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Melbourne**

**Submission to the Parliament of Victorian Legislative
Council Standing Committee on Law and Justice**

Inquiry into Adoption by Same-Sex Couples

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1. Introduction

Over the past decade a number of social, legal, political and economic forces have converged, to create a climate in which same-sex couples are raising children in ever increasing numbers. Same-sex couples may become parents through a variety of pathways including heterosexual intercourse, donor insemination or other reproductive procedures, surrogacy arrangements and adoption. For same-sex couples, adoption, either in the form of non-relative adoption or step parent/second parent adoption, represents a crucial and significant avenue for family formation. As with heterosexual couples, same-sex couples may elect to adopt children for numerous reasons including medical infertility, social infertility, and most importantly, the desire to provide a child with a loving, nurturing and wholesome environment. For male same-sex couples, who have fewer alternatives for achieving parentage, the adoption process is a particularly attractive pathway to parenting. Again, as with heterosexual couples, same-sex couples may jointly raise a child biologically related to one of the parties and in the interests of the child may seek to attain legal recognition of their relationship with the child.

The fact that in most Australian jurisdictions, including Victoria, same-sex couples can access fertility treatment,¹ is evidence that same-sex couples are viewed as suitable parents. Furthermore, there is now a significant volume of research that establishes that same-sex couples are just as good parents as heterosexual couples.² Once it is accepted that same-sex couples are suitable parents, there is no logical reason to discriminate against the means of achieving parentage. Thus, this submission argues that same-sex couples should be entitled to become parents by the same means that are available to heterosexual couples, including adoption.

2. The Current Law in Victoria – *Adoption Act 1984 (Vic)*

In the case of non-relative adoptions which are often of an infant child, adoption is ‘the legal process which permanently transfers all the legal rights and responsibilities of being a parent from the child’s birth parents to the adoptive parents.’³ The legal consequences of adoption are thus to deny a biological parent any legal status, rights or responsibilities regarding the child. It is therefore of considerable significance for the relinquishing parents, the adopters and most importantly the child. The *Adoption Act 1984 (Vic)* (*Adoption Act*) stipulates a number of threshold requirements that a couple must satisfy in order to be eligible to apply to adopt a child. For the purposes of this submission, the most important of these threshold requirements are that, in accordance with the *Adoption Act*, only married couples or

¹ See *Reproductive Treatment Act 2008 (Vic)*.

² See, for example, N. Gartrell & H. M. W. Bos, ‘US National Longitudinal Lesbian Family Study: Psychological adjustment of 17 year old adolescents’ (2010) 126(1) *Pediatrics* 28-36, L. Van Gelderen, H. Bos, N. Gartrell, et al., ‘Quality of Life of Adolescents Raised from Birth by Lesbian Mothers’ (2012) 33(1) *Journal of Developmental & Behavioral Pediatrics*, 1-7, Simon R Crouch, Elizabeth Waters, Ruth McNair, Jennifer Power and Elise Davis, ‘Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey’ (2014) *BMC Public Health*, at 9-10, at <www.biomedcentral.com/1471-2458/14/635> and Ruth McNair, ‘Outcomes for Children Born of A.R.T. in a Diverse Range of Families’, (Occasional Paper Victorian Law Reform Commission 2004).

³ NSW Family and Community Services, *Adoption* (17 March 2015) Family and Community website <http://www.community.nsw.gov.au/docs_menu/parents_carers_and_families/fostering_and_adoption/adoption.html>.

heterosexual couples living in a de facto relationship may apply to adopt child.⁴ With regard to step-parents in heterosexual relationships with the biological parent, adoption can occur under stringent circumstances outlined in s11(6) of the *Adoption Act*. Same-sex couples, by virtue of the definitions contained in the Act, are denied the same right. There is also provision for one person to apply to adopt a child.⁵ Thus, while one member of a same-sex couple may make application to adopt a child on their own, they cannot do so with their partner as a same-sex *couple*.

