

# SAFEGUARDING THE END OF THE RAINBOW

*A guide to help LGBTI people to plan an end of life of their choice*

MARCH 2018



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COTA Victoria acknowledges the Wurundjeri people as the traditional custodians of the land on which we work. We pay respect to elders past and present and those who continue the journey. We recognise the rich indigenous heritage and culture of this country.

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## PLEASE READ THIS DISCLAIMER

*The information contained in this booklet is of a general nature only, and relates to the jurisdiction of Victoria.*

*The contents of this pamphlet do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you may have.*

*The personal stories that appear in this booklet are hypothetical and are intended only to illustrate options to consider when planning for your future.*



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This booklet is available at <https://cotavic.org.au/lgbtiq-resources/>.  
For a free hardcopy to be posted to you, please call Seniors Information  
Victoria on 1300 13 50 90 or Transgender Victoria on (03) 9020 4642 (voicemail).



# A. SAFEGUARDING THE END OF THE RAINBOW

## Background to the research

This project was developed by COTA Victoria and Transgender Victoria. The lead researcher was the National Ageing Research Institute (NARI), an independent not-for-profit research institute. The project obtained ethics approval from Melbourne Health Human Research Ethics Committee.

We surveyed older people (aged 55 years and over) who identify as LGBTI and conducted a series of focus groups with community members. The aim was to collect information regarding community needs and current practices, if any, about end of life care and planning.

The information gathered was used to develop this resource which we hope will support older LGBTI people in planning for end of life.

## Why an LGBTI-specific resource?

One of the recurring themes that came out of our research was that many LGBTI people have negative experiences in healthcare settings, with lawyers and other service providers and as a result, do not access services which would assist in future-planning.

Planning for the future is particularly important for LGBTI people because, while legal protections are increasing, the diversity of relationships and genders etc are not yet recognised or widely understood.

This booklet includes tips on finding safe professionals; how to ensure that your relationships, your partner and family of choice are respected; and that your end of life is exactly as you would like.

The documents discussed in this booklet will help professionals or organisations – such as your doctor, bank or health care providers – to identify whom they need to consult with if you need someone to help you manage your affairs and when you die.



Recording your wishes also provides certainty and comfort to those close to you, who can be reassured they are making the right decision for you. If you do not have these documents, there is a chance that professionals or organisations may consult someone who does not respect your relationships – for example, because you’re bisexual or in a same-sex relationship – instead of someone you really wanted to be involved.

## *Protecting your family, friends and assets*

The law may provide some automatic protections for your partner if you lose capacity or they survive you. However, these protections will depend on how your domestic relationship is recognised by law. For example: the outcomes may differ based on whether you are married; in a “de facto” relationship; in a registered relationship; or have made a statutory declaration that you are domestic partners.

The best way to protect your family, friends and assets is to consider:

- Appointing a Supportive Power of Attorney
- Appointing an Enduring Power of Attorney
- Appointing a Medical Support Person
- Appointing a Medical Treatment Decision Maker
- Making an Advance Care Directive
- Writing a Will
- Making a Binding Death Benefit Nomination for your superannuation
- Communicating funeral, burial or cremation instructions
- Making other property or financial arrangements, such as setting up a trust

These documents are not necessarily complicated, difficult or very time consuming, provided you have thought things through and discussed the issues with those closest to you and, where appropriate, sought professional guidance. They are however, very important documents and it is important that you understand how they can be used.

While these documents can be useful, they also give rise to significant financial, legal and emotional risks. You need to understand how these documents can be used and ensure they work for you, your family and friends. It is very important you seek professional advice and discuss your arrangements with a trusted person so they know what to do if you need some help managing your affairs.



## *Expunging historical convictions for homosexuality*

If you are an older LGBTI Victorian and have been found guilty or convicted of historic homosexual offences, you can apply for these offences to be expunged from your criminal record. This is in recognition that homosexual sexual conduct between consenting adults should never have been a crime.

Obtaining an expungement will mean that your finding of guilt or conviction will be removed for **all** official purposes, including police records check, visa applications, employment history, court records and a Working with Children Check.

In Victoria, the Expungement Legal Service of the Human Rights Legal Centre is there to help you through this process. This Service can:

- advise you on the expungement scheme (including whether you are eligible to apply);
- help you prepare your application and relevant paperwork;
- support you through the expungement process; and can also
- talk to you about your options if you have offences from another state or territory.

The Expungement Legal Service is free and confidential. The team is staffed by LGBTIQ identifying lawyers and includes those with personal experience of the climate and police attitudes before the old laws were repealed.

Contact details for the Expungement Legal Service are in the **Finding Supportive Professionals** section.



## B. FINANCIAL AND PERSONAL MATTERS

As you get older you may be asked to contemplate important decisions like:

- where you live;
- what healthcare, or other services you need ;
- how your money is spent; and
- what happens after you die.

You have the right to make decisions for yourself so long as you have the requisite “capacity” at the time of making the decision. “Capacity”, in this context, means that you can understand and retain relevant information, weigh up your options and then communicate your decision in a meaningful way. Service providers must assume you have the requisite capacity, unless there are signs suggesting otherwise.

The question of capacity is fluid and decision-specific – every day is different and every decision is different. In some cases, a decline in capacity may be very obvious and rapid. In many cases, though, it may fluctuate over a long period of time. Therefore, different levels of support may be needed at different times.

Even if you appoint someone to help you out, you are still able to manage your own affairs as much as possible, and for as long as possible, and your wishes and values should be respected.

This booklet highlights the range of documents that are available to you, in which you can record what outcomes are important to you and to name the people who need to be involved in decision-making about you. It’s important that the people you choose are trustworthy, understand what is important to you, are good at making decisions and can get along with the range of people – including family and service providers – who will be involved in your care.

Before signing anything, it’s important you seek independent professional advice to make sure you understand what these documents mean, and that they are appropriate. You should also review these documents every few years, especially as your relationships and assets change.



## 1. Supportive Powers of Attorney

If you are able to manage your affairs, but need some help speaking to different organisations and professionals you could appoint a Supportive Power of Attorney. This is a document you sign where you choose someone you trust – a partner, a friend or a family member – who will help you make decisions.

If you make someone your Supportive Attorney, this allows them to talk to your doctor, your bank or health care providers for example, and is a way to overcome obstacles that can arise with rules around privacy.

### **Mary supports Rosa to organise her appointments**

Rosa, a trans-woman, and Mary, a cis-woman, have been in a de facto relationship for 20 years.

Rosa has been diagnosed with dementia. She can still do most things, but is starting to get a bit forgetful.

Rosa is concerned she is going to have trouble organising her appointments and keeping on top of her paperwork. Mary becomes more involved in organising Rosa's calendar and paying the bills. However, some organisations have said they cannot speak to Mary "for privacy reasons".

