/fileadmin/user_upload/A_guide_to_criminal_offending_and_sentencing4.doc

Sentencing

Judges must take into account the seriousness of the offending in the particular case and the seriousness of the type of offence in comparison with other types of offences. They are bound to impose the least possible restrictions appropriate in the circumstances. The maximum penalty prescribed for the offence can only be imposed if the offending is within the most serious of cases, unless circumstances relating to the offender make that inappropriate.

In sentencing an offender the judge must take into account aggravating factors that are applicable to the case. These include what are sometimes called “hate crime” factors. See para 5.3

Where there are any particular circumstances relating to the offender that mean that a sentence that would otherwise be appropriate would, in the particular instance, be disproportionately severe, this must be taken into account. For example, a sentencing judge should consider whether a prison sentence would be disproportionately severe in the circumstances where a trans woman who hasn't had assignment surgery is facing a imprisonment in a male prison.

5.2 LEGAL ASSISTANCE

Legal Aid

If you've been charged with an offence or you need assistance with a family or civil law matter, but can't afford a lawyer, your legal fees may initially be paid by legal aid. Legal aid covers all your lawyer's fees and other expenses of a court case. You may however have to pay some or all of it back.

Legal aid is granted by the Legal Services Agency (the LSA). It is only granted where the person involved is on a low income and doesn't have any assets they could sell to pay for a lawyer. Criminal legal aid is generally only available if the offence is serious (i.e. there is a possibility of six months imprisonment). The LSA may also grant criminal legal aid if you have any previous convictions which mean you are likely to face imprisonment or you face special barriers or disabilities such as mental illness or language difficulties. Before granting family or civil legal aid, the LSA looks at other issues such as whether court proceedings are likely or your chances of success are reasonable.

If you qualify for criminal legal aid, you will be assigned a lawyer by the LSA, unless you write down your "preferred" lawyer on the application form. If that person is a legal aid provider and is qualified to deal with your kind of charge, they will be assigned. If you want family or civil legal aid, you will need to approach a lawyer and see if they'll take your case on and whether they're a legal aid provider. They will apply for legal aid on your behalf.

You can check if your preferred lawyer is a legal aid lawyer by checking on the LSA website at www.lsa.govt.nz

The legal aid form asks for the following information:

- if it is criminal legal aid, the offence you are charged with (make sure you have your court summons with you)
- if it is family or civil legal aid, a summary of what you need the legal aid for;
- your contact address;
- your date of birth;
- your source of income;
- the amount of your income each week, and for the last 12 months;
- your partner's income details;
- any savings and debts; and
- if you own a house or car etc, how much they are worth.

After you have applied for legal aid, you will receive a letter back from the LSA saying whether or not you have been granted legal aid. If you have been refused legal aid, you can appeal this decision to the Legal Aid Review Panel (LARP). You should speak to a lawyer or Community Law Centre before doing this. If you are granted legal aid you will be advised of the maximum amount of money you will have to repay and will be required to start making repayments to the LSA.

Links:

<http://www.lsa.govt.nz/search.php>

<http://www.lsa.govt.nz/claid.php>

5.3 VICTIMS' RIGHTS

Restraining Orders

Violence and abuse is inappropriate in all situations and should not be tolerated. If you're not in a domestic relationship with the person who's being violent or abusive (e.g. they are a neighbour or work colleague), contact the Police, as the other person may have committed an offence that amounts to criminal harassment under the Harassment Act 1997.

Where the conduct does not amount to a criminal offence, you can still apply to the District Court for a restraining order under the Harassment Act 1997 to stop conduct which amounts to harassment and has occurred on more than one occasion.

Links:

http://www.lawaccess.govt.nz/Lrm_v2.aspx?BookId=50&ChapterId=0

<http://www.nnsvs.org.nz/>

See the [example in section 7.2](#) for more information

At Sentencing

If you have suffered any sort of harm (whether physical, emotional or financial) as a result of an offence you should be treated with courtesy and compassion and have your dignity and privacy respected by those in the justice system. You should also receive help with meeting any welfare, health, counselling, medical or legal needs you have that have resulted from your victimisation. Victim Support is able to assist you with this.

When a judge is determining a sentence, they are required by the Sentencing Act 2002 to take into account

aggravating factors in the offending. One aggravating feature is that the offender committed the offence “partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as ... gender identity [and] sexual orientation” and the offender believed the victim has that characteristic i.e. the offence is a ‘hate crime’.

Case Study – Lucky

Victor, Mo and Lucky leave a gay club around 4am. They have only gone a few metres down the road when they become aware of footsteps behind them and several voices chanting anti-gay and anti trans threats. Lucky turns to face the taunts and is stabbed in the stomach by one of the group, who then run off.

The main offender is caught, charged, and found guilty of wounding with intent in court. When it comes to sentencing, the Judge takes into account the homophobic and transphobic motivators for the attack and extends the offender’s sentence as a result of this aggravating factor.

Links:

<http://www.victimsupport.org.nz/knowyourrights.htm>

<http://www.justice.govt.nz/pubs/courts-publications/050-services-for-victims.html>

5.4 PRISONERS’ RIGHTS

General information about prisoners’ rights is available from New Zealand Prisoners Aid Rehabilitation Society (NZPARS).

Links:

http://www.howardleague.co.nz/fact_sheets.html

<http://www.pars.org.nz/index.php?tab=2>

Placement in prisons

The courts have no power to direct where an inmate is to be held. Regulation 190 of the Corrections Regulations 2005 determines whether an inmate is placed in a women’s or men’s prison. The Department of Corrections will generally only allow a transgender inmate to be placed in a prison which reflects their chosen gender if they have completed gender reassignment surgery. A medical officer will conduct a physical check to ensure this.

Generally, after a transgender person has been arrested and is in Police custody, they will be placed in a cell alone for their own safety. However, this is subject to the availability of suitable space.

Medical treatment

Inmates are entitled to receive primary health care (i.e. GP services) “reasonably equivalent to that they could expect in the community” and access to “any secondary and tertiary health care funded by the District Health Boards on the same eligibility criteria as any member of the public”.