Adoption is primarily a service to children and its major purpose 'is to provide a stable family for a child in need, rather than to meet the need or desire of an adult for a child'.⁶ In accordance with s15(1) of the *Adoption Act* applicants must satisfy the requirements set out in r35 of the *Adoption Regulations*. Key requirements include that applicants have 'the capacity to provide a stable, secure and beneficial emotional and physical environment during a child's upbringing until the child reaches social and emotional independence'⁷ and exhibit suitable 'general stability of character'⁸. In the interests of prospective adopted children, eligibility criteria are both necessary and desirable. However, the *Adoption Act* in its present form arbitrarily discriminates against same-sex couples purely on the basis of their sexuality, rather than their ability to provide a stable and loving home for a child. The existing eligibility criteria should be amended so that the only factors taken into account, are what is in the best interests of the child (consistent with the UN Convention on the Rights of the Child), and not the sexual orientation of the prospective parents.

Indeed, the case of *AB and Victorian Equal Opportunity & Human Rights Commission and Department of Human Services and Separate Representative of J*⁹ (AB and VEOHRC) displays the manner in which the courts have found loopholes in the existing legislation in order to allow same-sex adoption, where this is in the best interests of the child. In this case, two men, AB and CD had been in a long-term relationship and had been foster parents to the child, J, for a number of years. They sought to formalise their relationship with J by adopting the child. As adoption by same-sex couples is prohibited in Victorian law, AB applied to adopt J under s11(3) of the *Adoption Act* as 'one person.' The court adopted a broad approach and determined that 'one person' applied irrespective of whether that person was in a domestic relationship, and was not limited to a single, unattached individual. This allowed CD to adopt J. Since the legislation did not explicitly prohibit a gay or lesbian person from adopting a child, it would have been inappropriate for the court to narrowly interpret 'one person' as meaning only an individual not in a relationship. All parties agreed that it was in J's best interests to be adopted by CD. This case is evidence that the current legislative regime regulating adoption is inadequate and discriminatory and fails to serve the child's best interests. There is no logic in allowing same-sex couples to foster a child but not formalise their relationship with that child through adoption. The law needs to be reformed to rectify this.

The language in the *Adoption Act* must also be amended to incorporate appropriate terminology. In particular, references to 'natural parent(s)' and 'natural child' throughout the

⁴ *Adoption Act 1984* (Vic) s11(1).

⁵ *Adoption Act 1984* (Vic) s11(3).

⁶ Victorian Law Reform Commission, 'Assisted Reproductive Technology and Adoption: Final Report' (2007) 104.

⁷ *Adoption Regulations* r35(e).

⁸ *Adoption Regulations* r35(h).

⁹ Unreported, County Court of Victoria, Case No AD-10-003, Pullen J, 6 August 2010.

Act should be changed to ‘biological parent(s)’ and ‘biological child.’ The terms ‘natural parent’ or ‘natural child’ are problematic and outdated as they imply that adoptive children and families are ‘unnatural’ and that ‘in not being genetically linked we are less than whole or our relationships are less important than relationships by birth.’¹⁰

3. Australia’s International Obligations

3.1 Taking into Account the Best Interests of the Child

Consideration of the ‘best interests of the child’ should be paramount in determining adoption outcomes in order to ensure that Victorian law is compliant with international human rights law. Article 3 of the Convention for the Rights of the Child (CRC) states that, ‘in all actions concerning children... the best interests of the child shall be a primary consideration’. Whilst Victoria’s adoption legislation does not specifically incorporate the CRC, s9 of the *Adoption Act* incorporates a similar best interests standard by providing that ‘the welfare and interests of the child concerned shall be regarded as the paramount consideration.’ In fact, s9 sets a higher standard for Victoria than is provided by the CRC, since it requires that the best interests principle be *the paramount* consideration, as opposed to a *primary* consideration.

Whilst the CRC does not explicitly set out what the principle of best interests actually means, a general understanding of this requirement can be deduced through inference from the Victorian adoption laws, other Articles in the CRC, and various commentaries on the concept.

