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Submission to the Department for Education and Child Development, South Australia

Review of the South Australian Adoption Act 1988 and Adoption Regulations 2004

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1. **Introduction**
Since the turn of the century a number of social, legal, political and economic forces have converged, creating a climate in which same-sex couples are raising children in ever increasing numbers. Same-sex couples may become parents through a number of pathways including heterosexual intercourse, donor insemination, 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 limited alternatives for achieving parentage, the adoption process presents a particularly attractive pathway to parenting.

Furthermore, there is now a significant volume of research that establishes that same-sex couples are just as good parents as heterosexual couples.\(^1\) 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 South Australia – Adoption Act 1988 (SA)**
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.’\(^2\) 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.

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In South Australia, the *Adoption Act 1988* (SA) (*Adoption Act*) governs this process, and stipulates a number of threshold requirements that a couple must satisfy in order to be eligible to apply to adopt a child. Section 12(1) of the *Adoption Act* makes it a requirement that the adoptive parents be in “marriage relationship” – subject to the definition provided in s 4- for a continuous period of five years. Section 4 of the *Adoption Act* defines a “marriage relationship” as “the relationship between two persons cohabiting as husband and wife or *de facto* husband and wife.” This inhibits the ability of same-sex couples to be eligible to adopt as they cannot fit within this definition. This is further reiterated in the *Adoption Regulations 2004* (SA) (*Adoption Regulations*) under s19 (3) (c) which specifically excludes a person who is not in a marriage relationship from being eligible for adoption. An exception to this applies under section 12(2) of the *Adoption Act* and 19(3) of the *Adoption Regulations*, where “special circumstances” exists enabling the court to be satisfied that the adoption is appropriate. Special circumstances are not defined in the *Adoption Act* or the *Adoption Regulations*, leaving this to the discretion of the court. While same sex adoptions are not specifically prohibited in either the *Adoption Act* or the *Adoption Regulations*, these restrictions and definitional terms are widely viewed as implicit prohibition on the right of same sex couples to adopt in South Australia. Moreover, same-sex couples are not prohibited from caring for a foster child, or seeking parenting orders under *Family Law Act 1975* (Cth).

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’. Key requirements of the *Adoption Act* are “the suitability of the prospective adoptive parents and their capacity to care adequately for the child” which applies to all prospective parents who wish to make an application to adopt a child.

The Castan Centre for Human Rights Law agrees that in the interests of prospective adopted children, eligibility criteria are both necessary and desirable. However, it contends that 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 best the interests of the child.

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3 *Adoption Act 1988* (SA) s 12(1).
4 Ibid, s4
5 *Adoption Regulations 2004* (SA) s19 (3) (c)
6 *Adoption Act 1988* (SA) s12(2)
7 *Adoption Regulations 2004* (SA) s19(3)
10 *Adoption Act 1988* (SA) s22(1) (b).
(consistent with the UN Convention on the Rights of the Child), and not the sexual orientation of the prospective parents.

The existing eligibility criteria should thus be amended to exclude any implicit or explicit prohibition based on the sexual orientation of the prospective parents.

3. The Best Interests of the Child
There is an increasing number of same-sex families in Australia, with the 2011 census reporting in excess of 6,300 children living in same-sex couple families (up from 3,400 in 2001). This has given rise to an upsurge in social science and legal research presenting arguments for and against same-sex parenting.

3.1 The Empirical Evidence
The centrality of children’s interests has prompted those in favour of lesbian parenting to rely upon empirical research proving that children raised in lesbian-led families are ‘no different’ to those raised in heterosexual families. To do so requires researchers to prove a negative; namely, that lesbian parenting is ‘not harmful’ to children. 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.

A 2014 study conducted by researchers in Melbourne, the *Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey*, involved 315 eligible parents completing a survey which then 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 was a particularly pleasing aspect of this study as it also means the sample size is large enough to analyse the children of male gay parents. Many previous studies have 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. ‘Children of

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same-sex attracted parents demonstrate comparable health to other children across the population. However, the study did show that children of same-sex parents experience greater social stigma which can negatively impact mental and emotional wellbeing. 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.