However, in practice, unless you have been prescribed hormone treatment prior to sentencing, it is not possible to obtain hormones or begin hormone treatment while in prison. The Advocacy Service of the Health and Disability Commission may be able to assist if you wish to make a complaint.

Links:

Information about advocates is available at <http://www.hdc.org.nz/advocacy/>

Searches

Rub-down or strip searches must be carried out by a person of the same sex as the person being searched and must not take place in view of any person who is not of the same sex. All searches must be carried out “with decency and sensitivity and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search.” In practice, for example, this means that a transgender female who has not had reassignment surgery, will be housed in a male prison and may be subject to search by male prison officers.

Links:

Information about strip searches is available at <http://www.corrections.govt.nz/policy-and-legislation/policy-and-procedures-manual/section-b/b15/b1501r5.html>

Residency

Visitors to New Zealand

Appeals and Complaints



6.1 RESIDENCY

Immigration New Zealand evaluates all applications for residency in the same way.

Any person who has been in a genuine and stable relationship, including same sex or de facto relationships, with a New Zealand citizen or permanent resident for at least one year can apply for residence based on their partner's sponsorship.

Evidence of partnership may be provided by:

- marriage certificate or civil union certificate;
- proof of shared residence (such as joint mortgage or tenancy agreements or rent book);
- proof of financial dependence or interdependence (such as shared income or bank accounts, or accounts that show money transfers to or from your account to your partner's account);
- birth certificates of your children;
- any documents showing public or family recognition of your relationship;
- correspondence (including post marked envelopes) to you and your partner at the same address;
- photographs of you and your partner together;
- evidence of the duration of your relationship;
- the degree of commitment to a shared life;
- evidence of communication between you both;
- evidence of you being committed to each other emotionally and exclusively, such as evidence of joint decision making, an exclusive sexual relationship, and the sharing of household duties, parental responsibility, and spare time.

Applicants are required to get a medical check as part of their application to prove that they have an acceptable standard of health and must answer the questions asked by the doctor truthfully. If you are assessed as having an unacceptable standard of health (i.e. you are likely to be a danger to public health or to impose significant cost or demand on New Zealand's health services), a special 'medical waiver' will be required before your application will be approved.

Immigration policies change regularly so it is important to contact Immigration New Zealand directly to make sure you have the most up-to-date information if you are considering applying or sponsoring someone else's application for residency.

Links:

<http://www.immigration.govt.nz/migrant/stream/live/partner/>

6.2 VISITORS TO NEW ZEALAND

Visa requirements depend on which country the visitor comes from. Visa applicants must meet character and health requirements, depending on their country of origin. Sexual orientation and/or gender identity are not of themselves grounds for refusing a visa.

Links:

<http://www.immigration.govt.nz/migrant/stream/visit/>

6.3 HIV AND IMMIGRATION

All applicants for residence and temporary visas and permits must have an acceptable standard of health. If you, or any family members included in your application, do not have an acceptable standard of health, your application will be declined unless a medical waiver is granted by Immigration.

Since November 2005, HIV testing has been compulsory for all people who wish to remain in New Zealand for 12 months or more, as HIV is considered to be a medical condition that imposes significant costs and/or demands on New Zealand's health services. Therefore if you or your partner are HIV positive, you will need to be granted a medical waiver to be approved residence.

Section A4 of Immigration NZ's Operational Manual contains comprehensive policy on New Zealand's health requirements and when medical waivers may be granted, and is available online.

Links:

<http://www.immigration.govt.nz/migrant/general/generalinformation/research/Refugees/>

Operational Manual: www.immigration.govt.nz/manual

6.4 REFUGEE STATUS

Many refugees are resettled in New Zealand as part of the Refugee Quota Programme. These are people who are assessed by the United Nations High Commission for Refugees (UNHCR) to need protection. Up to 20 places are allocated for refugees with HIV/AIDS per year under the medical/disabled subcategory. The 'quota' refugees arrive in New Zealand with Permanent Residence.

In addition, an application for refugee status can be made with the Refugee Status Branch of Immigration New Zealand. Persons who claim refugee status in New Zealand are called refugee claimants, or asylum seekers.

A refugee is a person who has a well founded fear of being persecuted in her/his country of nationality for a reason related to their core human rights. This can include persons at risk of being persecuted because of their sexual identity. Refugee law requires that a refugee face a real chance of being persecuted, as opposed to a remote chance, and that the country of origin is unable or unwilling to protect the refugee claimant from the risk of persecution.

The refugee claimant bears the onus of establishing his or her claim to refugee status. Most refugee claimants have a lawyer to assist them to present their claim, and the costs of a lawyer may be covered by legal aid.

Refugee claimants should be aware that they should disclose all the reasons they believe themselves to be at risk, and should anticipate that the refugee status officer will enquire into the facts presented. This may include asking questions in an interview about the claimant's background, and potentially questions of a sensitive nature. The refugee status officer will have access to information about the human rights situation in the claimant's home country but will need to obtain information on the details of the individual refugee claim from the person making that claim.

If the refugee claim is declined, the claimant has the right to appeal to the Refugee Status Appeals Authority.

If the refugee claim is recognised (approved) then the claimant/refugee can apply for Permanent Residence in New Zealand. Partners, including same-sex partners, can be included in the residence application, but to be approved residence, they have to meet generic Government partnership requirements. The partners of approved refugees will also generally not be granted a visa to travel to New Zealand until the residence application is approved in principle.

Approved refugee claimants may also be eligible to sponsor their family members to join them in New Zealand.

Case study

In Refugee Appeal No 74465 (7 July 2004) the Refugee Status Appeals Authority considered a claim to refugee status by an Iranian national who feared being persecuted because of his homosexual identity. The Appeals Authority outlined the approach of New Zealand refugee law to persecution based on sexual orientation and found the appellant was a refugee because of his well-founded fear of being persecuted because of his "membership of a particular social group", namely homosexuals.