If Mary can show organisations she is Rosa's Supportive Attorney for "financial matters" and "personal matters", they should provide her with the information she needs to help Rosa.

**Note:** The idea of having someone as your Supportive Power of Attorney is still reasonably new. In practice, some organisations may still insist on a separate written or verbal authority. It is expected, as the use and understanding of Supportive Powers of Attorney become more widespread, it will become easier for Supportive Attorneys to engage with organisations.





The Office of the Public Advocate (OPA) has many resources for anyone considering appointing or agreeing to be a Supportive Attorney. It may be useful to show the OPA resources to the person you are thinking of nominating as your Supportive Attorney as well, so that they can assess whether they feel able to undertake the role.

- Supportive Attorney appointment: <http://www.publicadvocate.vic.gov.au/power-of-attorney/supportive-attorney-appointments>
- Advice for supportive attorneys: <http://www.publicadvocate.vic.gov.au/power-of-attorney/advice-for-supportive-attorneys>
- Guide to Supported Decision-Making in Victoria: <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/carers/447-guide-to-supported-decision-making>

If you become unable to make a certain decision, your Supportive Power of Attorney will lapse and your Enduring Attorney, if you have nominated someone, will be the person who will talk to relevant professionals and organisations. See the **Enduring Powers of Attorney** section below.

## 2. Enduring Powers of Attorney

An Enduring Power of Attorney is a document you can sign where you choose a trusted person – for example your partner, friend, family member or professional person – to make a decision about your money, your living arrangements or your health in case you become unable to do so. You can have one or more people involved.

### What an Enduring Attorney can help with

You can choose what your Enduring Attorney can do on your behalf. This could include routine tasks like paying your bills or arranging home care services. It could also include help with life-changing decisions like moving into residential aged care.

You can limit what matters your Enduring Attorney can help with. For example, you might feel comfortable with your Attorney paying your bills, but you may want to restrict the circumstances where they can sell or mortgage your home.



Your Attorney is also required by law to take certain steps while managing your affairs. Your Attorney must follow instructions in your Enduring Power of Attorney document as well as these laws.

The Office of the Public Advocate's fact sheet, *Advice for Attorneys*, will give you an idea of the range of tasks that your Attorney could perform. It may be useful to show it to the person you are thinking of nominating as your Attorney, so that they can assess whether they feel able to undertake the role.

An Enduring Attorney can play an important role towards the end of your life. If you appoint the wrong person though, this can have serious financial, legal and emotional consequences. You need to understand what an Enduring Attorney can and can't do and make sure you, your family, friends and assets are protected.

The Office of the Public Advocate has published the following booklets:

- *Take Control* (a guide to making a Power of Attorney)
- *Your voice – Trust your choice* (tips for seniors making Powers of Attorney)

To get a copy of *Advice for Attorneys* or the above booklets, contact the Office of the Public Advocate:

- Phone: 1300 309 337
- Web: <http://www.publicadvocate.vic.gov.au/power-of-attorney/advice-for-attorneys>
- Web: <http://www.publicadvocate.vic.gov.au/power-of-attorney>

You can also include information in your Enduring Power of Attorney about what is important to you, such as your preferred daily routine, valued relationships and appearance. For example, a trans man being able to wear men's clothing or a trans woman being able to wear make-up.

These instructions help to ensure:

- you access appropriate services
- your valued relationships are respected
- your wishes and preferences are respected, even if someone disagrees with your attorney



### **Mary ensures Rosa's values and preferences are respected in aged care**

Rosa's condition has worsened and she now needs to go into aged care. Rosa wants to continue to appear as a woman while in aged care and, of course, to see Mary.

Previously, Rosa was married and has a son. He disapproves of Rosa's choice to dress as a woman and her relationship with Mary. He believes Rosa should appear as a man while in aged care and Mary should be blocked from seeing her.

Rosa's values and preferences should be respected, irrespective of her capacity, and she should be able to appear as a woman and to see Mary.

Further, if Mary is Rosa's Enduring Attorney for "personal matters", which includes instructions about her preferred appearance, daily routine and valued relationships, Mary can make sure that aged care staff respect Rosa's instructions. This will take a bit of pressure off Mary as well when speaking with staff and other family members.

## **When an Enduring Attorney starts**

Depending on how they are worded, Enduring Powers of Attorney can start either when they are signed or only when you are unable to make a certain decision that needs to be made.

If you want to make it clear that you are to remain in control of your own affairs for as long as possible, you should say the Enduring Attorney can only step in to help you when they obtain medical evidence that you do not have the mental ability to make a certain decision.



## If an Enduring Attorney has not been appointed or is challenged

If you are unable to make a certain decision, and have no Enduring Attorney to help you, you may need a Guardian or Administrator. This involves going to a tribunal. While you can let the tribunal know what you want, the tribunal can appoint a family member, a friend, or an independent person, such as a trustee company or the Office of the Public Advocate.

Even if you have made an Enduring Power of Attorney, you may still need to go to the tribunal if someone else disagrees with your chosen Attorney. Any written guidance, prepared while you had capacity, should be presented to the tribunal. For example, that a certain person must / must not be involved in decision making.

### **Rosa helps Mary remain living in their home**

When Rosa moves into aged care, Mary remains living in their home. Rosa's son believes he should be in control – he doesn't agree with the decisions made about Rosa's care and thinks Mary should get out of Rosa's house. He wants to go to the tribunal.

If Mary is Rosa's Enduring Power of Attorney for "personal and financial matters"; and the Power of Attorney includes instructions about Rosa's care and that Mary is to remain living in their home, this information can be shown to the tribunal. It will help inform the management of Rosa's affairs.

This may not be enough to protect Mary, though, so it's important to seek professional legal and financial advice to see if there is anything else Rosa can do to protect Mary.

## If you don't have someone you trust

An independent person, such as someone from a trustee company or the Office of the Public Advocate, may be appointed if you do not have a trusted person to help you manage your affairs. In this case, it's really important you make sure your wishes and preferences are known while you have capacity.



When it comes to managing your money, you may make an organisation, like a trustee company, your Financial Enduring Attorney and include instructions about the management of your finances. For example, that certain money or property is made available to you or another person.

When it comes to organising where you live and deciding your medical treatment, the Office of the Public Advocate can only be appointed when you are unable to make a decision – like moving to aged care – that needs to be made. At this stage, it may be difficult for the advocate to know your wishes, preferences and values. To help the advocate, you may want to record this information in writing in an Advanced Care Directive or in your medical records.