The Adoption Act sets out, for instance, that the court must be satisfied that the welfare and the interests of the child must be promoted by the adoption, under s15(1)(d) of *The Adoption Act*. Regulation 35 of *The Adoption Regulations 2008* (Vic) (*Adoption Regulations*) outlines additional criteria that the court must be satisfied of before an adoption order can be made. As highlighted above, these include that the applicants must have the capacity to provide a stable, secure and beneficial emotional and physical environment¹¹ and be of suitable health, age and financial circumstances.¹² It can be inferred from this that where parents satisfy these conditions, therefore constituting ‘fit and proper’ adopters as per s15(1) of *The Adoption Act*, the child’s best interests have been properly considered. At no point does the law state that the parents’ sexual orientation should come into consideration when making these determinations, which implies that the sexual orientation of a child’s parents is not considered a factor affecting a child’s interests or a person’s capacity to be a ‘fit and proper’ parent.

Alston and Gilmour-Walsh¹³ assert that the principle of a child’s best interests must be informed by the other rights and principles set out in the CRC, including, for example, the principle of non-discrimination (Article 2) and the right to identity and family relations

¹⁰ Pat Johnston, *Adoption Is a Family Affair! What Relatives and Friends Must Know*, Perspective Press, 2001.

¹¹ *The Adoption Regulations 2008* (Vic), r35(e).

¹² *Ibid* r35(a), (b) and (d).

¹³ UNICEF International Child Development Centre, *The Best Interests of the Child: Towards a Synthesis of Children’s rights and Cultural Values Florence* (1996) p 32.

(Article 8). Article 2 prohibits discrimination against a child based on the attributes of the parent(s), such as their sexual orientation. Denying same-sex couples the opportunity to adopt a child may constitute discrimination against a foster child based on the sexual orientation of his/her foster parents.

Article 8 of the CRC provides that State Parties must undertake to respect the right of the child to preserve his or her identity and family relations. Associate Professor Gerber argues that to refuse to recognise a child's relationship to their parent is to deny their identity, as well as their family relations, and therefore contravenes Article 8.¹⁴ Empirical Australian research on children raised by lesbian parents confirms that such denial is inconsistent with the best interests of the child. The study found that children raised by lesbian parents described the non-recognition of their family as evoking feelings of 'sadness', 'distress' and 'anger'.¹⁵ For Australia to comply with the CRC, including Article 3 (best interests), Article 2 (non-discrimination) and Article 8 (respecting identity and familial relations), Victoria should allow same-sex couples to adopt.

Finally, academics shine light on this rather nebulous concept of best interests through various attempts to define it. For example, Eekalaar has suggested that the principle requires a consideration of 'basic interests, for example to physical, emotional and intellectual care; developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own'.¹⁶ Perhaps most succinctly, Dr McNair finds that it is 'family functioning (processes)', as opposed to 'family structure', that is the critical factor in determining children's outcomes.¹⁷ Thus, in line with Victorian law and the CRC, it is clear that best interests are not tied to the sexual orientation of the prospective parents and therefore Victoria's existing adoption eligibility criteria should be amended so that it is only factors pertaining to the best interests of the child which are taken into account.

3.2 The Interests of the Child in Same-Sex Families: The Empirical Evidence

There is an increasing number of same-sex families, with the 2011 census reporting in excess of 6,300 children living in same-sex couple families (up from 3,400 in 2001).¹⁸ This has given rise to an upsurge in social science and legal research presenting arguments for and against same-sex parenting. The centrality of children's interests has prompted some scholars to conduct empirical research which establishes that children raised in lesbian-led families are 'no different' to those raised in heterosexual families. To make these findings, researchers were required to prove a negative; namely, that lesbian parenting is 'not harmful' to children.

¹⁴ Paula Gerber 'The Best Interests of Children in same-sex Families' in Paula Gerber and Adiva Sifris *Current Trends in the Regulation of Same-sex Relationships* (2010) Federation Press, 34.

¹⁵ Short, L, 'It makes a world of difference: Benefits for Children of Lesbian Parents of Having their Parents Legally Recognised as their Parents' (2007) 3 *Gay and Lesbian Issues and Psychology Review* 1, 10.

¹⁶ 'The Importance of Thinking that Children Have Rights' (1992) 221 *International Journal of Law and the Family*, 230-1.

¹⁷ R McNair 'Outcomes for Children Born of A.R.T. in a Diverse Range of Families' (Occasional Paper Victorian Law Reform Commission 2004) 2.

¹⁸ Australian Bureau of Statistics, *Same-sex Couples* (17 March 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013>>.