Links:

Partnership requirements – contact the Immigration Contact Centre on 09 914 4100 or

www.immigration.govt.nz/migrant/stream/live/partner/canimovetonz/whatisrequired/

Sponsoring family members: www.immigration.govt.nz/migrant/stream/live/refugeefamilysupport

www.refugee.org.nz has more information about refugee law.

www.nzrefugeeappeals.govt.nz

6.5 APPEALS AND COMPLAINTS

Most immigration decisions are made based on policy (which changes regularly), rather than legislation.

If you have been declined a temporary permit (not a visa), you may ask for a *reconsideration*, which is dealt with internally by an immigration officer. You may have to provide new information which addresses the problems with your original application.

If you are declined residency, you have the right to appeal to the *Residence Review Board* but you will need to do this within 42 days of your application being declined. Information about your appeal rights to the Board should be included in your letter from Immigration New Zealand.

Links:

<http://www.residencereviewboard.govt.nz>

If you have had your temporary permit revoked or it has expired, you must leave New Zealand. You can appeal against this requirement to leave New Zealand through the *Removal Review Authority*. The appeal must be lodged within 42 days of the day on which you became unlawfully within New Zealand, or if you had applied to have your rejection of another temporary permit reconsidered, the day on which you were notified

that this decision had been confirmed, whichever is earlier. The only ground of appeal is that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for you to be removed, and that it would not in all the circumstances, be contrary to the public interest to allow you to remain.

If you are in New Zealand on a limited-purpose permit or you returned here while a removal order was in place, you are not able to appeal to the *Removal Review Authority*.

Links:

<http://www.removalreviewauthority.govt.nz>

If your application for refugee status has been declined, you are able to apply to the Refugee Status Appeals Authority.

Links:

http://www.nzrefugeeappeals.govt.nz/Pages/Ref_Home.aspx

The Minister of Immigration has the ability (but is not compelled) to intervene in individual cases at any point. Ordinarily, the Minister limits intervention until the end of the normal decision-making process and to special cases that warrant ministerial intervention. The Minister cannot intervene in refugee cases or if the appeal is currently being dealt with by an Authority or Board.

Goods and Services

Accommodation

Insurance

Government Services

7.1 GOODS AND SERVICES

Your rights as a consumer of goods and services are covered by an array of legislation, including

- Consumer Guarantees Act 1992;
- Fair Trading Act 1986;
- Contractual Remedies Act 1979;
- Sale of Goods Act 1908;
- Credit (Repossession) Act 1997;
- Credit Contracts and Consumer Finance Act 2003.



Links:

General information about these Acts and your protection can be found at

<http://www.communitylaw.org.nz/Consumer-Rights.40.0.html>

<http://www.consumer.org.nz/category.asp?category=Legal%20Rights>

<http://www.legislation.govt.nz>

The Consumer Guarantees Act 1993 (CGA) provides a range of protective guarantees into all contracts for the supply of consumer goods and services. A “consumer” is any person who “acquires from a supplier goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption”. It doesn’t matter what purpose you actually acquire the goods or services for, provided they are “ordinarily” acquired for “personal, domestic or household use or consumption”. If you purchase a motor car for commercial use, it will still be a consumer good, as cars are ordinarily purchased for personal or domestic use. Any attempt to contract out of the CGA in a consumer contract is prohibited and amounts to an offence under the provisions of the Fair Trading Act 1986.

The following guarantees are implied into all contracts for supply of consumer goods:

1. the seller has the right to sell the goods (e.g. the goods are not stolen or subject to a security

interest);

2. the goods are of an “acceptable quality” (e.g. safe, durable, free from minor defects, acceptable in appearance and finish);
3. the goods are fit for the purpose;
4. the goods comply with the description;
5. the goods comply with any sample or demonstration model;
6. a reasonable price will apply where no price is agreed at the time of sale;
7. repair facilities and spare parts are available for a reasonable time after sale where the goods are first imported into New Zealand (e.g. a secondhand car import).

Where consumer services are provided, the CGA guarantees that the services:

1. are provided with reasonable skill and care;
2. will be fit for the purpose intended;
3. will be completed within a reasonable time if no time is agreed as between the parties;
4. will cost no more than a reasonable price if no price is agreed by the parties.

If you feel the CGA has been breached, you must give the supplier an opportunity to remedy a breach, unless the breach is of “a substantial character”. A failure is of “substantial character” if the services “would not have been acquired by the reasonable consumer fully acquainted with the nature and extent of the failure”.

If a supplier neglects or refuses to remedy the breach or the breach is of “a substantial character”, you can reject the goods and claim a refund or replacement in the case of consumer goods, or cancel the contract and seek relief in the Court or Disputes Tribunal in a case of consumer services.

Links:

http://www.courts.govt.nz/tribunals/disputes_tribunals.html

<http://www.communitylaw.org.nz/An-Easy-Guide-to.43.0.html#c123>

Discrimination

Section 44 of the Human Rights Act 1993 (HRA) makes it unlawful for any person who supplies goods, facilities, or services to the public to refuse to provide these, or negotiate with any person less favourably, by reason of any of the prohibited grounds of discrimination in the HRA. This prohibition does not apply to the provision of separate facilities or services for each sex on the ground of public decency or safety.

As far as known, the law has not been tested in relation to a transgender person being denied access to single-sex toilet facilities. If you are male-identified and denied access to men's toilets (or are female-

identified and denied access to women's toilets) you could talk to the Human Rights Commission about the possibility of making a complaint of discrimination.

7.2 ACCOMMODATION

Most situations where you rent a house from someone else are covered by the Residential Tenancies Act 1986. However, there are a number of other kinds of residences, such as rest homes, boardinghouse accommodation, hostels, hotels and holiday homes that are not covered by the Act.

Tenancies

Tenancy relationships are generally covered by the provisions of the Residential Tenancies Act 1986 (RTA). A tenancy is defined as “a right to occupy” premises “in consideration for rent”. “Residential premises” are “any premises used or intended for occupation by any person as a place of residence”.

