

Standing Committee on Law and Justice

Adoption by same-sex couples

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Terms of reference

That the Standing Committee on Law and Justice inquire into and report on law reform issues regarding whether NSW adoption laws should be amended to allow same sex couples to adopt, with particular reference to:

- a. ascertaining whether adoption by same sex couples would further the objectives of the *Adoption Act 2000*
- b. the experience in other Australian and overseas jurisdictions that allow the adoption of children by same sex couples
- c. whether there is scope within the existing programs (local and international) for same sex couples to be able to adopt
- d. examining the implications of adoption by same sex couples for children, and
- e. if adoption by same sex couples will promote the welfare of children, then examining what legislative changes are required.¹

The terms of reference for the inquiry were referred to the Committee by the Minister for Community Services, the Honourable Linda Burney MP, on 27 November 2008.

¹ LC *Minutes* No 81, 2 December 2008, Item 14, p 943

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Chair's foreword

This inquiry into adoption by same-sex couples has been an unusually challenging one for the Law and Justice Committee. It has encompassed complex arguments not just about legal issues associated with the rights of children with respect to family and those of adults with respect to anti-discrimination. More notably, a core aspect of the inquiry has been the moral and belief-based arguments concerning the best interests of children, the role of family, and the kind of society we aspire to live in. In turn, these belief-based arguments have meant that there has been an unusual polarisation of views expressed during the inquiry about whether same-sex couples should or should not be eligible to adopt.

These challenges point to the value of a parliamentary committee undertaking an inquiry on a matter such as this, on which there are diverse and strongly held views within the community. As it is not possible for the House itself to thoroughly investigate complex policy issues, it is the role of parliamentary committees to do this and to make recommendations to the Government, having given detailed consideration to the views of a broad range of stakeholders. Just as the composition of the House reflects the broader community, so too does the membership of this Committee, each of whom brought their own perspective to the inquiry process.

The Committee has determined that the *Adoption Act 2000* should be amended to allow same-sex couples to adopt, but that an exemption from the application of the *Anti-Discrimination Act 1977* be created for faith-based adoption agencies. The Committee has concluded that reform to allow same-sex couples to adopt in NSW will protect children's rights and help to ensure children's best interests. It will do so by providing the security of legal recognition for existing parent-child relationships, by broadening the pool of potential applicants from which the most appropriate parents for any individual child are selected, and by enabling children currently fostered by same-sex couples to have that relationship permanently secured where appropriate. Such reform will also address discrimination against same-sex couples and their children, and address anomalous inconsistencies in their present treatment under the law.

I thank each of my Committee colleagues for their contribution to this inquiry, and for the exhaustive way they have fulfilled their responsibilities to consider the evidence presented to us, and to form their own views, on the basis of that evidence, about the most appropriate legislative and policy provision for adoption by same-sex couples. I also thank the Committee secretariat for their very professional work on each aspect of this complex and demanding inquiry.

Finally, on behalf of the Committee, I express our gratitude to all those who participated in the inquiry, via written submissions and oral evidence, for their thoughtful and valuable contributions.



Hon Christine Robertson MLC

Committee Chair

Executive summary

This inquiry encompassed a range of complex and sensitive issues associated with whether same-sex couples should be able to adopt children, not only those ‘unknown’ children generally associated with adoption, but also those who are already ‘known’ to gay and lesbian people through existing foster care, step-parent and second-parent relationships.

In conducting the inquiry, the Law and Justice Committee gave detailed consideration to the objects of the *Adoption Act 2000* (hereafter the *Adoption Act*), particularly the object that the best interests of the child be the paramount consideration in decision-making and policy in respect of adoption. In doing so, the Committee carefully examined the views, beliefs and reasoned arguments about the family arrangements most critical to the best interests of the child in the short and longer term, as well as the available research evidence in relation to this contested topic. The Committee also examined the human rights and legal issues associated with adoption by same-sex couples, including anti-discrimination law, the legal recognition of existing parent-child relationships, and inconsistencies in the treatment of same-sex couples under the present law. Finally, the Committee closely considered participants’ arguments in respect of whether faith-based adoption agencies should be exempted from a requirement not to discriminate against same-sex couples resulting from reform to the *Adoption Act*.

This inquiry is noteworthy for the Committee in that the views of stakeholders were significantly influenced by their religious and other beliefs, and arguments based on reason, about fundamental issues to do with the family, the wellbeing of children, and the standards that should operate in broader society. Thus, throughout the inquiry, in both submissions and oral evidence, the issues under consideration were influenced not only by legal and policy opinion, as well as factual information, but also these strongly and deeply held beliefs. The Committee has sought to document and consider the evidence presented by all inquiry participants with balance and sensitivity.

The conclusion reached by the majority of Committee members is that the *Adoption Act* should be amended to allow same-sex couples to adopt, but that an exemption from the application of the *Anti-Discrimination Act 1977* be created for faith-based adoption agencies, subject to those agencies meeting a statutory requirement that they refer any same-sex couples who seek their services to another accredited adoption agency that will assist them.

Chapter 1 – Introduction

This chapter provides an overview of the inquiry process, including the methods the Committee used to facilitate participation by members of the public, government agencies and other important stakeholders.

The terms of reference for the inquiry were referred to the Committee by the Hon Linda Burney MP, Minister for Community Services, on 27 November 2008. The reference arose out of a review of the *Adoption Act* by the Department of Community Services (DoCS) in 2006-2007, during which a proposal to allow adoption by same-sex couples emerged as a sensitive and contested issue.

This inquiry received a total of 341 submissions. Hearings were held on 24 and 25 February and 19 March 2009, with a total of 39 witnesses. Among the witnesses were representatives of adoption agencies, church organisations, legal organisations, as well as academics in the fields of law and psychology. In addition, three same-sex couples gave evidence, as did three heterosexual married

couples who had adopted children. Five children and young people, each parented by one of the same-sex or heterosexual couples, also took part in the hearings. The Committee thanks each of the individuals and organisations who made submissions or gave evidence during the inquiry.

Chapter 2 - Background

This chapter provides information on the *Adoption Act* and the present legal and regulatory framework with regard to adoption and foster care in NSW, including the present exclusion of same-sex couples from adoption. It outlines the process of adoption in NSW, including the role of DoCS and accredited non-government adoption agencies, and describes the different types of adoption. The chapter also provides information on recent legislative change to equalise same-sex relationships with heterosexual relationships in NSW and Commonwealth law. It then provides an overview of adoption law and foster care in other Australian jurisdictions and details adoption numbers in NSW for the 2007-2008 period.

Adoption is the legal process which permanently transfers all the legal rights and responsibilities of parenthood from a child's birth parents to the adoptive parents. DoCS is the government department responsible for the provision of adoption services in NSW, sharing responsibility for local adoptions with three accredited non-government organisations. DoCS is currently the only agency in NSW that arranges intercountry adoption placements. All adoption agencies must comply with the objectives and requirements of the *Adoption Act*.

Local adoption refers to Australian children who are adopted within Australia. Such adoptions are referred to as either 'known' or 'unknown'. In 'unknown' adoptions the child has been relinquished by his or her birth parents and is available for adoption by suitable applicants. 'Known' adoptions are where a child has an existing relationship with their prospective adoptive parents, such as relatives, step-parents or carers, including foster parents. Intercountry adoptions involve non-Australian citizen children from outside Australia.

In 2007-2008 a total of 125 adoption orders were finalised in NSW. Of those adoptions, 73 were intercountry. Of the remaining 52 local adoptions, 15 were unknown and 37 were known. Known adoptions for this period were comprised of ten step-parent, 22 foster carer, three other relatives and two special case adoptions. During this period, 19 children were placed for adoption in the local adoption program.

According to the most recent Australian Bureau of Statistics data, 0.4% of the Australian population (approximately 50,000 people) identified as being in a same-sex de facto relationship in 2006. In the same year, an estimated 4,376 children were living in same-sex couple families across Australia.

Chapter 3 – Best interests of the child

This chapter documents the views of inquiry participants on adoption by same-sex couples in light of the objects of the *Adoption Act*, most notably the object that the best interest of the child be paramount in decision making about adoption. Views on how the best interests of children are to be interpreted fell into two broad streams. The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality. The chapter also considers the evidence gathered during the inquiry on children's views of adoption by same-sex couples.

It is not possible to entirely disentangle the arguments presented in this chapter from the research evidence documented in the following one. Nevertheless, the majority of the Committee draws some conclusions at this stage with regard to the various views, beliefs and reasoned arguments presented during the inquiry about the perceived best interests of the child in respect of adoption by same-sex couples, as well as the arguments reflecting the way the adoption system works in practice. Our conclusions with regard to the research evidence are made in Chapter 4.

Some members of the Committee consider that the best interests of children are met in the context of a family comprised of a mother and a father in a permanent, preferably married relationship, where the child can experience on a daily basis the fundamental complementarity of motherhood and fatherhood. These members believe that mothers and fathers bring unique qualities to their parenting roles, both of which are essential to optimal child development. These members further consider that the state has a duty of care to ensure that children are adopted into families that will provide 'optimal care', and that same-sex parenting denies children such care, to their detriment in the short and longer term. Correspondingly, these members consider that the Government has a responsibility to adoptive children and to broader society to prevent adoption by same-sex couples.

The majority of members, however, consider that the gender of parents is not a significant determinant of children's wellbeing, and that as such, the sexual orientation of prospective parents is of no material relevance to the best interests of adoptive children. Nor do the majority consider that the sexuality of gay and lesbian people precludes them from being fit and proper parents, or that children in same-sex families necessarily have insufficient access to both male and female role models. The majority of Committee members are persuaded by the argument that an adoptive child's best interests are determined in the context of an assessment of the individual child's needs and the individual prospective parents' capacity to meet those needs. The majority of Committee members believe that same-sex parents should be able to be assessed on exactly the same basis as other prospective parents.

The majority note that if legally eligible to adopt, gay and lesbian people will, like all prospective parents, be subject to a rigorous assessment process by accredited adoption agencies to determine their suitability to adopt; they will also be subject to the preferences of relinquishing parents; and they must ultimately satisfy a court that they can fulfil the best interests of the child concerned. The majority of Committee members are confident in the rigour of the adoption system to continue to ensure that only those who would make fit and proper parents go on to adopt.

In addition, the majority of members are persuaded by a number of other arguments that the best interests of the child will be served by reform to allow adoption by same-sex couples. It is highly desirable to broaden the pool of adoptive parents in order to increase the likelihood of the best match between individual child and prospective parent. Also, the permanency that is so desirable for many children in out-of-home care would be facilitated by enabling same-sex couples to adopt their foster children.

Chapter 4 – Research on family form and family functioning

This chapter considers the research on parenting and outcomes for children which was presented during the inquiry, with particular emphasis on the research evidence regarding the importance of family form and family functioning to the optimal development of children. The chapter provides an overview of the criticisms made by participants with regard to the methodology and ideology of various studies, and presents a framework for objectively evaluating the research. Finally, it outlines suggestions for an appropriate policy response to the research. The Committee did not undertake own review of the research literature.

The Committee decided to deal with the research evidence in this chapter, separate to its analysis of the belief-based arguments, religious and otherwise, documented in Chapter 3, because the arguments with respect to the findings of various research studies and their methodological limitations were of such complexity as to warrant detailed consideration in their own right.

Some members of the Committee are persuaded by research suggesting that the interests of children are best served in a family parented by both a mother and father in a permanent, preferably married relationship. They are also persuaded by research reviews that question the methodology and validity of studies in support of same-sex parenting. These members conclude that there is insufficient research to suggest that children are not harmed or disadvantaged by being raised in a same-sex parented family. Accordingly, these members support the policy position that continues to preclude adoption by same-sex couples.

The majority of Committee members, however, are persuaded that the research evidence is weighted in favour of family functioning as the primary determinant of outcomes for children, regardless of gender and sexuality. These members are convinced that the research demonstrates that the development of positive relationships, and the provision of a supportive, nurturing and loving environment, benefit children most in both the short and longer term. Moreover, these members believe that the evidence suggests that sexual orientation is no indicator of parenting fitness or ability, and that there is no substantial research evidence to suggest that children are disadvantaged or harmed by being raised by same-sex parents. In addition, the majority of members do not consider that a perceived lack of evidence to suggest that children are not harmed or disadvantaged is a sufficient argument to maintain the status quo.

The majority of members are also persuaded that social science research in this field has grown in sophistication and methodological rigour over time, and that the weight of the up-to-date social science research suggests that same-sex parenting is as likely to result in positive developmental outcomes for children as opposite-sex parenting.

The majority's analysis of the available literature on the respective impact of family form and family functioning on children's developmental outcomes thus confirms our opinion that it is in the best interests of adoptive children for prospective parents to be evaluated individually on the basis of their ability to provide the best environment for a particular child.