This has been referred to as a ‘deficit model’, as it commences with the assumption that lesbian parents lack the attributes essential for effective parenting.¹⁹

A 2014 study conducted by researchers in Melbourne supported this conclusion. The *Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey*²⁰ involved 315 eligible parents completing a survey which provided data on 500 children. This is the first Australian based study of same-sex parent families and the largest study of its kind internationally to date. This means it ‘can be used to understand a broad range of families where at least one parent is same-sex attracted.’ The participation of 91 children with male same-sex attracted parents also means the sample size is large enough to analyse the children with male gay parents; many previous studies having focussed solely on lesbian parents. The study concluded that ‘there is no evidence to support a difference in parent-reported child health’ between same-sex and heterosexual parent families.²¹ The researchers found that ‘children of same-sex attracted parents demonstrate comparable health to other children across the population.’²² However, the study did show that children of same-sex parents experience greater social stigma which can negatively impact on mental and emotional well-being. Similar stigma is experienced by Aboriginal and Torres Strait Islander children and the children of single parent families. Thus, this is not a reflection on the ability of same-sex couples to parent, but rather on social attitudes and prejudices which result in stigma.

Columbia Law School’s ‘What We Know’ Project identified 75 scholarly studies conducted over the last 35 years which reviewed the well-being of children with gay or lesbian parents. Seventy-one of these studies found these children ‘fare no worse’ than children raised by heterosexual parents.²³ Only four studies concluded that children raised in same-sex families were worse off, and these studies were all criticised for failing to take into account contributing factors such as family break-ups and socio-economic disadvantage. Thus, the “What We Know” Project concluded that there is ‘overwhelming scholarly consensus ... that having a gay or lesbian parent does not harm children.’²⁴

The NSW Standing Committee on Law and Justice conducted a comprehensive inquiry into adoption by same-sex couples and published the results in the 2009 Report *Adoption by Same-Sex Couples*. The Committee concluded that reforming the law to allow same-sex couples to adopt in NSW would serve children’s best interests by:

- providing legal recognition for existing parent-child relationships;
- broadening the pool of potential applicants for which the most appropriate parents for a child are selected;

¹⁹ Ruth McNair, ‘From GP to Political Activist for the New Family’ in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (ABC Books, Sydney, 2005) 227, 229.

²⁰ Simon Crouch et al, ‘Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey’ (2014) 14 *BMC Public Health*.

²¹ Ibid.

²² Ibid.

²³ Columbia Law School *What we know: What does the scholarly research say about the wellbeing of children with gay or lesbian parents?* The Public Policy Research Portal <<http://whatweknow.law.columbia.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>>

²⁴ Ibid.

- enabling children currently fostered by same-sex couples to have the security of a permanent relationship;
- addressing discrimination against same-sex couples and their children; and
- addressing inconsistencies in the current law.

The Committee concluded that the quality of family relationships and the provision of a stable, nurturing environment are most important for the development of children, irrespective of the family structure or the sexual orientation of parents. The following year the NSW Parliament amended the *Adoption Act 2000* (NSW) to allow same-sex couples to adopt, and for a same-sex de facto partner to adopt his/her partner's child as a step parent.

A study published earlier this year by Donald Paul Sullins of The Catholic University of America asserted that children of same-sex parents are more likely to have emotional problems than children of heterosexual parents.²⁵ Sullins used data from the 1997-2013 United States National Health Interview Surveys to come to the conclusion that 'biological relationship... is both necessary and sufficient to explain the higher risk of emotional problems faced by children with same-sex parents.'²⁶ He stated that since the child of a same-sex partnership can never have a biological connection to both parents, the increased risk of emotional problems cannot be mitigated.

Several flaws have been identified in this study. First, the data analysed went back as far as 1997, when there was far less social acceptance of same-sex couples. Second, the 'emotional issues' suffered by children of same-sex parents were not clearly defined. Third, the study made no mention of the family background of the children with same-sex parents. For example, it is unclear if one or more parents had been divorced or had multiple partners over the child's lifetime, both of which can occur in heterosexual couples and are known to impact a child's emotional wellbeing.²⁷ As a result, the study has been largely discredited in its assertion that the children of same-sex parents are worse off than those raised by heterosexual parents.