When you die, the Enduring Power of Attorney appointment will lapse. At this stage, the person responsible for managing your affairs, who may be the same person as your Enduring Attorney, will be either:

- your chosen Executor, if you have made a Will
- the person who obtains approval from the Supreme Court, if you have not made a Will



## 3. Wills

Making a Will is one way you can better ensure your assets will be given to people according to your wishes when you die. It is not compulsory to make a Will. However, if you die without a Will, the law decides who receives your assets. There is a chance your assets will be given to people you had not intended.

A Will is a document in which you:

- Record what is to happen to your assets when you die
- Name who will be responsible for carrying out your wishes, known as your “Executor”

**Note:** When a person gets married it usually renders a previous Will invalid. From 8 December 2017 marriages of same sex couples were legalised in Australia and overseas marriages were recognised. Seek legal advice if this affects you, as you will most likely need to make a new Will.

### What can be included in your Will

Your Will should clearly describe:

- What assets you have: such as real estate, personal property, jewellery, art, coins, antiques, stocks and shares, etc – all of this property is collectively known as your “estate”
- Who is to receive these assets, known as a “beneficiary”
- What and how much each beneficiary will receive, for example:
  - you can name the beneficiary of each asset, “My car goes to X”, or
  - you can say “X will receive 40% of my estate and Y will receive 60% of my estate”
- One or more executors to carry out your wishes, as outlined in your Will
- If you may wish to leave a donation or bequest to a charity that is important to you (it may be a LGBTI charity, the arts, medical research, where you lived or faith based)

**Tip:** Be absolutely clear, many legal problems with Wills arise because they are vague or fail to give away everything.



## What assets can be left out of your Will

Assets held for you on trust, such as your superannuation, or property that you own with another person as “joint proprietors” are usually not covered by your Will.

For example, after you die the trustee of your superannuation fund is responsible for paying your member entitlements to:

- Your binding death benefit nominee, who must be a dependent; or
- If there is no binding death benefit nomination, a dependent; or
- Your estate, via your legal personal representatives, where it is distributed according to your Will or the intestacy laws, if you die without a Will.

**Note:** A “dependent” is your spouse, child or any other person who is dependent on you.

If you do not want money from your super fund to be covered under your Will, you may want to seek advice on whether to sign a Binding Death Benefit Nomination. For more details, see **Binding Death Benefit Nomination** section.

Any property you own with another person as “joint proprietors” will not form part of your estate to be dealt with under your Will. The most common types of property ownership are “joint proprietorship” and “tenants in common”.

The main difference between them is what happens when one of the owners dies:

- In the case of a joint proprietorship type of ownership, the surviving owner/s will automatically inherit the property by way of survivorship, not the beneficiaries of your Will.
- In the case of tenants in common, your interest in the property will form part of your estate and will be distributed to the beneficiaries of your Will.



### **Mary's right to stay in Rosa's home depends on ownership**

Sadly, Rosa dies in aged care. Within days, Rosa's son threatens to kick Mary out, as he has a copy of a will leaving everything to him. Mary is not sure if Rosa made another Will.

- If the house is in Rosa's name only, it will form part of her estate to be dealt with under her Will. Mary may need to challenge the Will if she wants to remain living in the home she shared with Rosa for 20 years.
- If the house is in Rosa's and Mary's names as "joint proprietors", the house will automatically transfer to Mary.
- If the house is in Rosa's and Mary's names as "tenants in common", Rosa's share will form part of her estate and be dealt with under her Will.

Obviously, the best way for Rosa to protect Mary was to prepare a Will while she had capacity.

## **Leaving someone out of your Will**

If you want to leave someone out of your Will, consider whether you have a moral obligation to provide for them. Certain people may be able to insist on inheriting part of your estate, if they feel you have failed to provide for them.

It is also a good idea to provide reasons for excluding someone. You could outline your reasons in a letter to your Executor or as a statement in your Will, which can be produced if needed. For example, if there is a challenge to your Will, your written reasons can inform the court as to why you have done this.

However, these reasons may not necessarily overcome a family maintenance claim being successful. Ultimately, if you want to leave someone out of your Will, seek legal advice about how to proceed.





## Children of same-sex parents

Once legally recognised as a parent of a child, the succession laws applicable to the parent/child relationship will apply, as per the *Administration and Probate Act 1958 (Vic)* (*Administration and Probate Act*).

If you are same-sex parents who are both registered on your child's birth certificate, you are legally considered to be that child's parents or guardians. This means the child may be able to inherit assets from you like any other child.

If you are a same-sex parent who is not on your child's birth certificate, the issue can be complicated and you may need legal advice. As a general rule however, you can apply to have your name placed on the birth certificate.

A woman who gives birth to a baby in Victoria will initially be legally recognised as its mother and will be recorded as such on the birth certificate. Her partner, if she has one, is recorded as the father or other parent of the child.

Where there is no father listed on the birth certificate, a same-sex mother can be added to the birth certificate by lodging a form with the Registry of Birth, Deaths and Marriages. If a donor father is listed on the birth certificate, a same-sex mother can apply to the County Court to have the father's name removed and replaced with her own. Where a child is born to gay co-parents, the fathers will be able to seek a substitute parentage order through the Supreme or Country Courts of Victoria.

If you are not leaving anything for a biological parent of your child, you may want to take steps to stop them from inheriting part of your estate. You should seek legal and financial advice about this as the law may be different for a biological parent that is a donor, friend or a family member for co-parenting families and for parents who are not recognised on a child's birth certificate.

## Executors

Your Executor is the person, or people, you name in your Will as being responsible for doing all that is necessary to carry out the instructions in your Will. The law also requires an Executor to take certain steps in resolving your financial, personal and legal affairs. The Executor must follow the instructions in your Will as well as these laws.

Your Executor will be responsible for arranging your funeral, paying your bills and debts, bringing in your assets and ensuring your assets are given to your beneficiaries.



It is wise to name more than one person as your Executor or at least nominate someone in the alternative. If one person becomes unable to act as Executor, the other person could carry out the role. You could also appoint a professional, such as a lawyer or a trustee company to be your Executor. Professional Executors will most likely charge a fee for their services. You should ask for details on how you will be charged for these services.

An Executor should be someone you trust – for example, a partner, a friend or your adult child. If you anticipate that there may be some conflict among family members after your death, choose an Executor who has the ability to manage the situation if the matter goes to court.

You can find a good Checklist for Executors which was developed by the State Trustees (you will need to enter some of your information before you can access the checklist online). This checklist will give you an idea of the range of tasks that your Executor may need to perform. It would be useful to show it to the person you are thinking of nominating as your Executor, so that they can assess whether they feel able to undertake the role.

To get a copy of the Checklist:

- Phone: (03) 9667 6444 (if you are in Melbourne)
- Phone: 1300 138 672 (if you are outside Melbourne)
- Web: <https://www.statetrustees.com.au/executor-services/free-executor-checklist/>.