Chapter 5 – Human rights and legal issues

This chapter turns to the evidence gathered during the inquiry with respect to the human rights of children and prospective parents in the adoption context, along with several other legal issues. It commences by documenting the rights-based arguments in respect of anti-discrimination and the legal recognition of existing parent-child relationships. It then considers the evidence about inconsistencies in the present legislation which allow for foster care by same-sex couples but not adoption, adoption by gay and lesbian individuals but not couples, and the presumption of parentage that applies only to certain same-sex parents. The chapter then examines the potential implications of adoption by same-sex couples for the intercountry adoption system.

Having considered the evidence about anti-discrimination with respect to adoption by same-sex couples, some members of the Committee believe that the call for anti-discrimination in adoption law elevates the rights of adults above those of children, contrary to the objects of the *Adoption Act*. These members emphasise that the best interests of the child, as reflected in the presence of a mother and

father in a permanent, preferably married relationship, must always override the claims of adults, even in relation to anti-discrimination.

The majority of Committee members, however, conclude that the best interests of children would be served by an end to discrimination against same-sex couples under adoption law. These members agree that sexual orientation is not a valid basis on which to determine whether a person should be a parent, and that all prospective parents are entitled to have their capacity to parent assessed on an equal basis. The members who form the majority are similarly concerned that the current exclusion of same-sex couples is also discriminatory against their children. The majority further note the human rights principles underpinning the imperative to address discrimination in respect of both groups. These members observe that the growing national and international trend in the legal recognition of same-sex relationships, as well as the support for recognition in adoption law among several noteworthy law reform bodies, lend further weight to this imperative. The majority of members also agree that removing discrimination from the *Adoption Act* would promote equality and send an important message to broader society about the positive contributions and capacities of gay and lesbian parents.

With respect to the arguments put forward in relation to the legal recognition of existing parent-child relationships, some members of the Committee do not consider that opening up adoption to same-sex couples is necessary to ensure that children in gay and lesbian parented families have legal recognition. These members maintain that to utilise adoption law to address these deficits would be to undermine the principles underpinning the *Adoption Act*, to the detriment of other children and society in general. These members believe that there may be alternative means, with less fundamentally negative consequences, to remedy some of the legal disadvantages experienced by children with same-sex parents.

The majority of members, however, consider that it is in the best interests of children already parented by gay and lesbian people to have their relationships legally recognised via amendment to the *Adoption Act*. These members have formed this conclusion in its own right, notwithstanding the previous arguments about the imperative of anti-discrimination. These members also note that it is in this area of known adoptions that reform to allow same-sex couples to adopt will have its greatest impact. It is observed that a number of same-sex parent-child relationships are already recognised in law, while others remain excluded from recognition and thereby do not enjoy the significant legal, material, social and emotional benefits that accompany full legal recognition. The majority of members further note the human rights arguments in respect of children that underscore the call for legal recognition of both their same-sex parents.

The majority of members are also persuaded that alternative forms of legal recognition are inferior to the recognition granted via adoption, and that reform to adoption law is the best mechanism to overcome these deficits. These members do not agree that to utilise the *Adoption Act* for this purpose will undermine the objects of that Act. On the contrary, they consider that it will further enhance these objects, especially with regard to ensuring that the best interests of the child are to be the paramount consideration in adoption law and practice, and that Australia complies with its obligations under international agreements.

The majority of members consider that the inconsistencies in the present law between adoption by same-sex couples and other closely related provisions are undesirable and not in the best interests of children. These members agree that it is nonsensical that the law enables a child to be placed with foster parents whom it would later preclude from adopting the same child, and that this is especially the case in light of the desirability of permanency for many children in out-of-home care. The members who form the majority also note the advice of DoCS that same-sex couples are helping meet a need for

foster carers, and are providing care very effectively. The majority of members further consider it anomalous and misguided to allow same-sex couples to adopt as individuals but not as a couple. Similarly, these members conclude that it is undesirable that there is now a presumption of parentage in relation to same-sex couples only in the limited circumstances of the same-sex partner of a woman who has undergone a fertilisation procedure.

The majority of Committee members are satisfied that no negative effects arising from reform can reasonably be anticipated for the intercountry adoption program, given that the criteria set by the country from where the child originates prevail, and that all countries in the program currently exclude same-sex couples.

Having considered all of the evidence documented in this chapter, and in light of our conclusions in the previous two chapters, the majority of Committee members conclude that the NSW Government should amend the definitions of ‘couple’, ‘de facto relationship’ and ‘spouse’ in the Dictionary of the *Adoption Act* to reflect the non-discriminatory definitions of the *Property (Relationships) Act 1984*. This will enable same-sex couples to apply to be assessed for adoption as a couple and will provide same-sex step-parents with equal access to existing step-parent adoption provisions. Other members of the Committee do not support this proposal.

In addition, the majority of members conclude that the NSW Government should ensure that all same-sex couples are able to have their parent-child relationships legally recognised by introducing a new second-parent adoption provision similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act*. This new provision should not include the current onus in section 30(d) of the *Adoption Act* which weighs against making the order. Other members of the Committee do not support this proposal.

Chapter 6 - Exemptions

This chapter examines the issue of whether faith-based adoption agencies should be exempt from anti-discrimination legislation if the law is changed to allow same-sex couples to adopt. While the *Anti-Discrimination Act* includes an exemption for religious bodies in certain circumstances, there is uncertainty as to whether this exemption would apply in the case of adoption services provided by faith-based agencies. During the inquiry there was debate as to whether these organisations would be exempt from the *Anti-Discrimination Act* as a matter of law and whether they should be exempt as a matter of policy.

After concluding that adoption by same-sex couples does further the objects of the *Adoption Act*, the most significant factor in the majority of the Committee’s reasoning to recommend that the law be changed to allow same-sex couples to adopt has been the right of gay and lesbian people to be free from discrimination in this area of life as they should be in all areas of life. The majority of the Committee believe that, in this regard, the argument against an exemption, that agencies offering public-funded services should not be permitted to discriminate, is very compelling. Other members of the Committee do not support this position.

The Committee notes the arguments in support of an exemption for faith-based agencies. While the Committee respects the right to religious freedom, it is not clear to some Committee members that the ability to provide adoption services to heterosexual couples while denying them to other couples based on their homosexuality alone is a matter of religious freedom. Other Committee members believe that faith-based adoption agencies should be able to provide adoption services in accordance with the tenets of their religious beliefs, and that this is sufficient reason alone to justify an exemption. The majority of

the Committee is not persuaded that these reasons alone justify the application of an exemption to this aspect of their work. Other members of the Committee do not share this view.

The Committee has, however, noted the proposition that these agencies would be placed in an untenable position if required to provide adoption services to same-sex couples, given the religious tenets upon which their operations are based, and that this might lead them to withdraw their services altogether. It is the Committee's view that this would be an undesirable consequence of reform and one that would not be in the best interests of children in general. It is important that the faith-based adoption agencies are able to continue their valuable work in facilitating adoptions in NSW.

The Committee has therefore concluded that, as a matter of policy, faith-based adoption agencies should be exempt from discrimination law in relation to providing same-sex couples with adoption services.

It is also the Committee's view that, due to the uncertainty concerning the scope of the exemption in section 56 of the *Anti-Discrimination Act* arising from the decision of the Administrative Decisions Tribunal in *OV and anor v QZ and anor*, a legislative amendment is required to ensure that faith-based adoption agencies can continue their policies of not providing services to same-sex couples. It is our view that, in order for all those involved in the adoption field to be certain about the application of the law to them, an exemption should be unequivocally spelt out.

The majority of the Committee has not drawn conclusions as to the precise form that this amendment should take, except to express the firm view that, as this inquiry relates specifically to the issue of adoption by same-sex couples, the exemption should be confined to the provision of adoption services. The exemption should not extend, directly or indirectly, to matters outside the Committee's terms of reference, such as foster care services. Other Committee members believe that formal legal advice should be sought on this issue.

The majority of the Committee is also of the view that an exemption from the application of the *Anti-Discrimination Act* for faith-based adoption agencies in the provision of services to same-sex couples should be linked to a requirement that these agencies refer any same-sex couples who seek their services to another accredited adoption agency that will assist them. At present, this would entail a referral to either the Department of Community Services or Barnardos, although in the future would include any other agencies that may become accredited. Other members of the Committee do not support this position.

The majority of the Committee is also of the view that if an exemption is created, the Department should ensure that the role of the various accredited adoption agencies is such that all applicants for adoption have equal access to the different groups of children that are currently the focus of each agency's work. For example, at present, Barnardos only deals with older children with complex needs, while Anglicare and CatholicCare focus on adoptions of unknown infants. DoCS facilitates both known and unknown adoptions. Unless DoCS and/or a secular non-government adoption agency continues to facilitate unknown adoptions, gay and lesbian couples would effectively be restricted to utilising Barnardos, and their equity of access to unknown adoptions would be significantly restricted. It will be important to ensure that gay and lesbian people are not inadvertently precluded from applying to adopt unknown infants, that their access is not restricted by geography, or that they may, in effect, only adopt children with complex needs. Other members of the Committee do not support this view.

Summary of recommendations

Recommendation 1

119

That the NSW Government seek to amend the definitions of ‘couple’, ‘de facto relationship’ and ‘spouse’ in the Dictionary of the *Adoption Act 2000* to reflect the non-discriminatory definition of de facto relationships in the *Property (Relationships) Act 1984*, thereby enabling same-sex couples to apply to be assessed for adoption as a couple and providing same-sex step-parents with equal access to existing step-parent adoption provisions.

Recommendation 2

119

That the NSW Government seek to introduce a new second-parent adoption provision similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act 2000* to ensure that all same-sex couples are able to have their parent-child relationship legally recognised. This new provision should not include the current onus in section 30(d) of the *Adoption Act* which weighs against making the order.

Recommendation 3

130

That included in any legislative amendment to allow same-sex couples to adopt should be an exemption for faith-based adoption agencies from the application of the *Anti-Discrimination Act 1977* in relation to providing same-sex couples with adoption services.

Recommendation 4

130

That, if an exemption from the application of the *Anti-Discrimination Act 1977* is created for faith-based accredited adoption agencies in the provision of services to same-sex couples, the exemption should be linked to a statutory requirement that the agencies refer any same-sex couples who seek their services to another accredited adoption agency that will assist them.

Recommendation 5

131

That, if an exemption from the application of the *Anti-Discrimination Act 1977* is created for faith-based accredited adoption agencies in the provision of services to same-sex couples, the Department of Community Services ensure that in practice all applicants for adoption have equitable access to the full range of children subject to local adoption.

Acronyms

ABS	Australian Bureau of Statistics
ACWA	Association of Children's Welfare Agencies
ADT	Administrative Decisions Tribunal New South Wales
AIHW	Australian Institute Health and Welfare
<i>BDMR Act</i>	<i>Births, Deaths and Marriages Registration Act 1995</i> (NSW)
CROC	Convention on the Rights of the Child
DoCS	Department of Community Services
FRC	Family Relationship Centres
GLRL	Gay and Lesbian Rights Lobby
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NCOSS	NSW Council of Social Services
NSW LRC	NSW Law Reform Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
VLRC	Victorian Law Reform Commission
WLS NSW	Women's Legal Services NSW

Chapter 1 Introduction

This chapter provides an overview of the inquiry process, including the methods the Committee used to facilitate participation by members of the public, government agencies and relevant organisations. It also includes an outline of the report's contents.

Overview

- 1.1 This inquiry encompassed a range of complex and sensitive issues associated with whether same-sex couples should be able to adopt children, not only those 'unknown' children generally associated with adoption, but also those who are already 'known' to gay and lesbian people through existing foster care, step-parent and second-parent relationships.
- 1.2 In conducting the inquiry, the Law and Justice Committee gave detailed consideration to the objects of the *Adoption Act 2000* (hereafter *Adoption Act*), particularly the object that the best interests of the child be the paramount consideration in decision-making and policy in respect of adoption. In doing so, the Committee carefully examined the diverse views, beliefs and reasoned arguments about the family arrangements most critical to the best interests of the child in the short and longer term, as well as the available research evidence in relation to this contested topic. The Committee also examined the human rights and legal issues associated with adoption by same-sex couples, including anti-discrimination law, the legal recognition of existing parent-child relationships, and inconsistencies in the treatment of same-sex couples under the present law. Finally, the Committee closely considered participants' arguments in respect of whether faith-based adoption agencies should be exempted from a requirement not to discriminate against same-sex couples resulting from reform to the *Adoption Act*.
- 1.3 The conclusion reached by the majority of Committee members is that the *Adoption Act* should be amended to allow same-sex couples to adopt, but that an exemption from the application of the *Anti-Discrimination Act 1977* should be created for faith-based adoption agencies in the provision of services to same-sex couples, subject to those agencies meeting a statutory requirement that they refer any same-sex couples who seek their services to another accredited adoption agency that will assist them.

Background to the inquiry

- 1.4 The issue of adoption by same-sex couples arose during a broad review of the *Adoption Act* conducted by the Department of Community Services (DoCS) during 2006-2007. The review involved extensive community consultation, resulting in the receipt of a large number of submissions by the Department. Submissions included the expression of views both for and against adoption by same-sex couples, as well as research citations to support both these positions.
- 1.5 A report on the Department's review of the *Adoption Act* was tabled in Parliament in October 2006.² With regard to the issue of adoption by same-sex couples, the report noted the need to further examine the views of both sides of the debate.