The Columbia Law School’s “What We Know” Project, published in 2014, identified 75 scholarly studies conducted over 35 years which reviewed the wellbeing of children with gay or lesbian parents. Seventy One of these studies found these children ‘fare no worse’ than children raised by heterosexual parents. Only four studies concluded that children raised in same-sex families are worse off, and these were criticised for failing to take into account contributing factors such as family breakups and socioeconomic disadvantage. Thus, the “What We Know” Project leads us to the ‘overwhelming scholarly consensus…that having a gay or lesbian parent does not harm children.’

In Australia a number of law reform commissions have examined the empirical data relating to same-sex couples. As early as 1997, the NSW Law Reform Commission commented that ‘[t]here is no established connection, positive or negative, between people’s sexual orientation and their suitability as adoptive parents.’ The Victorian and Tasmanian law reform bodies have provided the most extensive responses to the question of whether same-sex parenting is in the interests of the child. In 2003, the Tasmanian Law Reform Institute (‘the Institute’) submitted a report on adoption by same-sex couples. The Report recommended that the Adoption Act 1988 (Tas) ‘be amended to permit a couple to apply for adoption regardless of the gender or marital status of the partners making up the couple’. This conclusion was reached after a painstaking analysis of the empirical data then available.

The Institute concluded that the best interests of children required that same-sex couples be eligible to adopt children. The Institute openly criticised arguments regarding sexual

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20 Tasmania Law Reform Institute, Adoption by Same Sex Couples, Final Report No 4 (2003) Recommendation 1. See also Recommendation 3(a) which recommended that ‘both step-parent and relative adoptions should be available to the same-sex partner of a parent or a relative of a child.’
identity on the basis that they reflected prejudices about homosexuality as an undesirable, wrong or a pathological condition.\(^{21}\)

The Victorian Law Reform Commission (VLRC) approached the question of the children’s interests from a much broader perspective. Its reference included not only adoption which is assessed on a case by case basis, but also eligibility criteria for assisted reproduction and consequential amendments such as recognition of parentage.\(^{22}\) As part of its investigation the VLRC commissioned Dr Ruth McNair to prepare an occasional paper into the ‘Outcomes for Children Born of A.R.T.’ A good portion of this paper is dedicated directly to the outcomes for children with same-sex parents. In this publication the author carefully summarised, analysed and examined the outcomes of these studies from the perspectives of the outcomes for the children themselves, their family functioning and the wider social environment. Dr McNair concluded that ‘family functioning (processes) rather than family structure is the critical factor in determining children’s outcomes’.\(^{23}\) The VLRC responded positively to these findings, stating that ‘there is sound evidence that children born into families with non-biological parents or same-sex parents do at least as well as other children’\(^{24}\) (emphasis added). This conclusion, phrased in the positive, replaces the deficit model of ‘just as good’ with a positive pronouncement of ‘at least as well’.

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
- 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
- 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.

These Studies accord with the observations of Nancy Polikoff, a renowned academic from the United States of America, who some 10 years ago summed up the results of the empirical data as follows:

By now there have been more than fifty peer reviewed studies with small samples published. While these studies have often included samples of convenience, many of them utilized control groups. All of them concluded that there is no relationship between the sexual orientation of a parent and the wellbeing of a child. To summarize, gay and lesbian parents have equal parenting abilities to heterosexuals, and raise children as happy, healthy and well-adjusted as children raised by heterosexual parents. The studies show no difference in the rate of psychiatric, emotional or behavioural difficulties and no differences in the quality of peer relationships, self-esteem or popularity of children raised by lesbian and gay parents.\(^\text{25}\)

However, as acknowledged earlier in this submission, there are some studies that maintain that children raised in same-sex families are at a distinct disadvantage to those raised in a heterosexual unit. 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.\(^\text{26}\) 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.’\(^\text{27}\) He states 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.