As outlined above, this is further demonstrated by considerable research that has found that same-sex parenting does not have any adverse effects to the best interests of children. The research clearly demonstrates that a same-sex family structure is not in itself a cause of negative outcomes for children and should not in itself determine whether a couple is eligible to adopt children. The criteria for determining a suitable family environment for a child should be according to a person's/couple's individual merits as parents, rather than their sexuality.

²⁵ Donald Paul Sullins, 'Emotional Problems among Children with Same-Sex Parents: Difference by Definition' (2015) *British Journal of Education, Society and Behavioural Science* 7(2) 99.

²⁶ Donald Paul Sullins, 'Emotional Problems among Children with Same-Sex Parents: Difference by Definition' (2015) *British Journal of Education, Society and Behavioural Science* 7(2) 99, 110.

²⁷ Herb Scribner, *New study says children with same sex parents are worse off* (20 February 2015) Deseret News National <<http://national.deseretnews.com/article/3606/New-study-says-children-with-same-sex-parents-are-worse-off.html#L1MwMrvmAuABxh1.99>>

3.3 'Parent' not limited to heterosexual model

Prohibiting same-sex couples from adopting is inconsistent with Australia's obligations under international human rights law. No specific article of the CRC deals directly with the issue of parentage or for that matter, the number of parents which a child may or may not have. Article 7(1) emphasises the right of the child to know and be cared for by his or her parents as far as possible.²⁸ 'Parent' is not defined in the CRC, but there is no reason to assume that it is limited to heterosexual parents or, for that matter, to a two-parent model; sexuality appears to be an irrelevant consideration.²⁹ Nothing in the wording of Article 7 refers to heterosexual parents and the Preamble recognises that a child 'should grow up in a family environment in an atmosphere of happiness and understanding'.³⁰ Discussions of the Committee on the Rights of the Child contemplate a flexible, dynamic, evolving model of parentage, and reports of this Committee specifically state that 'the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single parent family, common law family and adoptive family'.³¹ Children are born and raised in diverse family forms and there is no reason to suggest that some of these children have the rights and protections set out in CRC, while others do not.

Australia's international obligations concerning the right of a child to two heterosexual parents came under the judicial microscope in *McBain's* case.³² The Catholic Church asserted that, the CRC, the International Convention on Economic Social and Cultural Rights and the International Convention on Civil and Political Rights (ICCPR), recognised the right of the child to be born into a family consisting of a male and a female parent, with the Universal Declaration of Human Rights and the ICCPR specifically linking family with marriage.³³ On that basis, it argued that marriage is a necessary precursor to founding a family. Justice Sundberg of the Federal Court rejected this argument, noting that when read as a whole, these obligations 'tell against the existence of an untrammelled right of the kind for which the Catholic Church contends'.³⁴

The General Comments issued by the Human Rights Committee in relation to Article 23 of the ICCPR (right to marry) have gone some way to clarifying the meaning of these treaty provisions.³⁵ The Committee recognised that the notion of 'family' might be construed

²⁸ Article 7.1 CRC: 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.'

²⁹ John Tobin, *The Convention of the Rights of the Child: The Rights and Best Interests of Children*, (Occasional Paper Victorian Law Reform Commission, 2004) 7-11. Tobin states in the context of same-sex parenting, 'given the diversity of family arrangements that exist within contemporary society they [the Committee on the Convention of the Rights of the Child] invite an interpretation whereby neither biology nor a heterosexual union should be the sole determinants of parenthood.'

³⁰ Article 7(1) CRC: '... the right to know and be cared for by his or her parents'.

³¹ See Committee on the Rights of the Child, Reports of General Discussion Days CRC/C/DOD/1 [2.1].

³² *McBain* [2000] 99 FCR 116, 120. The Catholic Church attempted to argue that the word 'service' in the Commonwealth *Sex Discrimination Act 1984* should be read so as to accord with Australia's international obligations.

³³ *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly Resolution 217 A III of 10 December 1948 Article 16: 'the right to marry and found a family' *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, Article 23(2) (entered into force 23 March 1976) – 'the right to marry and found a family'. The Human Rights Committee have interpreted these articles to include non-discrimination on the basis of sex and sexual orientation.