## Dying without a Will

If you do not make a Will before you die, your property will be distributed according to a legal formula which sets out who will inherit your assets and what share they will get. Different states and territories have different formulas.

These formulas may not represent your family, your circumstances or your wishes. The people closest to you could receive nothing and may need to challenge others to get a share of your estate. If your family of origin is estranged, hostile towards your partner or does not respect your relationships, they may go to court to ensure that they, and not your partner or family of choice, inherit your estate. This process is likely to be unpleasant, lengthy and expensive and could be avoided by making a valid Will.

In November 2017, sweeping changes to the laws of intestacy mean that if you die without a Will, your entire estate goes to your partner. Your children, grandchildren or other close family members will get nothing. If you would like to provide for people in addition to your partner, it is best to write a Will.



## Your assets if you die without a Will

From 1 November 2017 if you die intestate, the following rules apply.

- If you leave a partner, your partner is entitled to all your estate. This applies to same sex couples too.
- If you do not have a partner but have children – your children will inherit in equal shares
- If you have no partner or children at the time of death, your estate will go to:
  - parents
  - then siblings
  - then grandparents
  - then uncles and aunts
  - then cousins
- If you leave a ‘blended family’, a partner and children from other relationships, the rules in this case are complex and you should obtain legal advice. However, the following is an overview of what could happen if you leave a blended family:
  - your surviving partner is entitled to the whole of your estate provided the estate is worth less than the statutory legacy. The “statutory legacy” amount is declared by the Victorian government every financial year and is published in the Government Gazette. The statutory legacy amount is currently \$451,909 and is indexed to account for inflation from the beginning of the 2018-19 financial year.
  - If the value of the estate is greater than the statutory legacy, then:
    - your partner is entitled to receive all your personal possessions, the statutory legacy (plus any interest accrued on that amount) and one half of the remaining balance of your estate; and
    - your children are entitled to the remaining balance of your estate, in equal shares.
- If you leave more than one partner, the laws in respect of how an estate is to be distributed is complex and legal advice must be sought. For these purposes, a “partner” could be:
  - a spouse
  - a registered domestic partner
  - a registered caring partner
  - An unregistered domestic partner (who had been living with you on a genuine domestic basis at the time of death for at least two years before your death; or the parent of your child who is under 18)



Even though these new laws provide improved financial and social stability to a surviving current partner, or partners, of a person who dies without a Will, the complexities of the modern family with children from previous relationships are more effectively addressed by a carefully prepared Will.

- If you leave more than one partner, the laws in respect of how an estate is to be distributed is complex and legal advice must be sought. For these purposes, a “partner” could be:
  - a spouse;
  - a registered domestic partner;
  - a registered caring partner; or
  - an unregistered domestic partner (who had been living with you on a genuine domestic basis at the time of death for at least two years before your death; or the parent of your child who is under 18).

## Assets in more than one state

Inheritance laws within Australia are different for each state and territory. If you have assets in more than one state, you should seek legal advice, as these laws can be complex. You will need to know which laws are relevant to you.

For example, if you die without a Will, the inheritance of real property – such as a house, building or land – is governed by the law of the state where the real property is, while the inheritance of personal property – such as money or furniture – is governed by the law of the state where you lived.

## Binding Death Benefit Nominations

Superannuation does not necessarily form part of your estate to be dealt with under your Will. Instead, money out of your super fund, which can include your accumulated superannuation or a life insurance payout, should be dealt with by way of a Binding Death Benefit Nomination. You can usually obtain the relevant form from the website of your superannuation fund.

If you are a member of a self-managed superannuation fund, you should seek legal advice to ensure that any nomination is correctly completed.



There are limits on who you can nominate to receive money out of your super fund. You can only nominate one or more “dependents”, being:

- Your spouse or your de facto partner
- A child, of any age
- A person in an “interdependency relationship” with you. This means a close personal relationship between two people who live together, where one or both provides for the financial, domestic and personal support of the other.

**Rosa ensures Mary can access money from her super fund**

Rosa’s son contacts her super company – he wants some money out of her super fund.

If Rosa has made a valid Binding Death Benefit Nomination in favour of Mary, the trustee of her superannuation fund must pay the money to Mary.

If you want to benefit someone who is not considered a “dependent”, you can nominate your “legal personal representative” in your Binding Death Nomination form. This means your superannuation member entitlement will be dealt with by the terms of your Will or, if you do not have a Will, by the laws dealing with intestacy.

Some superannuation funds require Binding Death Nominations to be renewed every few years, so it’s best to carefully check on what your superannuation fund requires.

For more information on Superannuation Death Benefits see the Australian Securities and Investments Commission’s MoneySmart website:

<https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/insurance-through-super/super-death-benefits>.

**Be aware** that most Binding Death Benefit Nominations are only binding for 3 years from signing. After 3 years from signing they are no longer binding. You should diarise to update your Binding Death Benefit Nomination before it lapses.



## 5. Digital estates

We have very significant electronic or online lives these days. You should also consider how you want your online assets to be managed after you die.

Planning for your digital estate includes setting out:

- A complete list of all your online accounts (social media, email, banking, email, cloud, Instagram, photosharing, etc)
- How your accounts can be accessed (usernames, passwords, account numbers)
- Your wishes about keeping or destroying information stored online

Each social media platform has different rules for deactivating accounts – some allow your account to be turned into a memorial page – you will need to find out the rules for each of them.

- Some law firms offer digital estate management as part of their Wills and Estates services.
- The New Zealand Law Society has a useful checklist of things to consider:  
<http://www.lawsociety.org.nz/news-and-communications/news/2011/february/digital-legacy-checklist-and-information-on-web-service-policies>.
- You can get a social media Will template from Palliative Care Victoria at:  
<https://digitallegacyassociation.org/social-media-will-template/>.

## 6. Funeral, burial and cremation instructions

There are a number of events when your family and friends can celebrate, honour and farewell you after you have died. You can choose to have “the lot”, or request that your family keep things simple.

The following are some of the most common events following a death:

- A funeral – before the burial or cremation
- A memorial service or life celebration – after the burial or cremation
- A wake – immediately after the burial or cremation

You may include your wishes on these matters in your Will. However, a burial or cremation needs to be arranged relatively quickly and may occur before your Will is read.



If you would like specific funeral arrangements to be made, write down your instructions or make a video recording as a guide for your Executor, your partner or a friend. Remember that the law does not require your Executor or family to follow your instructions.

The best way to ensure that your wishes are respected is to have an open conversation with your Executor and others who are close to you. They may be more willing to carry out your wishes if they know why particular arrangements or choices are important to you.

## NOTES

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## C. MEDICAL MATTERS

Consider what will happen if you become very unwell and need some help making decisions about your medical treatment. Those closest to you may be in distress while at the same time being called upon to either support you in making difficult decisions, or make them on your behalf. Who would you want to speak on your behalf? What would you want them to say? At such a time knowing what your wishes are would be of invaluable reassurance that they are doing the right thing.