A number of flaws have been identified in this study. Firstly, the data analysed went back as far as 1997, when there was far less social acceptance of same-sex couples. Secondly, the ‘emotional issues’ suffered by children of same-sex parents are not clearly defined. Thirdly, the study makes 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.\textsuperscript{28} 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.

Thus the research demonstrates, that the 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/couples individual merits as parents, rather than their sexuality.

\subsection*{3.2 Australia’s International Obligations}

Consideration of the ‘best interests of the child’ should be paramount in determining adoption outcomes in order to ensure that South Australian 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 the South Australian adoption legislation does not specifically incorporate the CRC, s7 of the Adoption Act incorporates a similar best interests standard by providing that ‘the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration. In fact, s7 sets a higher standard for South Australia than is provided by the CRC, since it requires that the best interests principle be the paramount consideration, as opposed to a primary consideration.

In determining whether the child’s welfare has been of primary consideration, the Adoption Act provides limited guidance as to what factors need to be taken into consideration by the Court. The Adoption Act does place emphasis on an assessment report, which the court must consider in its determination as to whether the prospective parents have the ability to care for the child.\textsuperscript{29} Regulation 9 (3) of the Adoption Regulations 2004 (SA) outlines additional criteria that the report must have regard to, including the parenting skills,\textsuperscript{30} emotional warmth,\textsuperscript{31} maturity and stability,\textsuperscript{32} physical and mental health,\textsuperscript{33} economic position\textsuperscript{34} and the motivation of the applicant to adopt the child.\textsuperscript{35} It can be inferred that these criteria are relevant to the question as to whether the prospective adoptive parents are suitable and can adequately care for the child. At no

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{28}] Herb Scribner, \textit{New study says children with same sex parents are worse off} (20 February 2015) Deseret News National \langle\url{http://national.deseretnews.com/article/3606/New-study-says-children-with-same-sex-parents-are-worse-off.html#L1MwMrYfmAUBxh1.99}\rangle.
\item[\textsuperscript{29}] The Adoption Act 1988 (SA) s 22(1)(b).
\item[\textsuperscript{30}] The Adoption Regulations 2004 (SA) r 9(3)(a).
\item[\textsuperscript{31}] Ibid r 9(3)(d).
\item[\textsuperscript{32}] Ibid r 9(3)(d).
\item[\textsuperscript{33}] Ibid r 9(3)(e).
\item[\textsuperscript{34}] Ibid r 9(3)(h).
\item[\textsuperscript{35}] Ibid r 9(3)(o).
\end{itemize}
\end{footnotesize}
point does the law state that the parents’ sexual orientation should come into consideration. This strongly suggests that a parent’s sexual orientation is not a factor that has bearing upon the child’s best interests or that person’s ability to adequately care for a child.

Alston and Gilmour-Walsh\textsuperscript{36} 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 (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. It has been argued 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.\textsuperscript{37} 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’.\textsuperscript{38} For Australia to comply with the CRC, including Article 3 (best interests), Article 2 (non-discrimination) and Article 8 (respecting identity and familial relations), South Australia should allow same-sex couples to adopt.

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’.\textsuperscript{39}

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.


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. 40 ‘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. 41 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’. 42 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’. 43 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. 44 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. 45 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’. 46

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

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40 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.’
42 Article 7(1) CRC: ‘… the right to know and be cared for by his or her parents’.
43 See Committee on the Rights of the Child, Reports of General Discussion Days CRC/C/DOD/1 [2.1].
44 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.
45 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.
treaty provisions. The Committee recognised that the notion of ‘family’ might be construed 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. The recognition of family forms other than the nuclear family makes possible the inclusion of same-sex families within the concept of ‘family’. 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. Overview of Adoption by Same-Sex Couples across Australia

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. Victoria is currently reviewing its legislation.