² Department of Community Services, Answers to question on notice, p 4

- 1.6 Following the report to Parliament, the then Minister for Community Services referred the issue of adoption by same-sex couples, along with other sensitive issues canvassed in the review, to a Ministerial Advisory Committee comprised of experts in child welfare law and practice, for further consideration and advice. In July 2007, the Ministerial Advisory Committee advised the Minister that it considered that ‘parenting capacity should be the only criteria applied to who can adopt and that adoption should be open to same-sex couples.’³
- 1.7 The recommendations of the Department’s review became the basis for reforms to the *Adoption Act* brought about by the *Adoption Amendment Act 2008*. The focus of these reforms included streamlining the adoption process, simplifying the eligibility criteria for adoption with a greater focus on parenting capacity, and encouraging openness in adoption practices.⁴

Inquiry terms of reference

- 1.8 The terms of reference for the inquiry were referred to the Committee by the Hon Linda Burney MP, Minister for Community Services, on 27 November 2008. The terms of reference are reproduced on page iv.

Conduct of the inquiry

Submissions

- 1.9 The Committee called for submissions through advertisements placed in *The Sydney Morning Herald* and *The Daily Telegraph* in early December 2008 and by writing to relevant agencies, organisations and individuals. A total of 341 submissions were received from individuals, adoption agencies, legal organisations, church bodies, community advocacy groups, the NSW Government and a range of other organisations. The submissions are listed in Appendix 1 and a selection have been published on the Committee’s website at www.parliament.nsw.gov.au/lawandjustice.

Public hearing

- 1.10 The Committee held public hearings at Parliament House on 24 and 25 February and 19 March 2009. Among the 39 witnesses were representatives of adoption agencies, church organisations and legal organisations, as well as academics in the fields of law and psychology. In addition, three same-sex couples gave evidence, as did three heterosexual married couples who had adopted children. Five children and young people, each parented by one of the same-sex or heterosexual couples, also took part in the hearings. Of the total, 13 witnesses gave evidence *in camera*. A list of witnesses is presented in Appendix 2.
- 1.11 The Committee thanks each of the individuals and organisations that made a submission or gave evidence during the inquiry.

³ Department of Community Services, Answers to question on notice, pp 4-5

⁴ The Hon Henry Tsang MLC, Parliamentary Secretary, Second reading speech on the Adoption Amendment Bill 2008

Report structure

- 1.12** **Chapter 2** provides information on the *Adoption Act* and the present legal and regulatory framework with regard to adoption and foster care, including the present exclusion of same-sex couples from adoption. It outlines the process of adoption in NSW, including the role of the Department and accredited non-government adoption agencies, and describes the different types of adoption. The chapter also provides information on recent legislative change to equalise same-sex relationships with heterosexual relationships in NSW and Commonwealth law. It then provides an overview of adoption law and foster care in other Australian jurisdictions and details the number of children adopted in NSW in 2007-2008.
- 1.13** **Chapter 3** documents the views of inquiry participants on adoption by same-sex couples in light of the objects of the *Adoption Act*, most notably the object that the best interest of the child be paramount in decision making about adoption. Views on how the best interests of children are to be interpreted fell into two broad streams. The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality. The chapter then notes the evidence gathered during the inquiry on children's views of adoption by same-sex couples.
- 1.14** **Chapter 4** outlines the research on parenting and outcomes for children which was presented to the Committee through submissions, oral evidence and answers to questions on notice, with particular emphasis on the research evidence regarding the importance of family form and family functioning to the optimal development of children. The chapter provides an overview of the criticisms made by participants with regard to the methodology and ideology of various studies, and includes a framework for objectively evaluating the research. Finally, it outlines suggestions for an appropriate policy response to the research. The Committee did not undertake its own extensive review of the research literature.
- 1.15** The Committee decided to deal with the research evidence in this chapter, separate to its analysis of the diverse views, beliefs and reasoned arguments, religious and otherwise, documented in Chapter 3, because the arguments with respect to the findings of various research studies and their methodological limitations were of such complexity as to warrant detailed consideration in their own right. The Committee notes, however, that it is not possible to entirely disentangle the arguments analysed in Chapter 3 from the research evidence documented in Chapter 4.
- 1.16** **Chapter 5** turns to the evidence gathered during the inquiry with respect to the human rights of children and prospective parents, along with several other legal issues. The chapter commences by documenting the rights-based arguments in respect of anti-discrimination and the legal recognition of existing parent-child relationships. It then considers the evidence about inconsistencies in the present legislation which allow for foster care by same-sex couples but not adoption, adoption by gay and lesbian individuals but not couples, and the presumption of parentage that applies only to certain same-sex parents. The chapter then examines arguments about the implications of adoption by same-sex couples for the intercountry adoption program.

- 1.17** **Chapter 6** examines the issue of whether faith-based adoption agencies should be exempt from anti-discrimination legislation if the law is changed to allow same-sex couples to adopt. While the *Anti-Discrimination Act 1977* includes an exemption for religious bodies in certain circumstances, there is uncertainty as to whether this exemption would apply in the case of adoption services provided by faith-based agencies. During the inquiry there was debate as to whether these organisations would be exempt from the *Anti-Discrimination Act* as a matter of law and whether they should be exempt as a matter of policy.

A note on the sensitivities of this inquiry

- 1.18** This inquiry is noteworthy for the Law and Justice Committee in that the views of stakeholders were significantly influenced by their religious and other beliefs about fundamental issues to do with the family, the wellbeing of children and the standards that should operate in broader society. Thus, throughout the inquiry, in both submissions and oral evidence, the issues under consideration were influenced not only by legal and policy opinion, as well as factual information, but also these strongly and deeply held beliefs. The Committee has sought to document and consider the evidence presented by all inquiry participants with balance and sensitivity.

Chapter 2 Background

This chapter sets the scene for the body of the report by providing factual information on adoption in NSW and around Australia. It outlines the relevant legislation concerning adoption in NSW, including the current exclusion of same-sex couples, and explains the adoption system in this State. It provides information on adoptions for the 2007-2008 period and the available statistical information on same-sex couple families. The chapter then provides a brief overview of other NSW and Commonwealth legislation concerning same-sex couples, before documenting the legal status of same-sex couples with respect to adoption in each of the other states and territories, and in other countries. For a detailed account of the adoption system in NSW prior to 2000, see the report of the Standing Committee on Social Issues, *Releasing the Past: Adoption Practices 1950-1998 – Final Report*.⁵

Adoption Act 2000

2.1 Adoption is the legal process which permanently transfers all the legal rights and responsibilities of being a parent from a child's birth parent(s) to the adoptive parent(s). In NSW adoption is regulated by the *Adoption Act 2000*.

Objects

2.2 Section 7 of the *Adoption Act* sets out the objects of the legislation as follows:

- (a) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice,
- (b) to make it clear that adoption is to be regarded as a service for the child concerned,
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage,
- (d) to recognise the changing nature of practices of adoption,
- (e) to ensure that equivalent safeguards and standards to those that apply to children from New South Wales apply to children adopted from overseas,
- (f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,
- (g) to encourage openness in adoption,
- (h) to allow access to certain information relating to adoptions,

⁵ NSW Legislative Council, Standing Committee on Social Issues, *Releasing the Past: Adoption Practices 1950-1998 – Final Report*, Report 22, December 2000.

- (i) to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.⁶

Eligibility

2.3 Eligibility to adopt is outlined in the *Adoption Act* in Chapter 4, sections 26 to 31 inclusive. An application to adopt can be made by one person or by a couple, including a relative or step-parent of the child.⁷

2.4 Same-sex couples are effectively prevented from applying to adopt a child in NSW by the definition of ‘couple’ and ‘de facto relationship’ contained in the *Adoption Act*:

“couple” means a man and a woman who:

- (a) are married, or
- (b) have a de facto relationship.⁸

“de facto relationship” means 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.⁹

2.5 An individual person can apply to adopt, irrespective of sexual orientation. If an individual is in a couple relationship and is not making a joint application, consent from their spouse is required.¹⁰ A heterosexual couple can later submit a step-parent application for adoption to legally recognise both partners as parents of the child, whereas a homosexual couple cannot.¹¹

2.6 Where one member of a same-sex couple is already a parent, of either a biological or adopted child, their partner is prevented from adopting that child by the definition of step-parent:

“step parent” means, in relation to a particular person, another person who:

- (a) is not a birth parent or adoptive parent of the particular person, and
- (b) is married to the particular person’s birth parent or adoptive parent or has had a de facto relationship of 3 or more years duration with the birth parent or adoptive parent.¹²

⁶ *Adoption Act 2000* (NSW), s 7

⁷ *Adoption Act 2000*, Ch 4, ss 26-31

⁸ *Adoption Act 2000*, Dictionary

⁹ *Adoption Act 2000*, Dictionary

¹⁰ *Adoption Act 2000*, s 27

¹¹ *Adoption Act 2000*, s 30(1)

¹² *Adoption Act 2000*, Dictionary

Principles for decision making about adoption

2.7 Section 8(1) sets out the principles to be considered in making a decision about the adoption of a child:

- (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
- (b) adoption is to be regarded as a service for the child,
- (c) no adult has a right to adopt the child,
- (d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,
- (e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved,
- (e1) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare,
- (f) if the child is Aboriginal—the Aboriginal child placement principles are to be applied,
- (g) if the child is a Torres Strait Islander—the Torres Strait Islander child placement principles are to be applied.¹³

2.8 Section 8(2) of the *Adoption Act* sets out the principles to be considered in determining the best interests of individual children to be adopted:

- (a) any wishes expressed by the child,
- (b) the child's age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,
- (c) the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity,
- (d) any disability that the child has,
- (e) any wishes expressed by either or both of the parents of the child,
- (f) the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,
- (g) the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,

¹³ *Adoption Act 2000*, s 8(1)

- (h) the nature of the relationship of the child with each proposed adoptive parent,
- (i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,
- (j) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour,
- (k) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.¹⁴

Assessment criteria

2.9 The NSW Government advised the Committee that the general assessment criteria for prospective adoptive parents are as follows:

- having personal attributes and capacity to undertake the normal tasks of parenting, as well as specific tasks of adoptive parenting such as ensuring the child has opportunities to learn about their birth family and culture of origin;
- having appropriate age and fitness to have a reasonable expectation of retaining health and vigour to raise a child until adulthood;
- being a person of good repute (as evidenced by references, police records etc.);
- being able to provide a child with a safe, secure and beneficial physical environment;
- having the financial resources to enable adequate provision for a child's physical, educational, health and social needs.¹⁵

2.10 Additional criteria may be applied for different types of adoption, such as intercountry adoption or adoption of children with special needs.¹⁶

2.11 All applicants are assessed as to the suitability of their individual circumstances. In addition to the criteria listed above, applicants are assessed with regards to their support network and the

¹⁴ *Adoption Act 2000*, s 8(2)

¹⁵ Submission 223, NSW Government, p 2

¹⁶ DoCS includes a complete list of criteria in its online publication *Thinking about adoption 2009* <www.community.nsw.gov.au>

stability and quality of their relationships,¹⁷ including current or future de facto relationships in the case of single applicants.¹⁸

NSW adoption system

Department of Community Services

2.12 The Department of Community Services (DoCS) is the government department responsible for the provision of adoption services in NSW. While DoCS shares responsibility for local adoptions (see below) with several non-government organisations, it is currently the only agency in NSW that arranges intercountry adoption placements. All adoption agencies must comply with the objectives of the *Adoption Act*.

Non-government organisations

2.13 Barnardos, Anglicare Diocese of Sydney and CatholicCare (formerly known as Centacare) are the three currently accredited agencies that facilitate local adoptions in NSW. In addition to the regulations contained in the *Adoption Act*, these agencies apply their own policies on education, counselling and assessment to the process of adoption.