³⁴ *McBain* [2000] 99 FCR 116, 120.

³⁵ See Human Rights Committee, General Comment 19 (39) 'Protection of the Family, the Right to Marriage and the Equality of Family' adopted at the 102nd meeting 27 July 1990.

differently according to the norms of various societies and the content of domestic law. The Committee explicitly referred to diverse family forms such as ‘unmarried couples and their children and or single parents and their children’. It would appear, therefore, that the definition of family is not confined by marriage and may include a wide variety of living arrangements.³⁶ The recognition of family forms other than the nuclear family makes possible the inclusion of same-sex families within the concept of ‘family’.³⁷ These views of the Human Rights Committee highlight that the make-up of a family unit should not be a consideration in a determination to grant adoption rights and that opening up adoption to same-sex couples would in no way impair Australia’s compliance with its international obligations. Indeed, it would help to ensure that these obligations are being upheld.

4. The Experience in other Australian Jurisdictions that Allow Same-sex Couples to Adopt

All adoption legislation in Australia includes eligibility criteria. This means that a particular person or categories of persons are included in the adoption process while others are excluded. In the context of non-relative adoption, the legislation provides for individuals to be assessed on their particular characteristics in order to determine whether or not they are suitable candidates.

As Table 1 below illustrates, Western Australia, New South Wales, ACT and Tasmania have all put in place reforms that remove discrimination towards same-sex couples when it comes to adoption. South Australia is currently reviewing its legislation.

4.1 Table 1: Jurisdictions allowing same-sex adoptions

Australian Jurisdictions that allow same-sex couples to adopt	Australian Jurisdictions that do NOT allow same-sex couples to adopt	Australian Jurisdictions currently considering whether to allow same-sex couples to adopt
Australian Capital Territory (<i>Adoption Act 1993</i> , s 18)	Queensland (<i>Adoption of Children Act 1964</i> , s 12)	South Australia, Review of the <i>Adoption Act 1988</i> and <i>Adoption Regulations 2004</i>
New South Wales (<i>Adoption Act 2000</i> , s 23)	Northern Territory (<i>Adoption of Children Act 1994</i> , s 13)	Victoria, <i>Inquiry into adoption by same-sex couples</i>
Tasmania (<i>Adoption Act</i>)		

³⁶ See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed., Oxford University Press, Oxford, 2004) 588.

³⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 10 (entered into force 3 January 1976) does not expressly link marriage and procreation and thus may be interpreted as expressly recognising all forms of family.

1998, s 20)		
Western Australia (<i>Adoption Act 1994</i> , s 39)		

The Federal Government, in 2008, responded to a report of the Australian Human Rights Commission identifying 58 Federal Acts that discriminated against same-sex couples.³⁸ In November 2008, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) was passed. In accordance with this legislation s60H of the *Family Law Act 1975* (Cth) was amended to recognise a consenting non-birth mother as a parent.

Thus, in Australia, both state and federal governments have recognised the same-sex family unit and have made a determined effort to eradicate discrimination against same-sex couples and their children.³⁹ The Victorian legislature has been an active participant and a driving force in this recognition process. The amending of the *Assisted Reproductive Treatment Act 2008* (Vic) and the granting of legal recognition to the consenting non-birth mother of child conceived during the course of genuine same-sex relationship is confirmation of the belief that the sexuality of parents is irrelevant to the best interests of the children they raise. In passing this legislation Victoria has already validated same-sex parenting and with it the suitability of same-sex couples to parent. It would therefore be illogical for Victoria to continue to exclude same-sex couples from the adoption process.

5. Lessons from Overseas

A number of overseas jurisdictions have reformed their adoption legislation to include same-sex couples. In the United States, many states allow second parent adoption which enables the partner of the legally recognised parent to adopt the latter's child. These include Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.⁴⁰ In addition around 34 states allow same-sex couples to apply to adopt a child as a couple. In Canada, there is almost uniform recognition of adoption by same-sex parents who live together in a genuine domestic

³⁸ Research Paper, Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits. Areas of Federal law that Exclude Same-Sex Couples and their Children (Human Rights and Equal Opportunity Commission, 2006).