The RTA is compulsory – a landlord cannot say that the Act does not apply to your tenancy. Any attempt to exclude provisions of the RTA designed to protect tenants is an “unlawful act” and can attract a maximum penalty of \$500.

Tenancies covered by the RTA must have a tenancy agreement in writing and signed by both parties. It is the landlord’s duty to ensure that a copy of the agreement is provided to you. The agreement must include the following information:

- The full name and contact address of both landlord and tenant;
- The address of the premises;
- The date the tenancy agreement was made and the date the tenancy commenced;
- The landlord's and the tenant’s address for service;
- Whether the tenant is under the age of 18;
- The amount of any bond;
- The rent payable and the frequency of the rent payments;
- The place or bank account number where the rent is to be paid;
- Details of any fee or other charges payable to any solicitor or real estate agent by the tenant;
- A statement (if applicable) that the tenant shall pay for water provided to the premises;
- A list of any chattels provided by the landlord;
- If the tenancy is a fixed-term tenancy, the date on which the tenancy will end.

Tenants have always been the weaker party in the landlord/tenant relationship and the RTA addresses this imbalance by giving more protection to tenants. For example, the landlord has a duty not to cause or permit

any interference with the “reasonable peace, comfort, or privacy of the tenant” and a tenant can expect vacant and uninterrupted possession of the premises. The landlord also has an obligation to take all reasonable steps to ensure that none of their other tenants interferes with the reasonable peace, comfort, or privacy of the tenant. Where, for example, tenants are being harassed by other tenants of the landlord, there is a duty on the landlord to remedy the situation.

Case Study – Pera and Nate

Pera and Nate rent the upstairs flat in a two-flat property. A new tenant in the downstairs flat, Don, begins to harass Pera and Nate when he learns they are takataapui. Don is abusive to them; empties rubbish over their doorstep, and bangs on the ceiling at night.

Pera and Nate complain to the property owner who, as landlord for both properties, is legally obligated to intervene to stop the harassment. When the harassment continues over a period of time, the landlord evicts Ron.

Unfortunately Ron moves into a property across the road and continues his harassment of the couple. He often sits on their fence and threatens to harm them as they leave for work.

Pera and Nate apply to the District Court and are successful in taking out a restraining order against Don. Don is advised that, under the conditions of this restraining order, he is not allowed to make contact with Pera or Nate, or come within a certain distance of their property. Unless he has a reasonable excuse, it is a criminal offence for Don to breach the conditions of the order.

A landlord is not permitted to enter rented premises unless they have the consent of the tenant given immediately before the time of entry or under an order of the Tenancy Tribunal. The tenant is under no obligation to allow the landlord unannounced entry, unless there is an emergency. The landlord who uses force or threat of force to enter premises while the tenant is in the premises faces imprisonment for a term not exceeding 3 months or a fine not exceeding \$500 if convicted. The RTA does however give the landlord a limited right to inspect the premises provided the required notice is given to the tenant beforehand.

Unless the tenancy has a fixed term, the landlord may at anytime give a tenant 90 days notice of termination of the tenancy. The period of termination notice may be reduced to 42 days where the landlord has agreed to sell the premises and give vacant possession to the purchaser or where they require the premises for their own occupation or occupation by a family member. A tenant can challenge such a termination if they have proof of discrimination under the Human Rights Act 1993 or where the termination notice is “retaliatory” (i.e. the termination notice is motivated by the exercise of any of the tenant’s legal rights or any complaint they have made against the landlord). The Tenancy Tribunal may declare a retaliatory notice “of no effect”.

Where either party has alleged a breach of the tenancy agreement or provisions of the RTA, and the

amount claimed is \$12,000 or less, they may file an application with the Tenancy Tribunal. Tribunal hearings are designed to ensure fair and efficient resolution of disputes. Adjudicators are not bound to give effect to “strict legal rights or obligations or to legal forms or technicalities” and can determine disputes according to general principles of the law and “the substantial merits and justice” of each case.

The RTA gives the Tribunal extremely wide powers in order to determine disputes between landlord and tenant. The three most common orders made by the Tribunal are:

- an order that a party yield possession of any premises to any other party;
- an order that a party pay money to any other party;
- a work order.

Tenants have the right not to be discriminated against in respect of “a grant, continuance, extension, variation, termination, or renewal of a tenancy agreement” in contravention of the Human Rights Act 1993. As discussed in [section 1.1](#), this Act prohibits discrimination based on sex, marital status and sexual orientation.

A landlord who discriminates against anyone on one of those grounds commits an unlawful act under the RTA and faces a penalty of up to \$3,000. The tenant may choose to proceed against the landlord under either the Residential Tenancies Act 1986 or the Human Rights Act 1993, but not both.

Links:

The Act can be found at www.legislation.govt.nz

Check out <http://www.tenancy.govt.nz> for more information

Neighbours

If you are being hassled by your neighbours you could get a restraining order under the Harassment Act 1997. There is more information about this in [section 5.3](#). If the harassment is by one of your landlord’s other tenants, the landlord has a responsibility to take steps to stop it. If your landlord refuses to do anything, you can make an application to the Tenancy Tribunal to force them to address your concerns.

Other Types of Accommodation

Where a right to occupy residential premises is not covered by the Residential Tenancies Act 1986, a tenant or licensee has limited common law and contractual rights to rely on. A licensee either occupies premises at the will of the licensor or under contractual terms agreed between the parties. Occupants of boarding houses, motels, hostels and holiday homes have very little protection in the event of the landowner terminating their occupation.

However the Human Rights Act 1993 applies to all tenancies including the limited occupancies above. This Act makes it unlawful for a landlord to rent accommodation on less favourable terms and conditions by reason of any prohibited grounds of discrimination or to treat anyone wanting to rent accommodation differently based on these grounds. (e.g. a hotel that refused to let rooms to gay couples would clearly be in breach of the Human Rights Act 1993 and could face proceedings before the Human Rights Review Tribunal if a complaint was made).