2.14 Barnardos specialises in finding permanent foster placements for children in distressed circumstances and only facilitates adoption of children by carers known to them.¹⁹ Those carers are usually foster carers providing homes for children currently in out-of-home-care. Approximately one third of the children in Barnardos' permanency program are adopted.²⁰ Barnardos currently place pre-school and school-aged children, with the average age for adoption being nine years and six months.²¹

2.15 Anglicare's adoption service specialises in placing infants in either the local adoption program or their program for children with special needs.²² Its adoption services are available to residents living within a 200-kilometre radius of Sydney.²³

¹⁷ Ms Mary Griffin, Director, Adoption and Permanent Care Services, Department of Community Services, Evidence, 24 February 2009, p 6

¹⁸ Mr Rod Best, Director, Legal Services, Department of Community Services, Evidence, 24 February 2009, p 6

¹⁹ Ms Louise Voigt, Chief Executive Officer and Director of Welfare, Barnardos, Evidence, 24 February 2009, p 19

²⁰ Ms Voigt, Evidence, 24 February 2009, p 19

²¹ Ms Voigt, Evidence, 24 February 2009, p 20

²² Ms Jane West, Principal Officer, Adoptions, Anglicare Diocese of Sydney, Evidence, 24 February 2009, p 28

²³ Ms West, Evidence, 24 February 2009, p 28

- 2.16** CatholicCare is the only state-wide non-government adoption agency. CatholicCare specialises in finding suitable adoption placements for infants and also facilitates adoption of older children through their out-of-home care program.²⁴
- 2.17** Parents considering placing their child for adoption can seek information directly from the service or agency they wish to facilitate the adoption.²⁵

Types of adoption

- 2.18** Local adoption refers to Australian children who are adopted within Australia. Such adoptions are referred to as either 'known' or 'unknown'. In 'unknown' adoptions, the child concerned has generally not had any prior contact with their adoptive parents.²⁶ This usually occurs when the child has been relinquished by his or her birth parents and is available for adoption by suitable applicants.
- 2.19** 'Known' adoptions are where a child has an existing relationship with their prospective adoptive parents, such as relatives, step-parents or carers, including foster carers.²⁷ In the case of known adoptions, the child is usually not available for adoption by other people.
- 2.20** Intercountry adoptions are adoptions of non-Australian citizen children from a country outside Australia.²⁸ Intercountry adoptions must comply with state and federal law, as well as the legislation and policies of the child's country of origin. Australia currently has adoption agreements with 14 countries. The Commonwealth Attorney General's Department provides a list of countries on its website with whom Australia has an intercountry adoption program.²⁹ In each of these countries, same-sex couples are prevented from adopting due to either an explicit prohibition against same-sex adoption or through the requirement that joint applicants must be married. Of the 14, only Ethiopia, Thailand and the Philippines allow individuals (usually female) to adopt.³⁰
- 2.21** The international principles that govern intercountry adoption are set out in the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, which came into force on 1 May 1995. The Convention aims to protect children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad, by establishing principles for countries to follow that focus on the best interests of the child and his or her

²⁴ Telephone conversation between A/Senior Council Officer and Ms Maureen Eagles, Director, Children and Youth Services, CatholicCare, 17 April 2009

²⁵ Department of Community Services, Answers to questions on notice, p 12

²⁶ Australian Institute of Health and Welfare, *Adoptions Australia 2007-2008*, 2009, p 70

²⁷ Australian Institute of Health and Welfare, *Adoptions Australia 2007-2008*, 2009, p 69

²⁸ Australian Institute of Health and Welfare, *Adoptions Australia 2007-2008*, 2009, p 69

²⁹ http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_Currentintercountryadoptionprograms (accessed 30 March 2009)

³⁰ http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_Currentintercountryadoptionprograms (accessed 30 March 2009)

fundamental rights. The Convention also aims to prevent the abduction, sale, or trafficking of children. It came into force in Australia on 1 December 1998.³¹

- 2.22** Ethiopia, Fiji, South Korea and Taiwan are the only countries with whom Australia has an intercountry adoption program that are not signatories to the Convention. Nevertheless, the Australian Government and state and territory authorities work to ensure that all adoption programs meet the Convention's standards.³²

The adoption process

- 2.23** The process for adoption is set out in the *Adoption Act*.³³ A person or persons wishing to adopt a child are required to submit an expression of interest to the Director-General of DoCS or the principal officer of an accredited adoption agency. The Director-General or principal officer can then invite the applicant(s) to submit an application to adopt a child. The suitability of applicant(s) is then assessed, including via criminal records checks. An approval decision is made at the conclusion of the assessment. This initial process applies to both local and intercountry adoptions.³⁴
- 2.24** Once approval of an application is made, the prospective adoptive parents join the pool of applicants for that agency. When a child is relinquished by its birth parents, the needs of that child are assessed and the applicants who will best suit the needs of the child are chosen. If the birth parents are involved in the adoption of their child, they will be given de-identified information on the suitable applicants so that they may exercise some choice over the adoptive family of their child.
- 2.25** Once a suitable match has been found for the child, and consent to the adoption of that child has been given, the child is placed with his or her prospective adoptive parents. Placement supervision is carried out by an adoption caseworker or contracted adoption assessor, who reports on how the parents are meeting the needs of the child. This report is a mandatory component of an application for adoption orders, which can then be made to the Supreme Court.³⁵
- 2.26** Birth parents officially decide that their child is to be adopted when they sign a consent form. Consent cannot be given until 30 days after the birth of the child and 14 days after the relinquishing parent(s) have received the instrument of consent.

³¹ http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_Currentintercountryadoptionprograms (accessed 30 March 2009)

³² http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_TheHagueconventiononintercountryadoption (accessed 30 March 2009)

³³ *Adoption Act 2000*, ss 41-45

³⁴ DoCS outlines the process for adoption in its online publication *Thinking about adoption 2009* and provides additional information on relative and step-parent adoption under *Intrafamily adoption* <www.community.nsw.gov.au>

³⁵ Department of Community Services, Answers to questions on notice, p 1

- 2.27** After adoption orders are finalised, ongoing support from DoCS or the adoption agency can be made available at the request of the adoptive parents.³⁶
- 2.28** As a result of recent amendments to the *Adoption Act* that commenced on 1 January 2009, adoptions by relatives and step-parents no longer require the endorsement of the Director-General of DoCS, and therefore do not have to be facilitated by DoCS or an adoption agency. In such cases, the adoptive parents will seek an assessment by a contracted adoption assessor, who prepares a report on their suitability to parent, without which an application for adoption orders cannot be considered.³⁷ They can then submit an application for adoption orders directly to the Supreme Court.³⁸

Foster care

- 2.29** Foster care, the primary form of out-of-home care, is provided for children and young people who are unable to live with their own families. Foster care can involve short or long term care, emergency care or respite care and is facilitated by DoCS and accredited non-government organisations. Whether a child is placed with a carer from DoCS or an agency depends on the availability of carers and the needs of the child at that time.³⁹
- 2.30** In NSW foster care is regulated by the *Children and Young Persons (Care and Protection) Act 1998*. Foster carers, or ‘authorised carers’, are assessed for suitability as individuals. When an authorised carer has cared for a child or young person for a continuous period of at least two years, they may apply to the Children’s Court for an order awarding sole parental responsibility. The authorised carer and their partner may make a joint application for sole parental responsibility.⁴⁰
- 2.31** Same-sex couples are eligible to provide foster care in NSW under the *Children and Young Persons (Care and Protection) Act 1998*, which does not specify the gender of the authorised carer’s partner.⁴¹

Parenting orders

- 2.32** An alternative form of legal recognition for parent-child relationships to adoption is the provision of parenting orders under the *Family Law Act 1975* (Cth), which are made in relation to the care of a child, by conferring parental responsibility for a child on a person. Such orders do not replace or diminish the parental responsibility of any other person in respect of the

³⁶ Department of Community Services, Answers to questions on notice, p 2

³⁷ *Adoption Act 2000*, s 91

³⁸ Telephone conversation between A/Senior Council Officer and Ms Danielle Woolley, Director, Out-of- Home Care Policy, Department of Community Services, 31 March 2009

³⁹ Department of Community Services, Answers to questions on notice, p 12

⁴⁰ *Children and Young Persons (Care and Protection) Act 1998*, s 149

⁴¹ Department of Community Services, Answers to questions on notice, p 9

child unless expressly provided for in the order, or if it is necessary to give effect to the order.⁴² It is legal for two or more persons to have parental responsibility for a child.⁴³

2.33 An application for a parenting order can be made by the child's parent(s), grandparent(s), the child him or herself, or any other person concerned with the care, welfare and development of the child.⁴⁴

2.34 Parenting orders differ from adoption orders in that they do not establish a permanent legal relationship between the child and the adult. A parenting order ceases to be in force when the child reaches 18 years of age, or where they marry or enter into a de facto relationship.⁴⁵

Adoptions in NSW in 2007-2008

2.35 From 1 July 2007 to 30 June 2008, a total of 125 adoption orders were finalised in NSW. Of those adoptions, 73 were intercountry. Of the remaining 52 local adoptions, 15 were unknown and 37 were known adoptions.⁴⁶ Known adoptions for this period were comprised of ten step-parent, 22 foster carer, three other relative and two special case adoptions.⁴⁷ During this period, 19 children were placed for adoption in the local adoption program.⁴⁸

2.36 Of the 125 children whose adoptions were finalised, 121 children were adopted by a couple and four children were adopted by a single person. Of those four children, one child was adopted by their foster carer and three were adopted from overseas through the intercountry adoption program.⁴⁹

2.37 As at April 2009, 239 expressions of interest to adopt a child through the local adoption program were lodged with DoCS, 229 of which were from couples, and 10 from single persons. There were also 378 expressions of interest lodged for the intercountry adoption program. Of these, 347 were from couples and 31 from single persons. Also at that time, 31 couples had been approved to adopt within the local adoption program. In addition, 402 applicants, comprising 349 couples and 53 single persons, had been approved to adopt from an overseas program.⁵⁰

2.38 NSW had the highest number of known and intercountry adoptions in Australia for the 2007-2008 period. Of all adoptions in Australia, NSW represented 27 per cent of all intercountry adoptions, 21.4 per cent of all local adoptions and 37 per cent of all known adoptions.⁵¹

⁴² *Family Law Act 1975* (Cth), s 61D

⁴³ *Family Law Act 1975*, s 61DAC

⁴⁴ *Family Law Act 1975*, s 65C

⁴⁵ *Family Law Act 1975*, s 65H

⁴⁶ Australian Institute of Health and Welfare, *Adoptions Australia 2007-2008*, 2009, pp 15, 19, 23

⁴⁷ Department of Community Services, *Annual Report 2007-2008*, p 59

⁴⁸ Department of Community Services, Answers to further questions on notice, p 1

⁴⁹ Department of Community Services, Answers to questions on notice, p 18

⁵⁰ Department of Community Services, Answers to questions on notice, p 19

⁵¹ Australian Institute of Health and Welfare, *Adoptions Australia 2007-2008*, 2009, pp 15, 19, 23

Same-sex couple families

- 2.39** The most recently available source of figures for same-sex couple families is the 2001 Census. The 2001 Census identified 11,000 male same-sex couples and 9,000 female same-sex couples in Australia. Same-sex couple families represented 0.1% of couples with children and 1% of couples without children. With the exceptions of Queensland and Tasmania (both 0.3% of all couple families) and the Australian Capital Territory (1% of all couple families), the proportion of same-sex couples within the states and territories closely reflected the national distribution.⁵² These figures do not include single gay and lesbian people with children living with them.⁵³
- 2.40** In its online publication, *Australian Social Trends, March 2009: Couples in Australia*, the Australian Bureau of Statistics (ABS) reported that in 2006, 0.4% of the Australian population (approximately 50,000 people) identified as being in a same-sex de facto relationship.⁵⁴ These figures do not include individual gay and lesbian people who are not in a de facto relationship. This publication does not provide information regarding children in same-sex couple families.
- 2.41** In its online publication, *Year Book Australia, 2005: Same-sex couple families*, the ABS noted a number of possible limitations to same-sex data, such as the reluctance of people to identify as being in a same-sex relationship or not knowing that a same-sex relationship would be counted and included as a de facto relationship in the Census.⁵⁵
- 2.42** The Victorian Law Reform Commission referred to figures from the Australian Study of Health and Relationships, conducted in 2000 to 2001, which revealed that approximately 2.2% of all couples living in the same household were same-sex couples.⁵⁶
- 2.43** In its submission, the Gay and Lesbian Rights Lobby cited unpublished ABS 2006 Census data estimating that 4,376 children were living in same-sex couple families across Australia. It suggested that this figure is likely to be an underestimate as it does not include non-resident children, adult children who have moved out of home, or sole-parent gay and lesbian households.⁵⁷

NSW legislation recognising same-sex couples

- 2.44** The past decade has seen an increasing trend to legislate to equalise same-sex relationships with heterosexual relationships. Legislation to legally recognise same-sex relationships was introduced in NSW in 1999 and 2008.

⁵² Australian Bureau of Statistics, *Year Book Australia, 2005: Same-Sex Couple Families*

⁵³ Australian Institute of Family Studies, *Diversity and Change in Australian Families: Statistical Profiles*, David de Vaus, July 2004, p 84

⁵⁴ Australian Bureau of Statistics, *Australian Social Trends, March 2009: Couples in Australia*

⁵⁵ Australian Bureau of Statistics, *Year Book Australia, 2005: Same-Sex Couple Families*

⁵⁶ De Vaus D, *Diversity and Change in Australian Families: Statistical Profiles, 2004*, cited in Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption, Final Report*, VLRC, March 2007, p 25

⁵⁷ Gay and Lesbian Rights Lobby, Answers to questions on notice, p 1

Property (Relationships) Legislation Amendment Act 1999

2.45 The *Property (Relationships) Legislation Amendment Act 1999* changed the definition of de facto partner, de facto relationship and spouse in 25 pieces of NSW legislation, including in the areas of health care, inheritance and ownership. The amendments removed gender specific terms to give same-sex couples equal status with heterosexual relationships under the law. Where appropriate, the definition of de facto relationship was amended to have the same meaning as in the *Property (Relationships) Act 1984*. That Act stipulates:

- (1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:
 - (a) who live together as a couple, and
 - (b) who are not married to one another or related by family.⁵⁸

2.46 These amendments were introduced in 1999 and do not apply to the *Adoption Act*.

Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008

2.47 The *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* made amendments to 55 pieces of NSW legislation. These amendments were primarily concerned with changing the existing definitions of ‘de facto partner’ or ‘de facto relationship’ to the definition of de facto relationship within the meaning of the *Property (Relationships) Act 1984* (see paragraph 2.43). In doing so, the amendments equalised same-sex relationships with heterosexual relationships under the law. This included closing potential loopholes in areas such as pecuniary interest, where existing definitions failed to legislate for same-sex relationships.