To cover this situation, you can:

- appoint a Medical Support Person;
- appoint a Medical Treatment Decision Maker;
- write an Advance Care Directive, including a values directive or an instructional directive or both.

These documents are useful because they clearly identify who health professionals need to consult and what you would like them to do for you. Having this certainty is also a great comfort to those close to you to know that they are following your wishes.

When you are appointing a Medical Support Person and a Medical Treatment Decision Maker consider who you feel would best represent your wishes and understand what the law requires of them.

It may be particularly important for lesbian, gay, bisexual, trans, gender diverse and intersex communities to complete these documents.

For example, you may not be in close contact with your biological family, have no children, or have children/family who do not accept your life decisions. These factors can impact on your healthcare at critical times. If you haven't appointed someone to help you with medical decisions or documented your wishes for future healthcare, the law may automatically assign someone you don't trust to make these decisions on your behalf.

This process helps those closest to you and your treating healthcare team understand who is to be involved and how you want to be treated if you are unable to make a decision about your medical treatment or communicate your wishes.





## 7. Medical Support Persons

A Medical Support Person is someone who can help you make decisions about your medical treatment for yourself. You may still be able to make decisions about your medical treatment, but may require some help speaking to your doctor and other healthcare providers, who have privacy obligations.

If you make someone your Medical Support Person, this allows them to talk to your doctor or other healthcare providers, for example, and overcomes many obstacles that can arise with rules around privacy.

The role will vary depending on what is required. For example, a Medical Support Person may assist with organising your medical appointments as well as collecting, presenting information and communicating it in a way that can be understood.

A Medical Support Person may help to ensure that you are able to make your own decisions for longer. A Medical Support Person cannot make a decision about your medical treatment on your behalf or pressure you to make a decision – they are just there to support you.

### George and Tony

George has lung cancer and relies on his friend Tony to look after him, as he finds it hard to get around and remember things.

One day George experiences difficulty breathing and Tony takes him to emergency. The doctor wants to discuss how they can prevent further admissions. George wants Tony to be involved because he might forget what was discussed.

While George is receiving treatment, hospital staff organises a meeting. When Tony requests an update on what is happening, staff advise him they can't tell him anything "for privacy reasons".

If Tony is George's Medical Support Person, staff should provide Tony with information he needs to help George make a decision about his medical care.



## 8. Medical Treatment Decision Makers

Your medical treatment decision maker can make a decision about your medical treatment on your behalf, if you are unable to.

It is important to choose someone who:

- is 18 years or older
- knows you well
- is trustworthy and will respect your views and values
- will be a strong advocate for you
- is capable of making decisions under circumstances that may be difficult or stressful

Your medical treatment decision maker will need to accept the appointment by signing the Medical Treatment Decision Maker Appointment form. It is important that you tell this person about your preferences regarding future medical treatment and discuss your Advance Care Directive, if you decide to make one. See Advance Care Directive section.

### If you do not appoint a medical treatment decision maker

If you do not appoint a Medical Treatment Decision Maker, the law provides a hierarchy of the people that it will recognise to make a decision about your medical treatment on your behalf, if you are unable to.

The list is as follows:

- A guardian appointed by the Victorian Civil and Administrative Tribunal (VCAT)
- The first of the following with a close and continuing relationship with you and who is available, willing and able to make the decision:
  - spouse or domestic partner;
  - primary carer;
  - oldest adult child;
  - oldest parent; or
  - oldest adult sibling of the person.



## If you already have a Medical Enduring Power of Attorney

Before 12 March 2018 you could appoint a Medical Enduring Power of Attorney to make a decision about your medical treatment on your behalf, if you are unable to.

If you made a Medical Enduring Power of Attorney before 12 March 2018, the person appointed will become your Medical Treatment Decision Maker.

## 9. Advance Care Directive

An Advance Care Directive is a document that allows you to record the type of healthcare you would like to receive if you are unable to make a decision about your medical treatment. This allows your loved ones, your doctor and other healthcare providers to know your wishes in advance.

In your advance care directive, you can include:

- A values directive
  - An instructional directive
- A values directive is a statement of your values and preferences for your medical treatment. A values directive enables you to write down your thoughts about what quality of life means to you, and the circumstances where you would prefer comfort measures over active medical treatment.  
It is important to discuss your wishes with your medical treatment decision maker, others that are important to you and your doctor. Your medical treatment decision maker will use your values directive to guide them if they are required to make a decision on your behalf.
  - An instructional directive is a legally binding statement in which you can consent to, or refuse, types of future medical treatment. Your instructional directive takes effect as if you had consented to, or refused the treatment. These decisions are directed towards your health practitioners not your medical treatment decision maker. If you choose to complete an instructional directive, it is recommended that you consult a doctor first, to make sure you have the information you need.

You can choose to complete either a values directive or an instructional directive or both. On completion, the Advance Care Directive must be witnessed by two adults, one of whom must be a medical practitioner.



## For more information:

- Office of the Public Advocate (an Advance Care Directive form is available from the website so you can get an idea of what information can be included):
  - Phone: 1300 309 337
  - Web: <http://www.publicadvocate.vic.gov.au/>
- Advance Care Planning Australia
  - Phone: 1300 208 582
  - Web: <http://advancecareplanning.org.au>
- Better Health Channel website
  - Web: <http://www.betterhealth.vic.gov.au/havetheconversation>

Advance Care Planning in Victoria is supported by the *Medical Treatment Planning and Decisions Act 2016* which came into effect 12 March 2018.  
The above information is based on these laws.



## E. WORKING WITH PROFESSIONAL ADVISORS

### 10. Finding supportive professionals

#### The Rainbow Tick

The Rainbow tick is a world first and was developed by GLHV in consultation with Quality Innovation Performance (QIP). Rainbow Tick Accreditation provides assurance to LGBTI consumers and staff that an organisation will be responsive to their needs.