In addition to protection under the HRA, an occupier will also enjoy general consumer protection under the Consumer Guarantees Act 1993. There is more information on the CGA in [section 7.1](#). “Service” includes the provision of facilities for accommodation such as hotels, motels and boarding houses.

Where, for example, a hotel or boarding house lacks security or is so unsafe that a reasonable consumer would not have booked that accommodation, the contract could be cancelled outright as a “breach of substantial character” and you could claim for damages to pay for removal costs and/or extra alternative accommodation costs.

Disputes involving hotel, motel or boarding house accommodation will generally fall within jurisdiction of the Disputes Tribunal and can be dealt with under the Disputes Tribunals Act 1988.

Retirement Villages

Where residential premises come within the provisions of the Retirement Villages Act 2003, the resident will have added protection afforded by this Act. A retirement village is defined as any property that contains two or more residential units that provide residential accommodation together with services or facilities mainly for persons in their retirement for which the residents pay a capital sum as consideration.

The operator of a retirement village must register with the Registrar of Retirement Villages and provide a copy of the “occupation right agreement” gives residents their right to occupy a residential unit and sets out the terms or conditions of that occupation. This agreement must include the following information:

- the staffing of the retirement village;
- the safety and personal security of residents;
- fire protection and emergency management;
- the transfer of residents within the retirement village;
- meetings of residents with the operator;
- accounts;
- maintenance and upgrading;
- termination of the occupation right agreement by a resident or the operator.

The operator must also consult with the residents about any proposed material changes to the services, benefits or charges that the residents pay, and provide a complaints facility and disputes procedure that complies with the Retirement Villages Act 2003.

Residents must be provided with information on the code of residents' rights and the code of practice. The following is a summary of the basic rights given to residents under the Retirement Villages Act 2003.

Residents have:

1. the right to services and other benefits promised in the occupation right agreement;
2. the right to information relating to any matters affecting, or likely to affect, the terms or conditions of the residency;
3. the right to be consulted by the operator about any proposed material changes in the services and benefits provided or the charges paid;
4. the right to complain to the operator and to receive a response within a reasonable time;
5. the right to a speedy and efficient process for resolving disputes with the operator or other residents of the village;
6. the right to involve a support person or representative in all dealings with the operator or other residents of the village;
7. the right to be treated with courtesy and have rights respected by the operator, the people who work at the village, and the people who provide services at the village;
8. the right not to be exploited by the operator, the people who work at the village, and the people who provide services at the village.

Retirement village accommodation is also subject to the Human Rights Act 1993 and the discussion above on the rights given to persons under this Act also applies to residents of retirement villages. (e.g. Retirement village operators cannot refuse to provide accommodation to same sex couples or refuse to allow transgender relatives access to facilities).

Links:

<http://www.dbh.govt.nz/retirement-villages>

<http://www.sorted.org.nz/life-stages/60plus/retirement-villages>

7.3 INSURANCE

Discrimination in medical and life insurance

It is unlawful for any person to refuse to supply facilities, or to supply services on less favourable terms by reason of any of the prohibited grounds of discrimination in the Human Rights Act 1993. "Facilities" include

banking, finance, credit and insurance services.

It is unlawful for an insurer to refuse to provide someone with insurance or to treat them less favourably by reason of any of the prohibited grounds of discrimination (which includes sex, disability and sexual orientation). These grounds apply to a person's past, present or assumed circumstances.

However, insurers are allowed to provide insurance on different terms and conditions for sex, disability and age if the treatment is based on actuarial or statistical data relating to life expectancy, accidents or sickness which it is reasonable to rely on. Disability includes the presence in the body of organisms capable of causing illness. It is unlawful to refuse or offer policies on different terms and conditions on any of the other grounds in the Human Rights Act 1993, including sexual orientation. Most life insurance products will contain an "AIDS Declaration" which includes a requirement that the applicant declare they don't have the AIDS virus, don't present with AIDS symptoms and don't have previous sexual partners who they know could not make the same declarations. A material misrepresentation on the proposal will void the policy and the ability to claim anything other than the premiums paid will be lost.

Disclosure of personal information

The Human Rights Commission has issued guidelines to assist New Zealand insurance companies to comply with the Human Rights Act 1993 (HRA). They are intended to "assist in developing best practice" and are not binding. The guidelines state that it is not unlawful to include questions relating to characteristics that relate to the prohibited grounds in insurance applications, i.e. asking questions of a person in a same sex relationship that the insurer would not ask of a heterosexual couple. However, the Commission notes that "insurance companies need to be aware that a particular pattern of questioning may indicate an intention to discriminate".

While such questioning may not be contrary to the HRA, it could be a breach of the Privacy Act 1993 as insurers are only allowed to gather the information that is necessary for the purpose of assessing eligibility for insurance. More information about the Privacy Act 1993 is included in [section 1.2](#).

Insurance contracts are special contracts of "utmost good faith". There is a legal duty on any person seeking insurance not only to tell the truth if asked a question, but also to disclose all material facts that could affect the premium or the insurer's decision to grant cover, whether or not a particular question is asked by the insurer. If you fail to disclose information that could affect the insurer's decision to accept a proposal or set the premium, a claim can be validly declined by the insurer if that information subsequently comes to light.

Complaints

The Insurance and Savings Ombudsman (ISO) deals with complaints about personal insurance and savings products in New Zealand. Your insurer must be a member of the ISO scheme before the Ombudsman can consider your complaint. The ISO deals with fire and general insurance, health insurance, life insurance and savings schemes.

You can complain to the ISO about your company if the claim relates to:

- house, contents, vehicle, travel, health, income protection, mortgage protection, critical illness, life insurance and superannuation;
- claims not in excess of \$150,000, or \$1,000.00 per week for a disability benefit (unless by agreement with the company);
- policy interpretation;
- claims made by, or on behalf of, the policy holder;
- the amount payable under a claim;
- small business claims.

The ISO cannot consider claims about:

- awards of compensation or damages;
- commercial or business insurance, except small business claims;
- third party or insured losses;
- premiums, charges, excesses, returns and underwriting decisions;
- complaints which are, or have been, the subject of proceedings in another forum.

