

**Guardianship, Power of Attorney and Superannuation Issues for LGBTI People**

**Guardianship**

**Relevant Acts**

* Australian Capital Territory: *Guardianship and Management of Property Act 1991*
* Queensland: *Guardianship and Administration Act 2000*
* New South Wales: *Guardianship Act 1987*
* Northern Territory: *Adult Guardianship Act 1988*
* South Australia: *Guardianship and Administration Act 1993*
* Tasmania: *Guardianship and Administration Act 1995*
* Victoria: *Guardianship and Administration Act 1986*
* Western Australia: *Guardianship and Administration Act 1990*

**Issues**

On an initial review of existing Guardianship Acts three Acts stand out as causing potential problems for LGBTI people. These are the *Guardianship Act 1987 (NSW),* *Guardianship and Administration Act 1995 (TAS)* and *Adult Guardianship Act 1988 (NT).* The main problem is caused by the hierarchy of identification of the ‘person responsible’ in NSW and Tasmanian legislation and the definition of ‘near relative’ in the Northern Territory legislation.

Other Guardianship Acts may have similar issues and this needs a closer investigation.

In NSW and Tasmania if there is no guardian appointed then there is a hierarchy of people that can be approached to make decisions on a person’s behalf. This commences with the ‘spouse’ and concludes with a ‘person who has care of the person’ and ‘close friend or relative of the person’.

This is problematic for a number of reasons for LGBTI people, especially so if the person has dementia, is unconscious or is unable to clearly state who they want to make decisions on their behalf. In addition their partner may also be fearful of identifying themselves if the family is unaware of, or disapproves of, their relationship. For example in recent interviews conducted by Val’s Café a key issue arising for LGBTI people with dementia is that they are having their rights violated by family members – who take the opportunity to reassert control over sexuality or gender.

In addition a health or aged care service will follow the hierarchy and is more likely to listen to someone identifying as a relative – the service will not spend the time identifying if a there is an ‘ongoing’ relationship or not. In addition a family member can identify as a person ‘having care’ of the person in care and by default are higher in the hierarchy. Other potential issues are:

* They may not be living with the person who they want to have make decisions on their behalf or they may be fearful of identifying their partner
* They may still legally be identified as being in a relationship with a ‘spouse’ even though the ‘spousal’ relationship has ended
* Many older LGBTI people identify their partner as their ‘close friend’ due to a history of discrimination and fear of exposure as LGBTI
* There is also a reluctance among certain same-sex couples to formally declare their defacto relationship because of the financial disadvantage of a reduction in Centrelink entitlements (i.e., two people living as a couple receive less than two single persons).

In the Northern Territory it is the definition of ‘near relative’ that is concerning for LGBTI people. Again the requirement that there is either a defacto or domestic relationship can exclude those older LGBTI people who may not live together and, as mentioned above, may not identify their partner due to past treatment and fear of exposure.

***NSW Guardianship Act***

(4) Person responsible for another person There is a hierarchy of persons from whom the
**"person responsible"** for a person other than a child or a person in the care of the Director-General under section 13 is to be ascertained. That hierarchy is, in descending order:

(a) the person’s guardian, if any, but only if the order or instrument appointing the guardian provides for the guardian to exercise the function of giving consent to the carrying out of medical or dental treatment on the person,

(b) the spouse of the person, if any, if:

(i) the relationship between the person and the spouse is close and continuing, and

(ii) the spouse is not a person under guardianship,

(c) a person who has the care of the person,

(d) a close friend or relative of the person.

*(spouse is identified as husband, wife or defacto partner)*

**Tasmanian Guardianship and Administration Act**

(1) In this Act, person responsible for another person means –

(a) where the other person is under the age of 18 years and has a spouse, the spouse; or

(b) where the other person is under the age of 18 years and has no spouse, his or her parent; or

(c) where the other person is of or over the age of 18 years, one of the following persons, in order of priority:

(i) his or her guardian;

(ii) his or her spouse;

(iii) the person having the care of the other person;

(iv) a close friend or relative of the other person.