³⁹ See also the *Same-sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act (Cth) 2008* and the *Same-sex Relationships (Equal Treatment Commonwealth Laws –Superannuation) Act (Cth) 2008* which remove discrimination against same-sex couples from a raft of Commonwealth legislation in relation to superannuation, social security, taxation, veterans affairs and workers compensation.

⁴⁰ Human Rights Campaign, *Parenting Laws: Second Parent Adoption*, (14 December, 2012), < http://www.familiesthruurrogacy.com/files/pdf/USA_2nd_parent_adoption_laws_by_state.pdf >

relationship.⁴¹ In both the United States and Canada, the judiciary has been active in extending the laws of adoption to same-sex couples.⁴²

In the United Kingdom, c 38 of the *Adoption of Children Act 2002* (UK) provides that same-sex couples are eligible to adopt children. This was achieved by changing the definition of couple which reads as ‘two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.’⁴³

New Zealand has recently passed the *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) which has the effect of allowing same-sex couples to adopt, as well as marry. Previously there were restrictions on the ability of same-sex couples to adopt jointly, although individuals were able to adopt regardless of their sexual orientation or partner.⁴⁴ Recognition of same-sex marriage, however, has removed this obstacle as, under the requirements of s3(3) of the *Adoption Act 1955* (NZ) it is required that for a couple to adopt a child jointly, they must be spouses. With recognition of same-sex marriage, it follows that same-sex relationships have the same recognition as heterosexual relationships.

The increasing recognition of same-sex adoption and marriage around the globe demonstrates the significant change in the world-wide public perception of same-sex couples. To prevent same-sex couples from adopting is discriminatory and contrary to the views of Australians and the world at large. Changing attitudes have resulted widespread reform of archaic laws that prevent same-sex adoption. This has become a world-wide trend as more countries reject continued discrimination on the grounds of sexual orientation and move toward an equal and inclusive society for all families.

6. Conclusion

The *Adoption Act* in its existing form arbitrarily discriminates against same-sex couples. Whilst heterosexual couples are eligible to adopt children if they have ‘the capacity to provide a stable, secure and beneficial emotional and physical environment during a child’s upbringing until the child reaches social and emotional independence’,⁴⁵ same-sex couples are ineligible, even if they meet this requirement.

No evidence exists that children raised in same-sex families are disadvantaged. Not *all* same-sex couples make good parents, just as not *all* heterosexual couples make good parents. The *Adoption Act* should be amended so that same-sex couples are eligible to adopt, subject to the same eligibility criteria as opposite-sex couples. Prospective parents should be evaluated individually and by reference to their ability to parent, rather than their sexual orientation.

⁴¹ See for example *Civil Code of Quebec* LQ 1991, c64 art 546 and 578, *Adoption Act* SNL 1999, c A21, s 20(1) and *Adoption Act* SS 1998 c A 5.2, ss 16(2) and 23(1).

⁴² See for example *Jacob and Dana*, 660 NE 2d 397 (NY App, 1995) and *In the Matter of the Adoption of two children by H.N.R.*, 666 A 2d 535 (NJ Super AD, 1995). In these cases it was decided that it is in the interests of the child for the non-biological parent to be eligible to apply to adopt the biological child of their partner. For Canadian examples *Re K* (1995) 15 RFL (4th) 129 and *Re M* (C.S.) 2001 NSSF 24.

⁴³ *Adoption of Children Act 2002* (UK) c 38, s 49(1)(a) and s 144.

⁴⁴ *Adoption Act 1955* (NZ) s 3.

⁴⁵ *Adoption Regulations* r35(e).

To achieve parity between same-sex couples and heterosexual couples, and remove discrimination from the legislation, only minor amendments are required to the existing legislation. In particular, the existing definition of ‘de facto relationship’ which reads as ‘the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another’ should be amended to read: **‘the relationship between two persons, irrespective of sex, who live together on a bona fide domestic basis’**.

We urge the Victorian Government to reform the Adoption Act in accordance with this submission.

Dated 20 March 2015

A handwritten signature in blue ink, appearing to be 'P. Gerber' or similar, with a long horizontal stroke extending to the right.

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