If you believe that your insurer has discriminated against you in terms of the HRA, you can complain directly to the Human Rights Commission.

In addition, the provisions of the Consumer Guarantees Act 1993 also cover insurance services and the guarantees identified in [section 7.1](#) apply to these contracts.

Links:

<http://www.hrc.co.nz>

<http://www.iombudsman.org.nz>

7.4 GOVERNMENT SERVICES

If you are not satisfied with a decision made by a government agency, you can complain to the

Ombudsmen. Ombudsmen are independent and impartial investigators who investigate complaints about the administrative acts and decisions of central and local government and the decisions of those agencies in relation to requests made to them under the Official Information Act 1982.

"Central government agencies" include agencies (such as government departments and statutory bodies) responsible for benefit payments, housing, health, immigration, passports, accident compensation, prisons, education, taxation and child support. "Local government agencies" include agencies (such as regional, city and district councils) responsible for roads, drainage, nuisance, animal control, planning and resource and building consents. Ombudsmen can also investigate the decisions of school boards of trustees, tertiary education providers and district health boards.

The ombudsman service is free and you will not need to be involved, other than providing the necessary information to the Ombudsman.

Links:

<http://www.ombudsman.parliament.nz>

Education
Employment
Benefits
Leaving Home
Youth Justice



8.1 ACCESS TO EDUCATION

General information about education is available in the resource ‘Schools and the Right to Discipline’ from the Wellington Community Law Centre and from YouthLaw. Specific information about education with reference to sexual orientation or gender identity is included below.

Links:

<http://communitylaw.org.nz/Schools-and-the.43.0.html#c128>

<http://youthlaw.co.nz>

<http://outthere.org.nz>

Discrimination

The Human Rights Act 1993 (HRA) and the NZ Bill of Rights Act 1990 (Bill of Rights Act) provide some protection or recourse against unlawful discrimination by education providers.

Part 1A of the HRA may apply if the education provider is a Government agency or a person or body performing any public function, power or duty conferred on them by law. The HRA would apply to discriminatory acts or omissions of the education provider if:

- there is a relevant ground of discrimination and
- the act or omission is not justified in accordance with section 5 of the Bill of Rights Act.

Part 1A will apply to the acts of state schools, universities and most other education providers. Part 1A could apply to acts or omissions of private schools depending on the nature of the school and the function being performed – otherwise Part 2 could apply.

Part 2 of the HRA may apply if the education provider is *not* a Government agency or a person or body performing any public function, power or duty conferred on them by law. Section 57 of the HRA prohibits “educational establishments”, or certain persons associated with such an establishment, from certain acts of

discrimination if the acts are done by reason of any of the prohibited grounds of discrimination.

An “educational establishment” includes an establishment offering any form of training or instruction that is not caught by Part 1A of the HRA. This definition also includes an educational establishment under the control of an organisation or association which has as its function, or one of its principal functions, the provision of training, or facilities or opportunities for training that would help to fit a person for any employment. This definition includes facilities or opportunities by way of financial grants.

The HRA prohibits educational establishments doing the following acts based on any of the grounds of discrimination:

- To refuse or fail to admit a person as a student; or
- To admit a person as a student on less favourable terms and conditions than would otherwise be made available; or
- To deny or restrict access to any benefits or services provided by the establishment; or
- To exclude a person as a student or subject them to any other detriment.

However, courses or counselling may be restricted to persons of a particular sex, race, ethnic or national origin, or sexual orientation, where highly personal matters, such as sexual matters or the prevention of violence, are involved.

In most cases where the HRA has been invoked it has been because the school has imposed a particular rule, or permitted a particular state of affairs, which is alleged to be discriminatory on a prohibited ground. In such a case it must be decided whether the rule or action offends the HRA. If it does then it is likely to be an ultra vires rule (made outside the lawful powers granted to the school) or an unlawful action. Complaints should be made to the school’s board of trustees and then the Human Rights Commission if the board does not act.

It is possible that a school could be liable for indirect discrimination if there is harassment of queer or transgender students. This is because it could be said that the school treats these students differently from other students because the environment is less favourable to these students. However there are difficulties with such cases being successful. It must be shown that such an unfavourable state of affairs exists and that the school is not addressing the problem. If the school has a reasonable policy in place to address such problems then it may be said to have fulfilled its obligations.

Links:

<http://www.hrc.co.nz>

Harassment at school

The responsibility for students at a school is with the boards of trustees of state and integrated schools and governing bodies of independent schools. The Education Act 1989 and the Health and Safety in Employment Act 1993 place certain obligations on these bodies that may be relevant in situations of harassment at school.

Section 60A of the Education Act 1989 allows for National Administrative Guidelines that includes guidelines to address harassment and bullying at school. Guideline 5 creates an obligation on schools to “provide a safe physical and emotional environment.” This guideline must be incorporated into every school’s charter.

Section 15 of the Health and Safety in Employment Act 1993 states that there is a requirement on schools to take all practicable steps to ensure that there is no harm, both physical and mental, to students due to the action or inaction of its employees. There is also an obligation under section 16 for schools to take all practicable steps to prevent hazards harming people in the vicinity of the school. A hazard includes where a person’s behavior may cause harm.

It is possible that these provisions could be relevant in a bullying situation at school and therefore potentially lead to prosecution. This could be so where a teacher knowingly allows harmful bullying to take place or where the bullying is a “hazard” and the school has not taken practicable steps to prevent it.

Limit of a School’s Authority and Responsibility

The extent of a school’s authority outside of school hours and/or school grounds is not clear and will depend on the particular circumstances. For example if a student is travelling by school bus then the school is likely to be responsible for monitoring their behaviour, but if the student is being dropped off by their parent, the parent will obviously be responsible. If the student is walking or biking to school then the question of who is responsible would depend on other circumstances such as whether a student is in school uniform.