2.48 The *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* also provided for the recognition of the same-sex partner of a woman who has undergone a fertilisation procedure as the parent of her partner’s child.

2.49 Schedule 2 of that Act amended the *Status of Children Act 1996* by inserting the following in section 14, *Presumptions of parentage arising out of use of fertilisation procedures*:

- (1A) When a woman who is in a de facto relationship with another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:
 - (a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and
 - (b) the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.⁵⁹

2.50 This amendment automatically recognises both members of the couple as parents of the child, as is the case when a child is born to a heterosexual couple.

⁵⁸ *Property (Relationships) Act 1984* (NSW), s 4 (1)

⁵⁹ *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), Schedule 2 (1)

Federal reforms

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008

- 2.51** In 2008 the Australian Government introduced legislation to equalise same-sex de facto relationships with opposite sex de facto relationships under the law.
- 2.52** Together, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* include amendments to 84 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support.⁶⁰ These Acts amended the definitions of 'de facto', 'parent', 'child' and 'relationship' to provide that same-sex couples and their families are recognised and have the same entitlements as opposite-sex de facto couples.

Family Law Act 1975

- 2.53** Since 2008 the *Family Law Act 1975* (Cth) has defined de facto relationships as follows:

- (1) A person is in a de facto relationship with another person if:
- (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).⁶¹

- (5) For the purposes of this Act:
- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.⁶²

- 2.54** The previous definition of de facto relationships in this Act specifically referred to a man and woman.⁶³

⁶⁰ <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_SameSexReform>, (accessed 6 April 2009)

⁶¹ *Family Law Act 1975*, s 4AA(1)

⁶² *Family Law Act 1975*, s 4AA(5)

⁶³ *Family Law Act 1975*, s 4

- 2.55 Section 60H of the *Family Law Act* was amended in 2008 by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* to recognise the consenting same-sex partner of a woman who has undergone a fertilisation procedure as a parent, if such recognition is operational on a state or territory level.⁶⁴

Adoption by same-sex couples in other Australian jurisdictions

- 2.56 Same-sex couples in the Australian Capital Territory (ACT) and Western Australia (WA) have equal access to adoption with heterosexual couples. In Tasmania same-sex couples are permitted to adopt a child who is related to a member of the couple. In all other states and territories there is no provision for same-sex couples to adopt. In every jurisdiction same-sex couples and individuals are permitted to provide foster care.

Australian Capital Territory

- 2.57 In the ACT, same-sex couples have had equal access with heterosexual couples to adoption since 2004. The *Adoption Act 1993* was changed by amendment under the *Parentage Act 2004* to replace gender specific terms such as ‘heterosexual relationship’ and ‘a man and woman’ with the gender neutral terms of ‘domestic partnership’ and ‘2 people’ respectively.
- 2.58 The *Adoption Act 1993* allows for adoption by two people jointly ‘who, whether married or not, have lived together in a domestic partnership for a period of not less than three years’.⁶⁵ The *Parentage Act 2004* amendments included the definition of a ‘domestic partnership’ as ‘the relationship between 2 people, whether of a different or the same-sex, living together as a couple on a genuine domestic basis’, as defined in the *Legislation Act 2001*.⁶⁶
- 2.59 In addition, the *Parentage Act 2004* recognises the same-sex partner of a woman who has undergone a fertilisation procedure as the parent of her partner’s child:

If the woman undergoes the procedure with the consent of her domestic partner at the time of the procedure, the domestic partner is conclusively presumed to be a parent of any child born as a result of the pregnancy.⁶⁷

Western Australia

- 2.60 In WA a couple may apply to adopt a child if they are married or in a de facto relationship.⁶⁸ In 2002, the *Adoption Act 1994* was amended to remove specific references to heterosexual

⁶⁴ *Family Law Act 1975*, s 60H(1)

⁶⁵ *Adoption Act 1993* (ACT), s 18 (1)(b)

⁶⁶ *Legislation Act 2001* (ACT), s 169

⁶⁷ *Parentage Act 2004* (ACT), s 11 (4)

⁶⁸ *Adoption Act 1994* (WA), ss 38(2), 39(1)(e)

couples.⁶⁹ This amendment effectively removed the limitation on same-sex couples to apply for adoption.⁷⁰

- 2.61** As is the case in NSW and the ACT, WA also recognises the non-biological partner of a lesbian couple as the parent of any child that is born as a result of a fertilisation procedure, if the partner's consent is given at the time of the procedure. This was achieved through the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*.⁷¹

Tasmania

- 2.62** In Tasmania the *Adoption Act 1988* was, from January 2004, amended to remove gender-specific terms that had previously precluded same-sex couples from applying to adopt. Under the Act, couples may adopt if they are married or parties to a 'significant relationship'.⁷² A significant relationship includes heterosexual and same-sex couples in a de facto relationship.⁷³ Couples in a significant relationship may only adopt a child if one member of the couple is a relative or biological parent of that child.⁷⁴
- 2.63** Adoption orders can also be made in favour of one person in exceptional circumstances which are not defined by the Act. However, that individual cannot be married or in a significant relationship, thus preventing one member of a couple from adopting a child who is not related to either member.⁷⁵

Northern Territory

- 2.64** In the Northern Territory (NT) people in same-sex relationships are effectively prevented from applying to adopt as couples or as step-parents by the definition of 'couple' and 'spouse' contained in the *Adoption of Children Act 1994*.
- 2.65** In section 13, 'Adoption by couple', the Act specifically refers to a couple as a 'man and woman'. The Act also defines the term 'couple' as follows:

For the purposes of this Act, a reference to 2 persons or a couple in relation to a joint adoption of a child under this Act is a reference to

- (a) a man and a woman who are married; or

⁶⁹ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) deleted Section 4 (2), paragraph b, from the *Adoption Act 1994*, that referred specifically to heterosexual couples

⁷⁰ A de facto relationship is defined in the *Interpretation Act 1984* (WA), s 13A

⁷¹ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA), s 26 (6A)

⁷² *Adoption Act 1988* (Tas), s 20

⁷³ *Relationships Act 2003* (Tas), s 4(1)

⁷⁴ *Adoption Act 1988* (Tas), s 20(2A)(a)(b)

⁷⁵ *Adoption Act 1988* (Tas), s 20(5)(a)

- (b) an Aboriginal man and woman who are living together in a traditional Aboriginal marriage.⁷⁶

2.66 In the category of step-parent adoption, the Act defines a step-parent as the ‘spouse’ of the parent. The Act states:

“spouse” means a person who is married or who is living in a traditional Aboriginal marriage in relation to the man or woman to whom he or she is married or with whom he or she entered into the traditional Aboriginal marriage.⁷⁷

2.67 These definitions also effectively prevent heterosexual de facto couples from applying to adopt.

2.68 The NT allows adoption by an individual only in exceptional circumstances. These circumstances are not defined in the Act. However, an individual is specified in the Act as a person who is not a relative of the child or spouse of the child’s parent, and the child must be in the guardianship of the Minister.⁷⁸

Queensland

2.69 In Queensland the *Adoption of Children Act 1964* prevents same-sex couples from applying to adopt through the specific reference to joint adoption by a ‘husband and wife’.⁷⁹ As is the case in the NT, adoption orders can be made in favour of individuals only in exceptional circumstances.

2.70 In April 2003, as part of Queensland’s reforms to remove discrimination against same-sex couples, the *Acts Interpretation Act 1954* was amended to include section 32DA, which defines the term ‘de facto partner’ as follows:

In an Act, a reference to a de facto partner is a reference to either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.⁸⁰

2.71 The effect of this amendment did not, however, extend to adoption. In this regard, the *Acts Interpretation Act 1954* was amended so that any reference to the term ‘spouse’ in other Acts included de facto partners, unless that legislation expressly states to the contrary, which is the case for the *Adoption of Children Act 1964*.⁸¹

2.72 After extensive community consultation the Queensland Government introduced into Parliament on 10 February 2009 the *Adoption Bill 2009*. The bill, in its eligibility criteria,

⁷⁶ *Adoption of Children Act 1994* (NT), s 3

⁷⁷ *Adoption of Children Act 1994* (NT), s 3

⁷⁸ *Adoption of Children Act 1994* (NT), s 14(1)

⁷⁹ *Adoption of Children Act 1964* (Qld), s 12(1)

⁸⁰ *Acts Interpretation Act 1954* (Qld), s 32DA

⁸¹ *Adoption of Children Act 1964* (Qld), s 67A

explicitly excluded same-sex couples from adopting children. It is noted that the bill did not pass into law as the Queensland Parliament prorogued on 23 February 2009.

South Australia

2.73 In South Australia same-sex couples are prevented from applying to adopt under both the couple and step-parent categories.

2.74 The *Adoption Act 1988* restricts joint adoption to people in a ‘marriage relationship’ and defines a ‘marriage relationship’ as follows:

marriage relationship means the relationship between two persons cohabiting as husband and wife or de facto husband and wife.⁸²

2.75 The Act provides for adoption by an individual person, but only under ‘special circumstances’, which are not specified in the Act.

Victoria

2.76 In Victoria same-sex couples are prevented from applying for adoption as the *Adoption Act 1984* specifically states that adoption may be made in favour of a ‘man and a woman’.⁸³ Furthermore, while couples in a de facto relationship are able to adopt, the definitions of ‘de facto relationship’ and ‘de facto spouse’ specify a relationship that is between a man and a woman.⁸⁴

2.77 Steps have been taken, however, to review the existing adoption laws in Victoria. The final report of the Victorian Law Reform Commission (VLRC) on assisted reproductive technology and adoption was tabled in Parliament in June 2007. The report contained the following recommendations with regard to adoption:

67. The *Adoption Act 1984* should be amended to allow the County Court to make adoption orders in favour of same-sex couples.

68. The same-sex partner of the parent of a child should be able to apply to adopt the child in accordance with the same criteria that apply to opposite-sex partners.

69. The Department of Human Services should review the *Adoption and Permanent Care Procedures Manual* to accommodate applications by same-sex couples.

70. Adoption agency staff should receive training to provide education about parenting by same-sex couples.

⁸² *Adoption Act 1988* (SA), s 4(1)

⁸³ *Adoption Act 1984* (Vic), s 11

⁸⁴ *Adoption Act 1984* (Vic), s 4

71. The *Adoption Act 1984* should be amended to allow the County Court to make an adoption order in favour of a single person in accordance with the same criteria that apply to couples.⁸⁵

- 2.78** In December 2008 the *Relationships Act 2008* was passed to register and recognise the relationships of committed adults who are not married. This legislation, however, did not include any reforms to adoption legislation and, to date, no legislation or government action has been taken to implement the VLRC's recommendations.

Overseas jurisdictions

- 2.79** Adoption by same-sex couples is currently legal in several overseas jurisdictions. Same-sex couples have equal adoption rights with heterosexual couples in Andorra, Belgium, Guam, Iceland, Israel, Norway, Spain, Sweden, South Africa and the United Kingdom. In the Netherlands, adoption by same-sex couples is limited to Dutch children, and in Germany and Denmark it is limited to step-parent adoptions. Adoption by same-sex couples is legal in several provinces and territories of Canada and in several states in the United States of America.
- 2.80** Adoption by same-sex couples is not permitted in the majority of countries around the world.

⁸⁵ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption – Final Report*, VLRC, March 2007, pp 106-108.

Chapter 3 Best interests of the child

This chapter examines the views of inquiry participants on adoption by same-sex couples in light of the objects of the *Adoption Act 2000* (hereafter *Adoption Act*), most notably the object that the best interest of the child be paramount in decision making about adoption. During the inquiry there was universal recognition among participants of this principle; at the same time, there was significant variation in how those best interests are to be interpreted in the context of the debate about adoption by same-sex couples. Views on this issue fell into two broad streams explored in detail in this chapter. The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality. The chapter then notes the evidence gathered during the inquiry reflecting children's views on adoption by same-sex couples, and closes with the Committee's comments about the views expressed on the best interests of children in respect of adoption by same-sex couples.

This chapter is focused on information presented to the Committee that was, by nature, based on the views, beliefs and reasoning of inquiry participants. It sets the scene for the following chapter, which explores the research evidence in relation to family form and family functioning, and the conclusions that can be drawn from the research about the best interests of children.