4.1 Table 1: Jurisdictions allowing same-sex adoptions

<table>
<thead>
<tr>
<th>Australian Jurisdictions that allow same-sex couples to adopt</th>
<th>Australian Jurisdictions that do NOT allow same-sex couples to adopt</th>
<th>Australian Jurisdictions currently considering whether to allow same-sex couples to adopt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory (Adoption Act 1993, s 18)</td>
<td>Queensland (Adoption of Children Act 1964, s 12)</td>
<td>South Australia, Review of the Adoption Act 1988 s 12(1) and Adoption</td>
</tr>
</tbody>
</table>

49 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.
50 Adoption Act 1984 (Vic)
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.\textsuperscript{51} 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(1) 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 an effort to eradicate discrimination against same-sex couples and their children.\textsuperscript{52} The South Australian legislature has been a participant in this recognition process. The *Assisted Reproductive Treatment Act 1988* permits women irrespective of their sexuality to access assisted conception procedures if they “appear to be infertile”.\textsuperscript{53} Furthermore the *Family Relationships Act 1975* deems the female domestic partner of a woman who consents to an assisted conception procedure a parent of the resultant child.\textsuperscript{54} This 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 South Australia has already validated same-sex parenting and with it the suitability of same-sex couples to parent. It would therefore be illogical for South Australia to continue to exclude same-sex couples from the adoption process.

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\textsuperscript{52} 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.

\textsuperscript{53} *Assisted Reproductive Treatment Act 1988* (SA) s 9(1)(c).

\textsuperscript{54} *Family Relationships Act 1975* (SA) s 10C(3).
5. Lessons from Overseas

A number of overseas jurisdictions have extended their adoption legislation to include same-sex couples. In the United States, several states allow second parent adoption which enables the partner of the legally recognised parent to adopt the latter’s child. These include Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, New Jersey, New York, Pennsylvania, Indiana, Idaho and Massachusetts. In addition, around 34 states including California, Nevada, New Jersey, Vermont, Illinois, Connecticut, District of Columbia and Oregon 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 relationship. In both the United States and Canada, the judiciary has been active in extending the laws of adoption to same-sex couples.

In the United Kingdom, the Adoption of Children Act 2002 (UK) c 38 provides that same-sex couples are eligible to adopt children. This has been achieved through 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.’ 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. 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.

Same-sex couples also have the same adoption rights as heterosexual couples in countries such as Andorra, Belgium, Guam, Iceland, Israel, Norway, Spain, Sweden and South Africa. The increasing number of same-sex families thus represents a worldwide phenomenon, evoking a global response, with many overseas jurisdictions extending their adoption legislation to include same-sex couples. The increasing recognition of same-sex adoption and marriage around the globe demonstrates the significant change in the world-

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56 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).
57 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
58 Adoption of Children Act 2002 (UK) c 38, s 49(1)(a) and s 144.
59 Adoption Act 1955 (NZ) s 3.
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 1988 (SA), in its existing form, arbitrarily discriminates against same-sex couples. Whilst heterosexual couples are eligible to adopt children if they can demonstrate that they ‘have the capacity to care for the child’,<sup>60</sup> same-sex couples are ineligible, even if they meet this requirement. The evidence overwhelmingly suggests that same-sex parentage does not of and in itself disadvantage children. Not <i>all</i> same-sex couples make good parents, just as not <i>all</i> heterosexual couples make good parents. The Adoption Act must 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.

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 a “marriage relationship” in the Adoption Act should be changed to a ‘qualifying relationship’ as defined in the Family Relationships Act 1975 (SA),<sup>61</sup> and read: ‘A qualifying relationship means a marriage-like relationship between 2 people who are domestic partners (whether of the same or opposite sex).’ This would create synergy between the legislation and a coherent legislative framework. We urge the South Australian Government to reform the Adoption Act in accordance with this submission.

Dated 26 March 2015

Dr Adiva Sifris & Associate Professor Paula Gerber

<sup>60</sup> Adoption Act 1988 (SA) s22(1)(b).
<sup>61</sup> Family Relationships Act 1975 (SA) s10A(1)
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