In relation to students being on the school grounds straight after school, such factors as whether the school gates are open and whether students regularly stay at school for a period after normal school hours will be relevant when deciding where responsibility lies. If a student leaves school and returns after normal school hours then the school may not be responsible for anything that happens on the grounds.

In each case it will come down to the individual circumstances. If bullying takes place and there are questions of whether the school should be taking responsibility it is important to obtain legal advice.

Case Study – Tamara

Tamara doesn't conform to a lot of what is expected of girls. Out of school she wears boys' clothes. A couple of times she wears her brother's uniform shorts to school, but both times she is given a detention and is sent home.

Girls in Tamara's class start a shaming campaign about her being queer. One day three of them confront Tamara in the toilets and accuse her of being a perv. They threaten to deal to her if they ever see her in the girls' toilets again.

Tamara is increasingly isolated and bullied. She confides in one of the teachers about the bullying but it makes no difference. It gets to the point where, after several months of bullying, Tamara no longer comes to school.

Tamara's parents lay a complaint to the Board of Trustees about the bullying and lack of response from the school. School Boards are obligated under the National Education Guidelines to make a school environment "safe" for all students..

Tamara also has the option of reporting the incidents to the Police because where threats are made with the intention of frightening a person, the Police may consider a charge of intimidation (under s. 21 of the Summary Proceedings Act).

Links:

<http://www.youthlaw.co.nz/default.aspx>

See the example in [section 1.2](#) for more information

8.2 EMPLOYMENT

Young people are protected by the same employment laws as those over 18, with one key exception. The minimum wage may be lower in some cases.

You are a 'new entrant' worker if you are 16 or 17 and you have not yet completed 3 months or 200 hours of employment (whichever is shorter) in any job. New entrant workers can be paid the minimum 'training wage' of \$9.60 an hour before tax. If you have worked for longer than that, you are entitled to the adult minimum wage of \$12.00 per hour.

This means that if you're starting your first job, your employer can pay you \$9.60 for the first three months but must then raise your wage to \$12.00.

This does not apply to anyone 15 or younger. What you get paid is up to you to negotiate with your

employer – there is no minimum. However workers under 16 will have a remedy under the Minors Contracts Act where conditions of employment are so unfair as to be unconscionable and a Disputes Tribunal can grant a remedy in such circumstances.

8.3 BENEFITS

If you want support dealing with Work and Income, your school or local Community Law Centre should be able to help you. The following financial assistance is available to people under 18.

Independent Youth Benefit

If you are unable to live with your parents and unable to get financial support from them or anyone else, you may be entitled to receive the Independent Youth Benefit.

You must be 16 or 17 and a New Zealand permanent resident or citizen. You will be unemployed and looking for work, or a full-time trainee on an approved work-related course or still attending secondary school.

Work and Income will assess your relationship with your parents and you will need to prove (usually including a psychologist's assessment) that there has been a serious breakdown in your relationship with your parents, your parents are absent (i.e. in prison, hospital or deceased) or there is another sufficient reason why you are not financially dependent on them.

Young Parent Childcare Payment

If you are:

- under 18 and a sole parent dependent on your parents for financial support; or
- a couple in a legal relationship where the main caregiver is 16 or 17;

and still at secondary school, you may qualify for financial assistance with childcare costs.

Links:

<http://www.youthlaw.co.nz>

<http://www.communitylaw.org.nz>

<http://www.winz.govt.nz>

8.4 LEAVING HOME

Your parents are legally responsible for you until you turn 16. Legally, you can leave earlier if they agree and they've made adequate arrangements for your care. If you are 16 you don't need their consent but if Child Youth and Family or the Police think you are at risk, they may intervene. Once you are 17, CYF aren't able to intervene.

There is more information about what to do if you're thinking of leaving home available from YouthLaw.

Links:

<http://www.youthlaw.co.nz>

8.5 YOUTH JUSTICE

Anyone under 17 who is accused of a crime must be dealt with differently than anyone older unless the offending is under the provisions of the Land Transport Act 1998 (ie traffic offences). The Youth Court has a comprehensive website about how the youth justice system works. YouthLaw has more information about what you should do if you're stopped by the Police.

Links:

<http://www.youthlaw.co.nz>

<http://www.courts.govt.nz/youth>

REFERENCES

In addition to the online sources included above, the following print sources have been referred to by the writers in the production of this resource:

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MINISTRY OF SOCIAL DEVELOPMENT

Te Manatū Whakahiato Ora

SELECTED SEXUAL ORIENTATION AND GENDER IDENTITY DEFINITIONS

These are not legal definitions and are to be used as a guide only. Note that the meanings of terms are often contested and tend to change over time. The terms may be used or interpreted differently depending on the individual or context.

Sex and Gender Related Definitions

Sex	Sex is the physical aspect of identity, classified as male or female or intersex on the basis of biological make up, such as external genitals, reproductive organs, hormones and/or chromosomes.
Gender	Gender is commonly understood as a social aspect of identity, generally classified as male or female. It is a cultural construction of what it means to be a man or a woman, including roles, expectations and behaviour.
Gender identity	<p>Gender identity is an aspect of identity that can be understood as the psychological sex. It is an individual's internal sense of being male or female or something other or in between. It may or may not correspond to a person's physical sex.</p> <p>A person's sexual orientation cannot be assumed on the basis of their gender identity.</p>
Gender expression	Gender expression refers to how an individual expresses themselves by way of external characteristics and behaviours (such as clothing and body language) that are socially defined as being either masculine or feminine.
Transgender	<p>The term transgender is used by different groups in different ways. It is often used as a catch-all umbrella term for a variety of people who feel that the sex they were assigned at birth is a false or incomplete description of themselves. The term transgender can include a number of sub-categories, including, among others, transsexuals, cross-dressers, transvestites, genderqueer and consciously androgynous people.</p> <p>Transgendered people may or may not use some form of medical intervention to better align their physical sex with their gender identity, and may or may not have any interest in such a procedure. Gender reassignment services are sometimes called gender realignment by trans people. They include but are not limited to hormone treatment and surgeries, such as mastectomy and genital reconstruction.</p> <p>The adjective "trans" is increasingly preferred as a general term, for example "trans person". If a gender term is also used, this refers to the person's gender identity, eg a "trans man" was born in a body defined as female but identifies as male.</p>