You can find Rainbow Tick accredited organisations at:

<http://www.qip.com.au/standards/rainbow-tick-standards/rainbow-tick-accredited-organisations/>

#### Ageing and Aged Care

- National LGBTI Health Alliance's Silver Rainbow LGBTI Ageing and Aged Care
  - Phone: (02) 8568 1123
  - Email: [info@lgbtihealth.org.au](mailto:info@lgbtihealth.org.au)
  - Web: <https://lgbtihealth.org.au/introducing-silver-rainbow/#>
  - Address: PO Box 51, Newtown NSW 2042
- Val's LGBTI Ageing and Aged Care works with aged care, health and human services providers, and a range of community stakeholders to improve the health, wellbeing and visibility of older LGBTI people.
  - Phone: (03) 94798740
  - Web: <http://www.latrobe.edu.au/arcshs/lgbti-ageing-and-aged-care/what-we-offer>

#### Health practitioners

- **DocLIST** is an online list of doctors and mental health professionals who have been recommended by lesbian and bisexual women in Australia: <http://www.doclist.com.au/>



- **Gay and Lesbian Health Victoria's** list of LGBTI friendly doctors and counsellors: <https://www.glhv.org.au/website-link/are-you-looking-gay-and-lesbian-friendly-doctor-or-counsellor>
- **The Centre Clinic:** a safe, friendly LGBTI General Practice. It provides general health care for gay men, lesbians and trans people, as well as specialist medical care for people living with HIV and expert sexual health screening and treatment.
  - Phone: (03) 9525 5866
  - Web: <https://vac.org.au/lgbti-health/centre-clinic>

## Lawyers

- You can call the **Law Institute of Victoria** and ask for their LGBTI competent lawyers. If you get a referral from the Law Institute, ask if you are eligible for 30mins free consultation with the lawyer.
- **St Kilda Legal Service** offers a free specialist LGBTIQ legal advice service. To find out more, give them a call or visit their website.
  - Phone: 9534 0777
  - Email: [st\\_kilda\\_vic@clc.net.au](mailto:st_kilda_vic@clc.net.au)
  - Web: <http://www.skls.org.au/>
  - Address: St Kilda Community Centre, 161 Chapel Street, St Kilda 3182 Victoria
- **Expungement Legal Service**, Human Rights Law Centre  
The team is staffed by LGBTIQ identifying lawyers and includes those with personal experience of the climate and police attitudes before the old laws were repealed.
  - Phone: (03) 8636 4458
  - Email: [expungement@hrlc.org.au](mailto:expungement@hrlc.org.au)
- **HIV/AIDS Legal Centre (HALC)** is a community legal centre run by the Victorian AIDS Council. It provides legal advice to people living with and affected by HIV within Victoria. HALC and their legal volunteers are sensitive to the variety of issues that may face people living with and affected by HIV, which includes partners, family members, close friends and carers of a person living with HIV.

Appointments with lawyers are offered at the Positive Living Centre on Thursdays from 7.00pm to 9.00 pm. Please note that HALC only operates once a week on a Thursday evening. A representative will contact you on a Thursday evening between 6.30pm and 9.00pm. It is important that you are contactable during these hours after your initial contact.

- Phone: (03) 9863 0406
- Email: [legal@vac.org.au](mailto:legal@vac.org.au)



- Web: <https://vac.org.au/hiv-aids/hiv-aids-legal-centre-halc>
- Address: Positive Living Centre, Level 5, 615 St Kilda Rd, Melbourne VIC 3004

## Employers

### Australian Workplace Equality Index Tiers

The Australian Workplace Equality Index Tiers (AWEI) contains a list of the employers that have been recognised for meeting a particular standard or level of activity within the last year, as assessed by the national benchmarking instrument for LGBTI workplace inclusion.

Often employers will include a history of their AWEI recognition tiers along with any additional awards received within the LGBTI section of their individual profiles.

For more information:

- Phone: (02) 9206 2139
- Email: [info@inclusiveemployers.com.au](mailto:info@inclusiveemployers.com.au)

## 11. Saving on costs

There are now many self-help options available to plan for your end of life. While these documents may seem simple, filling them in incorrectly or appointing the wrong person can have serious financial, legal and emotional consequences. You need to understand what these documents mean before signing them and make sure you have taken all steps to protect yourself, your family, friends and assets. After all, the documents are designed to give you some peace of mind and help your loved ones navigate complex, challenging and stressful situations.

### Self-help options

You may find that self-help options, like a Will kit or filling in the Take Control booklet, is all you need. However, it is best to have your Will reviewed by a lawyer; particularly if you have significant assets, or there is a risk of conflict between your family and friends. It is always best to seek professional guidance, even if this means paying for it.



## Private lawyers

The costs of engaging a lawyer to prepare a Will can range from \$150 to \$5,000, depending on the complexity of your assets and wishes, and who is appointed as an Executor. Some organisations may provide a discount for preparing a Will if they are appointed as the Executor; however this arrangement will attract fees for administering your estate after you die. The Law Institute of Victoria's Legal Referral Service can put you in touch with a specialist lawyer:

- Phone: 03 9607 9311
- Web: <https://www.liv.asn.au/Referral.aspx>

With a referral letter from the Law Institute, participating law firms will see clients free of charge for up to the first 30 minutes. Write your questions down beforehand using the checklist below, so you get as much out of the free 30 minutes as possible. You can also ask for a referral to someone who practices locally or who speaks your language.

## Fixed-price simple Wills

Some organisations may be able to prepare simple Wills for free or for a fixed price:

- Community Legal Centres: Some community legal centres offer a Wills service. Find your local legal centre contact the Federation of Community Legal Centres:
  - Phone: (03) 9652 1500
  - Web: <http://www.communitylaw.org.au/>
- The Red Cross offers low cost Wills. Find out more about their information sessions and Wills appointments:
  - Phone: 1800 811 700
  - Web: <https://www.redcross.org.au/support-us/donate-funds/leave-a-bequest/attend-a-red-cross-wills-day>
- A trustee company, such as the State Trustees, may offer cheaper Wills than a private practitioner
  - Phone if you are in Melbourne: (03) 9667 6444
  - Phone if you are outside Melbourne: 1300 138 672
  - Web: <https://www.statetrustees.com.au/wills/>





## 12. Preparing for appointments

It is very important to consider a number of questions before consulting a professional. Being well-prepared and doing your homework will mean that you do not waste any time during the appointment and save on costs. This will also ensure that important people and assets are not forgotten or overlooked.

### Useful guides on Wills

- The Hume Riverina Community Legal Service has developed a very useful document to help you prepare for an appointment about a Will. For details:
  - 1800 918 377
  - [http://www.hrcls.org.au/wp-content/uploads/2016/09/Willmaker-Record\\_CURRENT\\_2017323.pdf](http://www.hrcls.org.au/wp-content/uploads/2016/09/Willmaker-Record_CURRENT_2017323.pdf)
- The Victoria Law Foundation has also developed a useful guide
  - <https://www.victorialawfoundation.org.au/publication/your-will>

### Checklist – before making a Will

- Is a Will appropriate for you?
- Whom do you trust to be your Executor?
- Would you prefer to pay a lawyer or trustee company to be your Executor?
- Do you have a list of your assets and where they are located?
- Do you have any outstanding debts?
- Do you have any property, including overseas pensions, interstate or overseas?
- Do you have a clear idea of who your beneficiaries will be? For example: family, friends, your carer or an organisation?
- Do you want to give specific assets to certain beneficiaries?
- Do you have a moral obligation to provide for anyone?
- Have you made a Binding Death Benefit Nomination for your superannuation?
- If you own property, who else is listed on title as an owner?
- Have you divorced your previous partner?