**Northern Territory Adult Guardianship Act**

(2)     In the definition of near relative:

(a)     the reference to ***another relative*** is a reference to a person connected by blood relationship, marriage, de facto relationship, adoption or custom, and for this purpose persons are connected:

            (i)     by blood relationship if within the fourth degree of relationship;

(ii)     by marriage if one is married to the other or to a person who is connected by blood relationship to the other;

(iia)     by de facto relationship if one is in a de facto relationship with the other or with a person who is connected by blood relationship to the other;

(iii)     by adoption if one has been adopted as the child of the other or as a child of a person who is within the third degree of relationship to the other; and

(iv)     by custom if the relationship is generally regarded in a community as being akin to one of blood, marriage or adoption; and

(b)     the reference to the spouse of a person includes a reference to a person who is not legally married to the first-mentioned person but who lives with that person on a bona fide domestic basis.

**Powers of Attorney**

While a quick perusal does not show a problem specific to LGBTI people there may be some issues where the Power of Attorney Act refers to the relevant Guardianship Act in that State or Territory.

* Australian Capital Territory: *Powers of Attorney Act 2006*
* New South Wales: *Powers of Attorney Act 2003*
* Northern Territory: *Powers of Attorney Act 2011*
* Queensland: *Powers of Attorney Act 1998*
* South Australia: *Powers of Attorney and Agency Act 1984*
* Tasmania: *Powers of Attorney Act 2000*
* Victoria: *Instruments Act 1958*
* Western Australia: *Guardianship and Administration Act 1990*

**Superannuation**

Superannuation was identified as an issue in the Australian Human Rights Commission Same Sex: Same Entitlements Report of 2007. The Report notes in section 13.4:

“Since 1 July 2004, the Superannuation Industry Act has provided that a same-sex partner may qualify as a ‘dependant’ if the couple meets the criteria for an ‘interdependency relationship’ or if he or she can establish financial dependency on the deceased. A member of an opposite-sex couple will qualify as a ‘dependant’ if he or she meets the criteria of a ‘spouse’.

A child born to an opposite-sex couple will also qualify as a ‘dependant’. But a child born to a same-sex couple will only qualify as the ‘dependant’ of the birth mother or birth father (not the lesbian co-mother or gay co-father) unless he or she can establish financial dependency on the deceased.”

As noted above in Guardianship this excludes older LGBTI people who may identify their partner as their friend or alternatively the partners may not live together for a number of reasons. It is acknowledged that this can be overcome to some extent by people being able to nominate their beneficiary. However, as noted above, many older LGBTI people do not identify their partner as a result of the years of discrimination they faced and fear of facing further discrimination and harassment. It also places an additional burden of proof on LGBTI people that non-LGBTI people do not face.

***SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993 - SECT 10A***

*Interdependency relationship*

(1) Subject to subsection (3), for the purposes of this Act, 2 persons (whether or not related by family) have an interdependency relationship if:

                (a)  they have a close personal relationship; and

                (b)  they live together; and

                (c)  one or each of them provides the other with financial support; and

 (d)  one or each of them provides the other with domestic support and personal care

 (3) The regulations may specify:

(a) matters that are, or are not, to be taken into account in determining under subsection (1) or (2) whether 2 persons have an interdependency relationship ; and

(b) circumstances in which 2 persons have, or do not have, an interdependency relationship .

**Relevant Resources**

Cartwright C, Lienert T, Beck K. [*Knowledge about and Attitudes towards End of Life Care for Gay, Lesbian, Bisexual & Transgender People - Phase 2, Stage 1: State-wide Survey Report.*](http://scu.edu.au/health-sciences/download.php?doc_id=14960&site_id=64&file_ext=.pdf) ASLaRC Aged Services Unit. September 2010.

Lienert T, Cartwright C, Beck K. [*The Experiences of Gay, Lesbian, Bisexual and Transgender People around End-of-Life Care*](http://scu.edu.au/health-sciences/download.php?doc_id=14962&site_id=64&file_ext=.pdf). Scoping Study Report. Aged Services Learning and Research Centre (ASLaRC), January 2010.

Hughes, M & Cartwright, C 2013, 'Discussing end of life caer planning with LGBT people', paper presented to Grey Expectations: Ageing in the 21st Century: 46th Australian Association of Gerontology National Conference, Sydney, NSW, 27-29 November