<p>Transsexual</p>	<p>Transsexualism is usually understood as the enduring, pervasive, compelling desire to live in the sex opposite to the one a person was born in.</p> <p>A common way of describing this is the image of a transsexual as a woman trapped in a man's body or vice versa.</p> <p>“FtM” is sometimes used for a trans man / ‘female to male’, ie a person who was born in a female body/sex but has a male gender identity. An equivalent Māori term is tangata ira tane. “MtF” is sometimes used for a trans woman / ‘male to female’. Equivalent Māori terms are whakawahine, hinehi, hinehua. Many people prefer the terms male or female, in line with their gender identity.</p> <p>The process transsexual people go through to live in their gender identity is called transitioning.</p> <p>Pre-operative transsexuals have not had surgery to align their physical sex with their gender of identity. Post-operative transsexuals have had gender reassignment/ alignment surgery. Post-operative transsexuals can have their birth records altered by Births Deaths and Marriages to record their changed sex and have passports issued accordingly.</p> <p>Some transsexuals may not be interested in, or able to have surgery, but may take other steps, such as using hormones. They may identify as ‘non-operative’.</p>
<p>Fa’afafine</p>	<p>Fa’afafine is a Samoan term that literally means “like a woman”. Fa’afafine is often used to refer to people born male who express feminine gender identities in a range of ways, but is sometimes used more broadly refer to all Pacific people who do not identify with or live according to common understandings of their birth gender. Sometimes the term ‘third sex’ is used.</p> <p>Other similar Pasifika terms include Fakaleiti (Tongan), Akava’ine (Cook Islands Māori), Fiafifine (Niuean), Vaka sa lewa lewa (Fijian).</p>
<p>Genderqueer</p>	<p>Genderqueer is a term some people use to describe themselves who do not conform to or agree with traditional gender norms and who express a gender identity that is neither completely male nor female. Some may identify as gender neutral or androgynous.</p>
<p>Intersex</p>	<p>Intersex people are born with any of a number of physical variations that means they do not fit expectations of either male or female physical sex (eg they have genitals that are atypical, XXY chromosomes, etc). Intersex anatomy is not always visible at birth, and may become apparent at puberty, later or not at all. Surgery is performed on some intersex infants and children to physically align them with the sex they are assigned. This practice is criticised, particularly by intersex people. A child’s sex assignment may not match the gender identity the person develops as they grow up. This can mean that some intersex people can face gender identity issues similar to a transgender person.</p>
<p>Disorders of Sex Development (DSD)</p>	<p>Disorders of Sex Development (DSD) is a term that has recently appeared in some medical contexts in place of ‘intersex’.</p> <p>There is opposition to use of the term DSD from some intersex people who disagree with its medicalisation, and in particular, the reference to ‘disorders’.</p>
<p>Variations of Sex Development (VSD)</p>	<p>Variations of Sex Development (VSD) is an alternative to DSD proposed by human sexuality expert Professor Milton Diamond.</p>

Sexual Orientation Related Definitions

<p>Sexual orientation</p>	<p>Sexual orientation denotes the direction of a person’s sexuality relative to their own sex. It is usually classified according to the sex or gender of the people an individual finds sexually attractive. This can relate to a psychological component (the direction of sexual/romantic desire), a behavioural component (the sex of sexual/romantic partner/s) and/or an individual's social identity (group membership/identification).</p> <p>Sexual orientation is usually categorised as:</p> <ul style="list-style-type: none"> • homosexual (directed at the same sex) • heterosexual (directed at the opposite sex) • bisexual (directed at both sexes, sometimes abbreviated to ‘bi’). <p>Some people always identify with one sexual orientation, whereas others may change their primary orientation and the meaning they give it in a quite fluid way at times or throughout their life course.</p>
<p>Gay</p>	<p>Gay can refer to homosexual/same-sex attracted women and men, but is more often used in relation to males.</p>
<p>Lesbian</p>	<p>Lesbian is used exclusively in relation to homosexual/same-sex attracted women.</p>

Terms referring to both gender identity and sexual orientation

<p>Coming out</p>	<p>Coming out (of the closet) or being out refers to disclosing one's same-sex sexual attraction or one’s non-conforming gender identity. Coming out is usually a complex and dynamic process, often said to begin with coming out to oneself, ie acknowledging one’s identity, usually following a period of questioning. People must often continue to make the choice whether to out themselves in most new situations. Staying “in the closet”, and allowing or even fostering other people’s assumptions of heterosexuality or gender identity, is often an attempt to avoid homophobia or transphobia.</p> <p>A person can come out as trans before or while transitioning, and afterward to those unfamiliar with their previous sex.</p>
<p>Takatāpui</p>	<p>The traditional meaning of takatāpui is ‘intimate companion of the same sex’. Many Māori people have adopted this term to describe themselves, instead of or in addition to terms such as lesbian, gay, bisexual, queer or trans. It refers to cultural <i>and</i> sexual/gender identity. Also spelt takataapui.</p>
<p>Queer</p>	<p>Queer has been used as a derogatory term for gay and lesbian people in particular. Although some people continue to reject the term, it has recently been reclaimed and used in a positive sense by some to describe sexual orientation and/or gender identity or gender expression that does not conform to heteronormative expectations.</p> <p>It is sometimes used as an umbrella term for same-sex attraction and gender/sex diversity, including but not exclusive to people who are gay, lesbian, bisexual, transgender, takatāpui, fa’afafine, intersex or somewhere in between. This is more common among youth. It is sometimes used to express rejection of traditional gender categories and distinct sexual identities such as lesbian, gay, bi, and straight (heterosexual).</p>
<p>Sexual minority</p>	<p>Sexual minority is sometimes used to refer to groups that do not fit dominant heterosexual and/or gender identity norms. It is seldom used as a self-definition.</p>