## Checklist – before making a Supportive Power of Attorney

- Is a Supportive Power of Attorney appropriate for you?
- What decisions do you need help with? Financial, personal or both?
- Do you know someone who can be your supportive attorney? Do you trust them? Can they advocate on your behalf? What is their full name and address?

## Checklist – before making an Enduring Power of Attorney

- Is making an Enduring Power Of Attorney appropriate for you?
- Do you need someone to help you manage your affairs now or in the future?
- Do you know someone who can be your Attorney? Do you trust them? Can they listen to you? Have you discussed your wishes with them?
- What decisions do you want your Attorney to make? For example, financial, personal or both.
- Are there decisions you do not want your Attorney to make? For example, selling or mortgaging your property.
- Do you want your Attorney to report to another trusted person?
- Do you want more than one Attorney? If so, how would they make decisions? For example, jointly or any one of them?
- When do you want the powers to start? For example, on the loss of decision-making capacity, supported by medical evidence or on signing the Power of Attorney?

## Checklist for Enduring Power of Attorney

This checklist was prepared by Maddocks – Premium Legal Services. It is an example of what lawyers use for an appointment about an Enduring Power of Attorney.

Details of attendees	
Principal's name (ie, the person making the Enduring Power of Attorney)	
Principal's residential address	
Name of lawyer conducting meeting	
Name(s) of anyone else present:	



Checklist			
	Item	Yes	No
1.	Principal's instructions clear and understandable		<i>[*if no, may not be able to proceed]</i>
<b>Enduring Power of Attorney (Personal matters and / or Financial matters)</b>			
1a.	Appointment for: <ul style="list-style-type: none"> <li>– Personal matters?</li> <li>– Financial matters?</li> <li>– Both personal and financial matters?</li> </ul>		
1.b	Principal clearly identifies whom they want as their attorney and provides: <ul style="list-style-type: none"> <li>– full name and address details of each attorney and alternative attorney (if applicable)</li> </ul>		
1c.	Principal clearly identifies when the EPOA should commence: <ul style="list-style-type: none"> <li>– immediately?</li> <li>– upon loss of decision making capacity?</li> <li>– specific date or occasion?</li> </ul>		
2.	Attorney eligibility Is the proposed attorney: <ul style="list-style-type: none"> <li>– a health care provider</li> <li>– a care worker</li> <li>– an accommodation provider</li> <li>– for the principal</li> <li>– insolvent under administration</li> <li>– conviction of dishonesty offence (financial matters only)</li> </ul>		<i>*if the attorney is, they are not eligible to be appointed.</i>
3.	How are the attorneys to act? <ul style="list-style-type: none"> <li>– joint</li> <li>– joint and several</li> <li>– several</li> <li>– by majority</li> </ul>		
4.	Does the principal appear to have adequate decision making capacity?		<i>*if no, cannot continue.</i>



5.	<p><b>Signing and witnessing</b> Are you and your second witness comfortable that:</p> <ul style="list-style-type: none"><li>– principal appears to sign freely and voluntarily; and</li><li>– principal appears to have decision making capacity; and</li><li>– neither of you are an attorney; and</li><li>– neither of you are a relative of the principal; and</li><li>– neither of you are care workers or accommodation providers for the principal.</li></ul> <p><i>* one of the witnesses must be a person who is authorised to take affidavits</i></p>		
6.	Has the principal taken the EPOA with them to be accepted by attorney(s) and alternative attorney(s), and witnessed?		



## F. REVIEWING AND STORING YOUR DOCUMENTS

### Reviewing your documents

Once you make these documents, you should review them every few years, particularly if your circumstances, relationships, assets or place of residence change.

You may want to review your Will if these things happen:

- **you move interstate or overseas – the laws may be different in your new location**
- you separate – this does not cancel your Will and your previous partner is likely to still receive your assets, if provided for under your Will
- you divorce – this does not cancel all of your Will but may cancel some parts of it
- you get married – this generally cancels your Will unless you say specifically that that Will is to continue after you marry
- you have more children
- you purchase or sell significant assets

**Important:** If you have been married but do not get a divorce, your previous spouse can claim in your estate, regardless of your Will.

You may want to review your Powers of Attorney if these things happen:

- **you move interstate or overseas – the laws may be different in your new location**
- you no longer want an Attorney involved – you will need to cancel their appointment
- your Attorney dies or goes bankrupt – you will need to check if the Powers of Attorney allows someone else to step in for them



**From 8 December 2017**, overseas same-sex marriages and any marriages not between a man and a woman (e.g. if one of you has a sex or gender marker on your birth certificate that is not 'male' or 'female') were automatically recognised in Australia. This includes marriages solemnised at an embassy from another country that recognised marriage equality in Australia before this date.

You do not need to do anything further for your marriage to be recognised – you can produce your marriage certificate from the overseas jurisdiction as proof of your marriage.

A consequence of these changes is that your marriage or marriage recognition may render your previous Will null and void. You should seek legal advice and possibly make a new Will.

If you have separated from your spouse, you can now legally obtain a divorce. You can obtain advice if you are in this position and unsure about your legal entitlements or responsibilities.

## Storing your documents

Keep the original of your documents in a safe place. For example, a bank safety deposit box, with a law firm, State Trustees or in a safe in your home. It is important to let each support person; attorney; medical decision-maker; and executor know where these documents are so they know where to find it.

At some stage you may also want to provide copies of these documents to the relevant professionals and organisations you deal with, such as your bank, your doctor, your local hospital, for example.

You may also like to upload a copy of your Advance Care Planning documents to My Health Record online at <http://www.myhealthrecord.gov.au>.



## G. GLOSSARY

### 1. Advance Care Directive

An Advance Care Directive is a document that allows you to record the type of healthcare you would like to receive if you are in the position where you can no longer make your own medical treatment decisions. This allows your loved ones and healthcare providers know your wishes in advance. In your advance care directive, you can include:

- a values directive
- an instructional directive

### 2. Advance Care Planning

Advance Care Planning helps you to plan and record your health care preferences in case you become ill or injured and unable to express these wishes. These preferences may include, but are not limited to, end-of-life decisions.

### 3. Binding Death Benefit Nomination

After you die money from your super fund goes to the trustee of the fund, who is responsible for paying the money to either:

- a dependent – your spouse, child or any other person who is dependent on you; or
- your estate – where it is distributed according to your Will; or
- a Binding Death Benefit Nomination – this tells the trustee to whom they should pay money from your superannuation.

### 4. Enduring Powers of Attorney

By signing an Enduring Power of Attorney, you can appoint someone to make a decision about a financial or personal matter on your behalf, if you are unable to.