Key objects of the *Adoption Act*

- 3.1 The terms of reference for this inquiry require the Committee to consider whether adoption by same-sex couples would further the objects of the *Adoption Act*. The objects are set out in full in Chapter 2 of this report.
- 3.2 The first two objects of the *Adoption Act* are:
 - (a) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice.
 - (b) to make it clear that adoption is to be regarded as a service for the child concerned.⁸⁶
- 3.3 Mr Rod Best, Director of Legal Services with the Department of Community Services (DoCS), agreed in evidence that these two objects sum up the principles underpinning the *Adoption Act*.⁸⁷ The *Adoption Act* gives no consideration to the interests of the parents who may wish to adopt. As the NSW Government submission pointed out, and as many other inquiry participants noted:

⁸⁶ *Adoption Act 2000* (NSW), s 7

⁸⁷ Mr Rod Best, Director, Legal Services, Department of Community Services, Evidence, 24 February 2009, p 11

The Act is clear in stating that adoption is a service for the child (section 8(1)(b)), and that no adult has the right to adopt a child (section 8(1)(c)).⁸⁸

- 3.4** In its submission, the Social Issues Executive of the Anglican Church, Diocese of Sydney, observed that the important reforms that had taken place in adoption law and practice in recent decades were built on a growing understanding of the needs and best interests of children:

Over recent decades there have been a number of welcome changes to the nature and practice of adoption, particularly in the area of openness and access to information. Many of these developments have come about because practitioners and policy makers have come to a deeper understanding of the needs of adopted children not only in infancy and childhood, but also as they grow into adulthood. Underpinning current thinking and practice in the area of adoption, is a right and proper concern for the best interests of the child.⁸⁹

- 3.5** The NSW Commissioner for Children and Young People, Ms Gillian Calvert, articulated the purpose and focus of adoption and the significance of family for children's lives as follows:

Adoption is clearly for the benefit of children, not for parents. The legislation is also clear that we have a responsibility towards children: the decisions made about them are in their best interests. The legislation is also clear that children have a right to participate in decisions about adoption, having regard to their development, and that their wishes are an important factor in adoption decisions. Adoption is clearly important to children because it is providing them with families and stability for life. I know from my many conversations with children and young people over the past 10 years that families are central to children and young people's wellbeing. Families are the basis on which a child's life sits. It is where kids have experiences of being loved and cared for.⁹⁰

Interpretations of the best interests of the child

- 3.6** Inquiry participants' interpretations of the best interests of the child in respect of adoption by same-sex couples fell into two broad streams. The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.
- 3.7** The latter view was generally held by those participants who support adoption by same-sex couples, while the former was generally held by those who argued for the current legal arrangements to remain. The evidence taken by the Committee in relation to both these views is explored in detail the following two sections.

⁸⁸ Submission 223, NSW Government, p 2

⁸⁹ Submission 216, Social Issues Executive, Anglican Church, Diocese of Sydney, p 1

⁹⁰ Ms Gillian Calvert, Commissioner for Children and Young People, Evidence, 25 February 2009, p 35

- 3.8 At this point the Committee observes that these interpretations are by nature based on participants' views, beliefs and reasoning about fundamental issues to do with the family and the wellbeing of children. We acknowledge that on both sides of the debate these views are strongly held and deeply felt.
- 3.9 Proponents for both views referred to research evidence to support their statements to the Committee. The research in relation to the impact of family form and family functioning on children's wellbeing is explored in detail in the following chapter. Proponents for both streams also raised additional arguments about whether adoption by same-sex couples would further the objectives of the *Adoption Act* with regard to the best interests of the child, each of which are explored in this chapter.

Parenting by a mother and a father

- 3.10 A significant number of inquiry participants stated explicitly that they considered that adoption by same-sex couples would not be in the best interests of children. Most but not all of these participants based their views on religious teaching and belief, emphasising that the presence of both a mother and a father, preferably in a married relationship, has a major bearing on the best interests of children, both in the short and longer term.

Optimal care

- 3.11 Numerous participants emphasised that the best interests of an adopted child are served in the context of a committed heterosexual relationship. In its submission, Anglicare Diocese of Sydney, one of three non-government accredited adoption providers in NSW, referred to the imperative to place adopted children, who are by definition especially vulnerable, in an environment characterised by 'optimal care' where they will experience the presence of a mother and father.⁹¹ Ms Jane West, Principal Officer, Adoptions, from Anglicare, elaborated on this view in evidence:

Anglicare's position as a Christian organisation is that children are best cared for by a mother and a father and this is the model that provides optimal care. The experience of being mothered and fathered by two parents in a stable, lifelong relationship constitutes optimal conditions for child development. Anglicare's responsibility as one of only three accredited non-government providers of adoption services in New South Wales is to provide a service to the adopted child as the client. It is therefore necessary to ensure that the adopted child is provided every opportunity to experience optimal parenting throughout their childhood.⁹²

- 3.12 Similarly, CatholicCare, another accredited adoption provider, argued in its joint submission with the Life, Marriage and Family Centre on behalf of the Catholic Archdiocese of Sydney, that a child's best interests, both in childhood and in later life, are served in a traditional family

⁹¹ Submission 151, Anglicare Diocese of Sydney, p 3

⁹² Ms Jane West, Principal Officer, Adoptions, Anglicare Diocese of Sydney, Evidence, 24 February 2009, p 27

unit in which the parents are bound together by marriage.⁹³ In evidence, Mr Chris Meney, Director of the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney, explained the Archdiocese's position:

It ... directly relates to ensuring that the best interests of a child in terms of ability to flourish as a person are always taken care of. We believe that the situation that most enables that to happen is the placement of a child with a married couple who are committed to one another for life and that to place a child who is in an extremely vulnerable situation in another arrangement that is different from that is not doing justice to that child. So we are unable to embark on that process because we would see that as an unjust process that is not in the interests of the child ... What is most important is the ability of the parties to deliver what is in the interests of the child in terms of the ability to provide a mother and a father and to enable mothers to mother and fathers to father. I think it is a long stretch to suggest that fathers can mother or that mothers can father, and that is where the child's best interests are going to be compromised in that situation.⁹⁴

3.13 Other participants who highlighted the presence of a mother and father as critically important to a child's development included the Australian Christian Lobby, the Christian Democratic Party and Family Voice Australia, along with a number of individual authors of submissions.⁹⁵

3.14 Like Anglicare, some witnesses and submissions expressed concern about the particular vulnerability of adopted children, pointing to a responsibility on the part of the state to provide the optimum conditions in which such children will grow up. The Anglican Church, Diocese of Sydney's submission differentiated between laws concerning children and laws concerning same-sex couples, and urged caution in relation to legitimating same-sex parenting:

We suggest that when the law concerns children, it is substantively different to laws that primarily concern couple relationships and their legal and financial entitlements. There is a community expectation that when the state acts on behalf of children, who have their own set of individual needs and are unable to advocate for their own interests, legislators need to exercise an appropriate caution ... As the state is mandated to protect the best interests of the child we assert that there is no consensus that these new forms of family arrangements will further the interests of the child. Rather, collective human wisdom suggests that children are best cared for by a mother and a father.⁹⁶

3.15 Similarly, the Christian Democratic Party suggested:

⁹³ Submission 213, Life, Marriage and Family Centre and CatholicCare, Catholic Archdiocese of Sydney, p 3. Hereafter this submission is referred to as that of the Catholic Archdiocese of Sydney.

⁹⁴ Mr Chris Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 24 February 2009, p 40

⁹⁵ Submission 185, Australian Christian Lobby, p 1; Submission 186, Christian Democratic Party, p 8; Submission 30, Family Voice Australia, p 2. See also Submission 193, Family Life International, p 3; Submission 204, NSW Council of Churches, p2; Submission 207, Australian Family Association, p 4; Submission 199, Fatherhood Foundation, p 1; Submission 196, Non-Custodial Parents Party, p 1; Submission 217, Children's Rights Council Australia, p 3; Submission 194, Salt Shakers, p 1; Submission 152, Women's Action Alliance NSW, p 2; Submission 162, Redfield College, p 1

⁹⁶ Submission 216, p 4

Whilst there are no certainties in life, those tasked with the care and protection of the most vulnerable element within our society have a duty of care to ensure all children placed for adoption are afforded the greatest possible opportunity in life with as little potential risk as possible to their physical, mental and emotional development.⁹⁷

- 3.16** A further concern expressed during the inquiry by some participants, including the Women's Action Alliance NSW, related to the potential for adoption by same-sex couples to set adopted children further apart from their peers:

The adopted child will have many issues to face during their lives and if this review is proposing allowing homosexual couples to adopt then we believe that this will only add to those issues. As an adopted child grows and learns more about their background they will, even with the 'Openness in Adoption' formula face issues of abandonment, loss, self-doubt, identity amongst others. Would it really be fair to have that child also face another factor that makes them different from others in the form of same-sex parents? This would place far too much stress on the child and we believe that it will have a negative impact in later life, especially the teen years. Children are our nation's best asset and we should be focusing on ensuring their journey to adulthood is as smooth as possible and not be using them as test cases.⁹⁸

The 'fundamental complementarity' of men and women

- 3.17** Some participants who advocated that the best interests of children in the short and long term are served by the presence of a mother and father in a permanent, preferably married relationship, went on to illuminate their position by referring to the 'fundamental complementarity' between men and women embodied in motherhood and fatherhood. In their view, this complementarity is by nature absent from same-sex relationships, to the detriment of children.
- 3.18** A number of inquiry participants, including those who made submissions, spoke about the unique nature of both mothering and fathering and the contributions each makes to the nurturing and development of children. Many of those making a contribution to the inquiry emphasised that mothering and fathering was much more than providing role models for children.
- 3.19** Family Voice Australia spoke of the 'inherent, objective differences between men and women' which 'mean that fathers and mothers parent in a complementary way'⁹⁹ and suggested that:

Allowing male same-sex couples to adopt a child would deprive a child of the care and love of a mother ... Allowing female same-sex couples to adopt a child would deprive a child of the care and love of a father.¹⁰⁰

- 3.20** Similarly, Mr Lyle Shelton, Chief of Staff of the Australian Christian Lobby, stated in evidence:

⁹⁷ Submission 186, p 7

⁹⁸ Submission 152, p 2, citing adoptive mother Megan Turner

⁹⁹ Family Voice Australia, Answers to questions on notice, p 1

¹⁰⁰ Submission 30, p 2

Men and women are different. A male brings a different love to a child than does a female, but together the two are complementary. Together the two give the child something very precious, which allows that child to grow and to be formed in a very balanced way. I think most people would prefer that. Even people who are in single-parent relationships would prefer that there was that complementary gender influence on their child's life and development.¹⁰¹

- 3.21** Asked to comment on the most important factors in a family environment that promote the wellbeing of children in the short and longer term, the Catholic Archdiocese of Sydney identified the following:

Relationships that model the difference and complementarity of persons allow children the immediate experience of the natural complementarity of men and women. This is important for gender identity.

Relationships that model fidelity and exclusivity and minimize family disruption.

An environment where children benefit from the unique contributions that a mother and a father make to child development. e.g. fathers are very important for reducing both antisocial behaviour and delinquency in boys and early sexual activity in girls; mothers are vital for providing children, particularly infants, with emotional security and for giving daughters the trusted counsel they need during puberty and adolescence.