When you die, the Enduring Power of Attorney appointment will lapse.



## 5. Guardianship and Administration

If you are unable to make a certain decision, and have no Enduring Attorney to help you, you may need a Guardian or Administrator. This involves going to a tribunal. Even if you have made an Enduring Power of Attorney, you may still need to go to the tribunal if someone else disagrees with your chosen Attorney. If this is the case, the tribunal may appoint a Guardian to help with personal and medical matters and an Administrator to help with financial matters. While you can let the tribunal know what you want, the tribunal can appoint a family member, a friend, or an independent person, such as State Trustees and the Office of the Public Advocate.

## 6. Medical Support Person

A Medical Support Person can help you make medical decisions for yourself. You may still be able to manage your affairs, but may require some help speaking to different health organisations and professionals, who have privacy obligations. Your Medical Support Person can talk to your doctor, for example, overcoming many obstacles that can arise with rules around privacy.

## 7. Medical Treatment Decision Maker

Your Medical Treatment Decision Maker is someone who can to make a decision about your medical treatment on your behalf, if you are not able to make the decision yourself. You can appoint someone over the age of 18 to be your Medical Treatment Decision Maker. If you have previously appointed someone under a Medical Enduring Power of Attorney, this person may be automatically recognised as your Medical Treatment Decision Maker.

## 8. Supportive Powers of Attorney

A Supportive Attorney can help you make financial and personal decisions for yourself. You may still be able to manage your affairs, but may require some help speaking to different organisations and professionals, who have privacy obligations. Your Supportive Attorney can talk to your doctor, your landlord or your bank, for example, overcoming many obstacles that can arise with rules around privacy.

## 9. Wills

A Will is a written document that sets out what you want to happen to your assets – such as cash, savings and investments, real estate and personal belongings – after you die. The will also directs your Executor, the person or organisation responsible for resolving your affairs, on how this is to be done.





# NOTES

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For information about the organisations involved in this project or to make a donation or bequest to help us with our work please contact:



**COTA VICTORIA**

<https://cotavic.org.au/>

<https://cotavic.org.au/get-involved/bequests-and-donations/>



**TRANSGENDER VICTORIA**

[www.transgendervictoria.com](http://www.transgendervictoria.com)

[www.transgendervictoria.com/get-involved/donate](http://www.transgendervictoria.com/get-involved/donate)



**NATIONAL AGEING RESEARCH INSTITUTE LTD**

[www.nari.net.au](http://www.nari.net.au)

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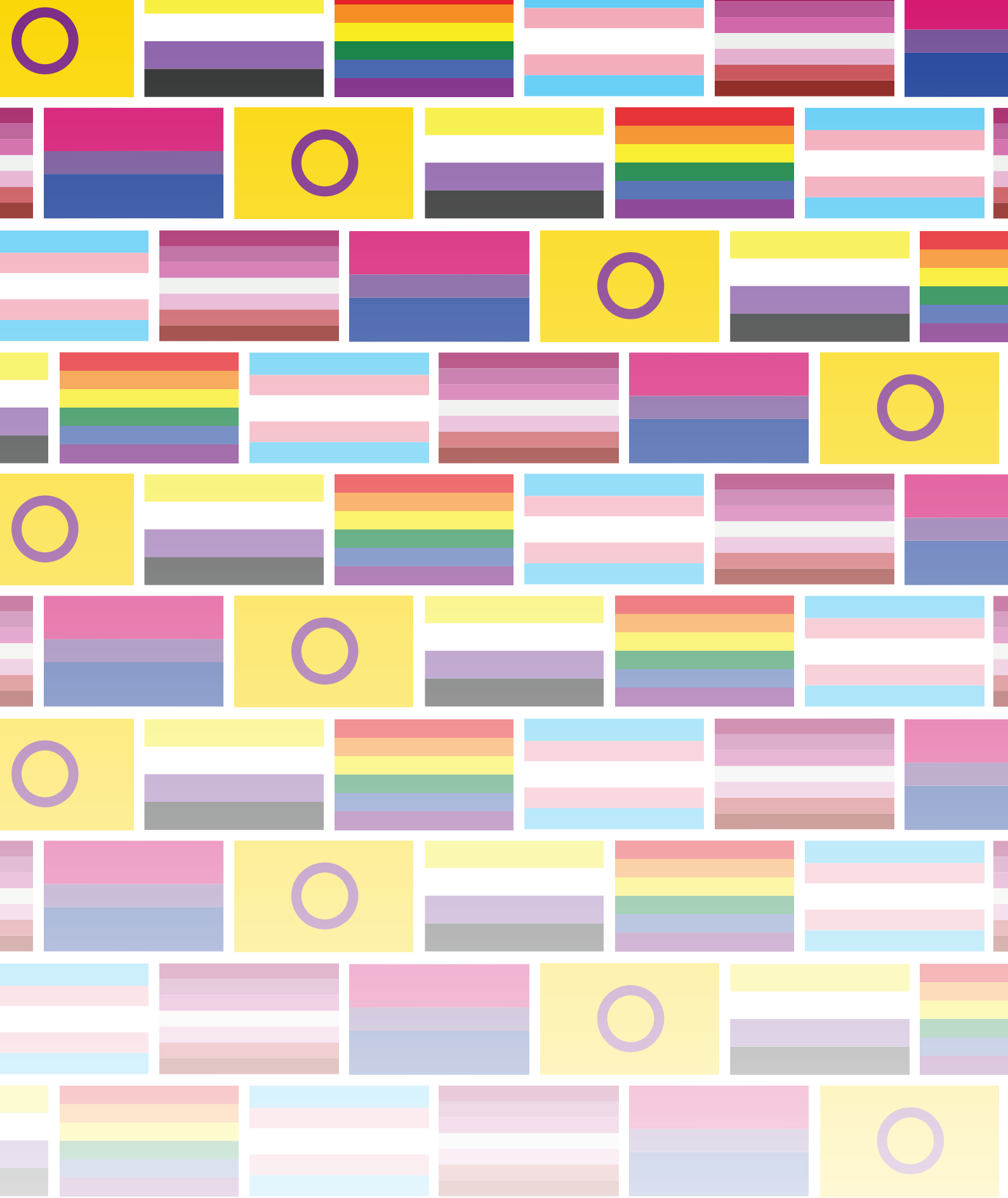


**GAY AND LESBIAN FOUNDATION OF AUSTRALIA**

[www.galfa.org.au](http://www.galfa.org.au)

[www.galfa.org.au/donations/ways-to-donate/](http://www.galfa.org.au/donations/ways-to-donate/)

[www.galfa.org.au/donations/bequests-and-wills/](http://www.galfa.org.au/donations/bequests-and-wills/)



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