The sense of love and security that children have in the knowledge that their mother and father love each other and have committed to each other for life.¹⁰²

- 3.22** When the Committee took evidence from three heterosexual couples as part of the inquiry, members asked two of them about whether they parent in fundamentally different ways, and whether their children relate to them differently as mother and father. One father, who had two adopted sons, spoke of the masculinity that men role model for their sons, underscoring the importance of the day-to-day role modeling that fathers provide:

It is our view that boys actually learn to be men from their fathers, not from their mothers. It is also our view that boys learn appropriate love and respect for their mother and henceforth for other women from their father, assuming of course that their father is an appropriate role model to model the behaviour ... We can only speak because we have boys, but our boys are going to grow up to be men. They are not going to grow up to be women. So they have to learn how to be a man in a masculine sense from their father. It is more than just that, because it has to be daily role modelling. It is not like they can learn it from their mother's brother or their mother's close male friend. They have to learn it from their father who is a part of their everyday life.¹⁰³

- 3.23** This witness's wife spoke of her unique contribution as a mother to her sons' development. She argued that both male and female role models were vitally important and suggested that

¹⁰¹ Mr Lyle Shelton, Chief of Staff, Australian Christian Lobby, Evidence, 25 February 2009, pp 30-31

¹⁰² Catholic Archdiocese of Sydney, Answers to questions on notice, p 3

¹⁰³ Witness G, Evidence, 19 March 2009, p 4

other male role models cannot fully emulate fathers.¹⁰⁴ She later talked about the impact of a male parent on daughters as follows:

But we have talked about with friends how the presence of a father is one which gives a daughter the sense of who she is as a woman and gives her that confidence and that self-esteem to be a woman and relate to men. We see a man being present for a daughter as being extremely important. I think that affirmation from the father that “I respect you as a woman and I value you as a woman” is very, very important. That just does not happen here, there and everywhere from an uncle or a male that they might see every so often. It helps her relate in society to other men and to make choices, should it be in a relationship down the track, and make the right choice that she is safe and well loved and feels good about herself. So, I think a father is very important.¹⁰⁵

3.24 The young adult children of the second heterosexual couple who gave evidence attested to the qualitatively different relationships they have with their mother and father. Asked whether his parents differed in the ways they were raising and nurturing him, the son stated that the things he would talk with his mother and father about were significantly different. While he would seek his mother out when he was sick, he would seek his father out for ‘bigger life issues’, in which he finds ‘that male-to-male sort of communication’ more effective.¹⁰⁶ His sister echoed this view and went on to talk about her mother and father setting complementary examples as adults:

I think certainly through things like adolescence I would definitely feel more comfortable talking to mum simply because she has been there, she has done that, and I can talk to her. It is empathetic, like the conversation that we would have or the disagreement we would have—mum has been there before; she has been a girl my age. Then again there are things from dad that I do not think I could learn from mum. I see the way that dad treats mum and that is an example to me of how I would like to be treated when I find someone that I want to be with. The examples they set for both of us are different, and I think that is important for a child.¹⁰⁷

3.25 Asked by Committee members to consider the impact of social change in respect of the parenting roles and styles of men and women in recent decades, participants including the Australian Christian Lobby maintained that in spite of significant social change, the fundamental complementarity between men and women remains, and continues to be critical to children’s development.¹⁰⁸ Mr Damien Tudehope, Legal Adviser to Family Voice Australia, argued that while men are much more involved in family life now than in the past, their contribution is still fundamentally male:

[F]athers play much more of a role in their homes than fathers previously did. What I am asking is, though: Has that changed the relationship that the child has with the father, and those things that the father brings to bear on the development of a child? ... The fact of the matter is that although we might have changing roles in terms of

¹⁰⁴ Witness F, Evidence, 19 March 2009, pp 3-4

¹⁰⁵ Witness F, Evidence, 19 March 2009, p 10

¹⁰⁶ Witness K, Evidence, 19 March 2009, p 14

¹⁰⁷ Witness J, Evidence, 19 March 2009, p 14

¹⁰⁸ Mr Shelton, Evidence, 25 February 2009, p 27

affection and nurturing, fathers and men are different [to mothers and women] and have different interests and deliver different messages to their children, which their children accommodate.¹⁰⁹

Doctrine, natural law, self-evident truth and research

- 3.26** Several church-based organisations who participated in the inquiry advised that their views in this area are based on fundamental matters of Christian doctrine. In its submission the Catholic Archdiocese of Sydney placed Catholic teaching on marriage and the family within the context of broader social and moral instruction:

Catholic teaching on sexuality, marriage and family is part of a much larger body of Catholic social and moral teaching, which includes respect for the dignity of the human person and the need to care for all, especially the poorest and most vulnerable. The Church's teaching on sexuality and family must be understood in that wider context. The genuine, committed and exclusive love between a man and a woman, grounded in marriage, is the foundation of family life and promotes the optimum welfare and development of children.¹¹⁰

- 3.27** Revd Dr Andrew Ford, Lecturer and Member of the Social Issues Executive of the Anglican Church, Diocese of Sydney, also spoke of the longstanding, essential position of the church with respect to marriage and the family.¹¹¹ Asked whether fundamental matters of doctrine can shift in keeping with social change, the Anglican Church, Diocese of Sydney spoke of the enduring authority of the Bible:

From within the reformed Protestant church, the fundamental basis from which we speak is the Bible. Biblical teachings inform our understanding about the world, life, death, humanity and our responsibilities towards each other. These teachings have not changed and remain true for every generation. Christians everywhere but particularly those who enter into public debate need to do the hard work of understanding and explaining biblical truths and how they apply to society.¹¹²

- 3.28** The Anglican Church, Diocese of Sydney then asserted, as did the Catholic Archdiocese,¹¹³ that the primacy of the heterosexual family unit is not just a matter of faith, but also a manifest reality reflected in the vast majority of society:

Clearly not everyone shares the Christian view of the world, and yet on any account of human history, the basic building block of societies everywhere has been the mother/father/child relationship (albeit with some diversity in the outworking of these relationships). There have been many changes in the structure of the Australian family over the past few decades such as a growth in the number of single parent families, blended families and same-sex relationships. And yet same-sex parenting is

¹⁰⁹ Mr Damien Tudehope, Legal Adviser, Family Voice Australia, Evidence, 24 February 2009, p 56

¹¹⁰ Submission 213, p 2

¹¹¹ Revd Dr Andrew Ford, Lecturer and Member, Social Issues Executive, Anglican Church, Diocese of Sydney, Evidence, 25 February 2009, p 48

¹¹² Anglican Church, Diocese of Sydney, Answers to questions on notice, p 1

¹¹³ Mr Meney, Evidence, 24 February 2009, p 37

still fairly uncommon. The proportion of couples living in same-sex relationships, according to 2001 census figures was just under half of one percent. Of those couples, 17% of lesbian and 4% of gay male couples have a child living with them. While these may be underestimates, we nevertheless assert that Australians are still committed to the family unit, at its best, being based on a life-long relationship between a man and a woman.¹¹⁴

3.29 In evidence, Revd Dr Ford emphasised that faith and objective experience converge on this point:

[W]hat I am saying is that there are some fundamentals that have come to us from the pages of scripture and our understanding about the world as God has created it, and us in it, that align with the way that people who have no concept or knowledge or belief or do not see any need for those things of God, view the world. There is something fundamental about the way this place we live in called the world, the universe, is put together that we can agree on even if we do not agree on God, belief and doctrine, and those things.¹¹⁵

3.30 Mr Shelton of the Australian Christian Lobby referred to the ‘natural social order of human relations’,¹¹⁶ stating:

This social order of raising children within opposite sex marriage has been faithfully practised by diverse cultures for millennia. Not only is it natural law, it is humanity’s social heritage. Nature—some might say God—has decreed that it takes a male and a female to create a baby. This is self-evident in natural law. It is also self-evident that male and female are different.¹¹⁷

3.31 Many of these participants argued that, apart from being a matter of religious doctrine and manifest reality, there is considerable research evidence substantiating that the best interests of the child, as reflected in outcomes for children, are served by the presence of a mother and father.¹¹⁸ This evidence is examined in detail in the following chapter. As an example, Family Voice Australia contended:

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children. Children flourish best on a range of indicators (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes) when they are raised by a mother and a father in a publicly committed, lifelong relationship.¹¹⁹

¹¹⁴ Submission 216, p 2

¹¹⁵ Revd Dr Ford, Evidence, 25 February 2009, p 50

¹¹⁶ Mr Shelton, Evidence, 25 February 2009, p 27

¹¹⁷ Mr Shelton, Evidence, 25 February 2009, p 27

¹¹⁸ See for example Submission 185, pp 4-5; Submission 213, pp 8-9; Submission 194, p 1; Submission 204, p 2

¹¹⁹ Submission 30, p 1

Fitness to parent

3.32 Several participants voiced concern about the fitness of gay and lesbian people to parent children. For example, the NSW Council of Churches and Family Life International suggested that heterosexual marriages are more likely to value fidelity and exclusivity than are homosexual relationships.¹²⁰ The Catholic Archdiocese of Sydney also expressed this view, stating in its submission:

[W]hile same-sex couples have no monopoly on infidelity, the evidence reflects that married heterosexuals better value and model sexual fidelity and exclusivity. It is highly likely that higher rates of household infidelity would impact upon children. Placing children in domestic situations where infidelity may be more likely to occur threatens the stable, loving environment and appropriate role modelling which are important for the healthy development of all children, especially vulnerable ones.¹²¹

3.33 The Australian Christian Lobby noted that the *Adoption Act* recognises the importance of stable, committed parental relationships. It then pointed to evidence that homosexual couples have, on average, shorter relationships, and suggested that commitment to monogamy is ‘much less a feature of same-sex relationships than of heterosexual relationships.’¹²² Mr Shelton stated:

[W]e know from research from the National Centre in HIV Social Research that 57 per cent of male homosexuals are highly promiscuous. That is hardly a stable environment in which to place a child ... Promiscuity is a bad thing for any child to have to live with in an environment where that takes place ... All I am saying is that the research shows that male homosexual relationships are notoriously unstable, they are not generally monogamous, and this is not in the best interests of children. We are talking about legalising same-sex adoption. I think we need to think very carefully about the type of environment and lifestyle that currently occurs in these communities and whether that is an appropriate environment in which to place children, particularly when there are other alternatives available.¹²³

3.34 In its submission the Fatherhood Foundation argued that ‘[t]o legislate for homosexual adoption is to endanger our children physically, mentally, emotionally and spiritually’, based on the suggestion that same-sex couples are characterised by higher levels of:

- drug use and partner violence
- communicable diseases and bad health
- decreased life expectancy and
- sexual exploitation of children.¹²⁴

¹²⁰ Submission 213, p 6; Submission 204, p 2; Submission 193, p 2

¹²¹ Submission 213, p 6

¹²² Submission 185, p 6

¹²³ Mr Shelton, Evidence, 25 February 2009, p 34

¹²⁴ Submission 199, pp 1-2

The limited number of children available for adoption

- 3.35** A number of inquiry participants including the NSW Council of Churches and the Anglican Church, Diocese of Sydney, argued that given the limited number of children presently available for adoption, compared with the large number of heterosexual couples willing to adopt, there is at present no evident need to change the legislation to broaden parental eligibility.¹²⁵ Similarly, the Catholic Archdiocese of Sydney stated in its submission:

Given the numbers of children adopted on an annual basis (12 local adoptions, 40 known child adoptions and 112 inter-country adoptions occurred in NSW in 2006-07) compared with the number of adoption enquiries, there would seem to be no need to broaden the pool of potential adoptive parents beyond those who are married.¹²⁶

- 3.36** The Australian Christian Lobby suggested that opening up eligibility would disadvantage heterosexual prospective parents already waiting to adopt:

The number of children requiring adoptive parents, therefore, remains significantly less than the number of couples seeking to adopt. Allowing same-sex couples to adopt would only expand the already large pool of adoptive parent applicants, and extend the wait for applicants who can provide the different but complementary benefits of a woman and a man.¹²⁷

A responsibility to maintain the status quo

- 3.37** A number of the witnesses and submissions that argued parenting by a mother and a father rather than a same-sex couple is in a child's best interests emphasised the importance of upholding the heterosexual family unit as the building block of society. Mr Meney of the Catholic Archdiocese suggested that to depart from this model was to experiment with children and ignore the wisdom and reality of human history:

Every society before our own has privileged heterosexual marriage as the place for the upbringing of children because this has been sought and found to be the best situation for all concerned. To propose alternative models of family and parenting is to be willing to experiment on children not for their own benefit, and to be willing to dispense with the accumulated wisdom and experience of millennia.¹²⁸

- 3.38** Mr Ben Williams, Research Officer with the Australian Christian Lobby noted that same-sex relationships are very much in the minority and that their exceptional circumstances should be treated as such.¹²⁹

- 3.39** Some participants argued that the government has a responsibility to broader society to maintain the status quo in relation to adoption by same-sex couples. As Revd Dr Ford stated in evidence:

¹²⁵ Submission 204, p 3; Submission 216, p 5; see also Submission 152, p 1

¹²⁶ Submission 213, p 17

¹²⁷ Submission 185, pp 6-7

¹²⁸ Mr Meney, Evidence, 24 February 2005, p 37

¹²⁹ Mr Ben Williams, Research Officer, Australian Christian Lobby, Evidence, 25 February 2009, p 31

Keeping the *Adoption Act* as it is reinforces the right of children to have a mother and a father as the societal norm and the most optimal condition for children within our society.¹³⁰

3.40 The issue of whether children have right to a mother and father is discussed in Chapter 5.

3.41 Responding to the hypothetical argument that ‘children can thrive whatever the family form’, Anglicare asserted in its submission:

Our response is that some children may indeed thrive under the care of single carers or same-sex carers. We can be very glad for them, but their existence is not a safe basis for responsible public policy and no child should be used to advance the cause of any adult-centred ideology. Until the state knows incontrovertibly that it can remove mothering or fathering from a child with no negative outcomes, it has no business to do so.¹³¹

3.42 Other participants such as St Philips Christian College suggested that legislative change to allow same-sex couples to adopt ‘would be saying that the Government no longer values the traditional family unit - that anything goes’.¹³²

3.43 The Women’s Action Alliance (NSW) also urged caution for the sake of the children involved:

Adopted children should not become the guinea pigs in a social experiment. We as a community owe these children, who have had such a difficult start, the very best chance for a happy and productive life.¹³³

Adoption decisions regardless of parental gender and sexuality

3.44 The second stream of views presented in evidence to the Committee was that the best interests of the child would be served by making adoption decisions based on the individual needs of the child and the capacities of the prospective adoptive parents, regardless of their gender and sexuality. This argument rejected the idea that same-sex parenting is, per se, less than ideal or harmful to children. Participants in this stream argued that it is ‘family functioning’ rather than family form that has the major bearing on children’s wellbeing.

3.45 This view was encapsulated in the position of Barnardos, the third accredited non-government adoption agency in NSW, which explicitly supported adoption by same-sex couples. Barnardos currently facilitates adoption by gay and lesbian individuals as well as foster care by same-sex couples and individuals, in line with current legislation.¹³⁴ It refuted the assertion that the best interests of a child are served by the presence of both male and female parents, focusing instead on the parenting capacities of prospective parents without regard to sexuality:

¹³⁰ Revd Dr Ford, Evidence, 25 February 2009, p 43

¹³¹ Submission 151, p 13

¹³² Submission 9, St Philips Christian College, p 1

¹³³ Submission 152, p 2

¹³⁴ Submission 180, Barnardos, p 2

When considering the “best interests of the child”, it is often argued that children “need” or “do better with” a mother and father. This premise is not borne out by research, with studies showing that children with same-sex parents do at least as well as children raised in heterosexual families. The traditional definition of a “family” has changed from “mother, father, child/ren” and now encompasses a wide variety of family combinations, established in a variety of ways. The focus must not be on the “absent” mother or father, rather it must be on the capacity of the “parent” to meet the child’s needs.¹³⁵

- 3.46** Proponents for adoption by same-sex couples cited research evidence that children raised in same-sex families are just as well off as those raised in heterosexual-headed families.¹³⁶ This literature is explored in detail in the following chapter. What follows is an analysis of the views of these participants in respect of their interpretations of the best interests of the child.

Reliance on the assessment process

- 3.47** Numerous participants argued that the assessment process in respect of adoption will continue to be sufficient to ensure that decisions are made in the best interests of the child, should same-sex couples be eligible to adopt.
- 3.48** As the NSW Government agency responsible for adoptions, the Committee questioned representatives of the Department of Community Services (DoCS) extensively about their interpretation of the best interests of the child. While these officers did not take an explicit position in relation to parenting by homosexual versus heterosexual couples, Ms Mary Griffin, Director of Adoption and Permanent Care Services, emphasised family functioning as more important than family form:

When I look at the best interests of children, it is really about the capacity of the person and not the family structure that they are in that should be important to a practitioner in making decisions around children. I think the objectives and principles of the Act are very clear in that it has to be the best interests of the child and not necessarily the structure.¹³⁷

- 3.49** Following the hearing the Department advised the Committee that:

All prospective adoptive parents are assessed against selection criteria that focus on adoptive parenting capacity and are considered to be determinative of the long term success of an adoption. It is the experience of practitioners that it is the adoptive parenting capacity of the person and not the family structure in which they live which is important in making decisions around the adoption of children ... The Department’s priority in making all adoption decisions is the best interests of the

¹³⁵ Submission 180, pp 3-4

¹³⁶ See for example Submission 221, Castan Centre for Human Rights Law, Monash University, pp 7-10; Submission 224, Dr Damien W Riggs, pp 1-2; Submission 180, p 2; Submission 163, Council of Social Services of NSW (NCOSS), p 6

¹³⁷ Ms Mary Griffin, Director, Adoption and Permanent Care Services, Department of Community Services, Evidence, 24 February 2009, p 13

child. The capacity of the adoptive applicants to meet the needs of the child having regard to their overall skills, experience and supports will be key considerations.¹³⁸

3.50 Mr Rod Best, Director of Legal Services with DoCS, explained that the Department's approach with any child is to endeavour to match their needs with the best arrangement reflected in the capacity and circumstances of the prospective parents.¹³⁹ Ms Griffin went on to talk about the consideration given to the skills and capacities of prospective parents:

[I]t comes back to looking at the skills and qualities of the particular person you are looking at who is going to be the parent and making the decision about whether they are the right people to best meet the needs of that particular child and each circumstance is so different and people can bring different things. I think particularly for adoption and the most important thing, other than a general parenting capacity, is their capacity to include the birth families, to value the birth family, to help the child deal with the fact that it has two separate families.¹⁴⁰

3.51 In keeping with this emphasis, the Department advised that the Adoption Regulations 2003 are to be amended in 2009 to provide that the eligibility and assessment criteria for adoptive parents be less prescriptive and more focused on factors affecting parenting capacity. The new criteria are to include the person's:

- health, including emotional, physical and mental health
- age and maturity
- skills and life experience in respect of their ability to undertake parenting tasks and attend to the specific needs of an adopted child
- capacity to provide a stable, secure and beneficial emotional and physical environment during the child's upbringing until the child reaches social and emotional independence.¹⁴¹

3.52 The Department also advised that in 2007, the Ministerial Advisory Committee charged with further considering the issue of adoption by same-sex couples following the Department's review of the *Adoption Act*, advised the Minister that on the basis of the available research, it 'strongly' supported adoption by same-sex couples. This is discussed in more detail in the following chapter.

3.53 Asked what issues should be considered when determining the best interests of children in relation to adoption by same-sex couples, Ms Calvert, the Commissioner for Children and Young People, emphasised that the key issues to be considered in any decision about adoption are the same, whatever the sexual orientation of the parents:

I think the same issues are weighed when considering any adoptive parents. I do not think issues change depending upon whether it is same-sex or heterosexual parents.

¹³⁸ Department of Community Services, Answers to questions on notice, pp 5-6

¹³⁹ Mr Best, Evidence, 24 February 2009, p 13

¹⁴⁰ Ms Griffin, Evidence, 24 February 2009, p 14

¹⁴¹ Department of Community Services, Answers to questions on notice, p 1. The proposed amendment to the Regulations is set out in Tab D to the Department's answers.

The sorts of things that the young people [I consulted with] identified, and are already present in the legislation, are the important issues: the ability to provide a safe and loving environment for the child; the motivation for adoption; the match between the adoptive child and the adoptive parent; and, if able, the child's wishes. I think the best interests of children are the paramount consideration regardless of the sexuality issues.¹⁴²

3.54 Ms Calvert went on to suggest that these considerations are all captured in the principles that the *Adoption Act* stipulates decision-makers must take into account when determining the best interests of individual children (as set out in the previous chapter), and which necessarily guide the practices of adoption agencies.¹⁴³

3.55 In its submission, Barnardos noted that the issue of any person's 'right' to adopt should not be the focus of the debate, and went on to call for sexuality to be removed as a factor in decision making, so that all couples are carefully assessed on the same basis, as reflected by the principles of the *Adoption Act*:

[W]hen considering this issue, the "best interests of the child" is the focus, rather than the rights of adults, whether they are gay, lesbian or heterosexual. The sexuality of a potential adoptive parent for a child should not be a factor, particularly since such discrimination is frequently based on unsubstantiated myths and stereotypes; rather there should be an emphasis on assessing each individual's capacity to parent a child who was not born to them. All applicants should be regarded equally and undertake the same rigorous assessment process, which needs to identify the applicant's strengths, experiences, attributes and competencies in order to make the most appropriate match for every child. Assessment needs to consider the applicant's ability to nurture and protect the child, to provide a safe and loving home environment, to genuinely believe in the importance of openness in adoption, to assist the adoptee to know their origins and maintain links with their birth family, to understand the child's trauma and loss that results from their adoption, to be aware of the issues of attachment and childhood development.¹⁴⁴

3.56 Similarly, the Gay and Lesbian Rights Lobby (GLRL) asserted that the sexuality of parents was not relevant, and that all couples should be assessed on the same basis:

The sexual orientation of prospective adoptive parents provides no meaningful indication of the parenting abilities and skills of particular same-sex couples. The GLRL believes couples should be assessed on their individual merits according to objective criteria in order to ascertain each couple's true capacity to provide a loving and stable home to a child.¹⁴⁵

3.57 Mr Ghassan Kassisieh, Policy and Development Coordinator with the GLRL, emphasised that if, when assessed according to objective criteria reflecting the best interests of the child, a couple could not show that they were fit and proper people to bring up a child, then they, like any other couple assessed on the same basis, should not proceed into the pool of people eligible to adopt. He further argued that to be excluded from such consideration on the basis

¹⁴² Ms Calvert, Evidence, 25 February 2009, p 36

¹⁴³ Ms Calvert, Evidence, 25 February 2009, p 39

¹⁴⁴ Submission 180, p 5

¹⁴⁵ Submission 183, Gay and Lesbian Rights Lobby, p 18

of their sexuality alone was discriminatory.¹⁴⁶ The issue of discrimination is considered in detail in Chapter 5.

- 3.58** The GLRL further contended that allowing same-sex couples to adopt would focus the adoption inquiry firmly on the best interests of the child:

In relation to unknown adoption, the GLRL believes that by removing a barrier to considering same-sex couples ... for the purposes of adoption eligibility – you focus the adoption inquiry squarely on the best interests of a child in each particular case. You remove the prejudice and judge people on their individual merits according to objective criteria.¹⁴⁷

- 3.59** The National Children’s and Youth Law Centre, a community legal centre based at the University of NSW, argued that to exclude certain people on the basis of arbitrary criteria was not in the best interests of children:

Each case must be looked at individually to ensure the appropriateness of the applicants and their ability to care and provide for a child. Laws which prevent a certain group of people from adopting, based on a criterion other than their ability to care for and support a child are not in the best interests of any child, and run counter to the objectives of the Act.¹⁴⁸

- 3.60** Both the Association of Children’s Welfare Agencies (ACWA), the peak body representing agencies providing direct services to children and families, and the gay and lesbian support organisation Parents and Friends of Lesbians and Gays (NSW), pointed to the findings of the 1997 NSW Law Reform Commission review of the *Adoption Act 1965*, which called for assessments to focus on the suitability of applicants to promote the best interests of the child without regard to sexual orientation or marital status.¹⁴⁹

- 3.61** Professor Jenni Millbank of the Faculty of Law, University of Technology, Sydney, pointed out that opening up eligibility for adoption to same-sex couples would mean subjecting them to assessment, and that any decision would ultimately have to satisfy the court:

In any discussion of adoption it is important to recall that eligibility to apply for adoption and adopting are very different things. Eligibility to apply for adoption enables willing couples to apply and be assessed according to current standards of suitability and if evaluated as suitable then matched with a compatible child if such a child is available for adoption and then an adoption is completed if the court determines such adoption to be in the child’s best interests.¹⁵⁰

¹⁴⁶ Mr Ghassan Kasssieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 53

¹⁴⁷ Gay and Lesbian Rights Lobby, Answers to questions on notice, p 2

¹⁴⁸ Submission 215, The National Children’s and Youth Law Centre, University of NSW, p 12

¹⁴⁹ *Review of the Adoption Act 1965* (1997), NSW Law Reform Commission, Report 81, Chapter 6, cited in Submission 192, Association of Children’s Welfare Agencies (ACWA), p 3 and Submission 38, Parents and Friends of Lesbians and Gays (NSW), p 1. ACWA has noted that the views in its submission do not reflect the views of all ACWA members, particularly faith-based member organisations.

¹⁵⁰ Submission 222, Professor Jenni Millbank, p 2

3.62 Women’s Legal Services NSW and the Inner City Legal Centre, both community legal centres, expressed trust in the adoption assessment system to continue to select appropriate people, should same-sex couples become eligible to adopt.¹⁵¹ This view was also shared by the NSW Council of Social Services (NCOSS), which stated:

The fact that a couple is involved in a same-sex relationship is not indicative of the type of parenting they will provide. Given all the process involved in adoption, prospective parents will be carefully scrutinized by an adoption agency, and undergo same processes as opposite sex couples, ensuring that a suitable family for a child is found.¹⁵²

3.63 Ms Lynn Moggach, Deputy Senior Manager of Barnardos’ Find-a-Family program, explained their assessment process:

The process is very intensive and goes over a number of months. It includes an initial telephone conversation and going out to see people who are seen as being possible carers. We do screening checks and we sit down—the assessment process itself is a minimum of four interviews, perhaps longer depending if there are children involved in the family. There is a core-training program that goes over three days and an additional component as well if people are infertile. There are references, medicals and criminal record checks.¹⁵³

3.64 Witness L and Witness M, the third heterosexual adoptive parents who appeared before the Committee, spoke about their experience of the adoption assessment process, testifying that this process is rigorous and very confronting, such that many prospective couples filter themselves out.¹⁵⁴ While Witness M expressed some ambivalence about whether same-sex couples should be able to adopt an unknown infant, he told the Committee that he accepted the desirability of legislative change, saying:

[T]he worry is that [legislative change] is going to allow open season for same-sex couples to enter the mainstream adoption process. That is not going to happen ... With all respect, you have to go through the process to understand it. The number of heterosexual couples who go through the adoption training and come through the other side is very small. You start out with a large pyramid and get down to a small point ... from our experience, I think 10 couples came to the training and two or three got through to the pool. That is an 80 per cent attrition rate. I think that would be exactly the same for same-sex couples, because when they entered the process and found out what was involved, a lot would fall by the wayside.¹⁵⁵

3.65 Several inquiry participants, including the GLRL and the Hon Penny Sharpe MLC, also observed that relinquishing parents will have the ultimate say in the decision to place a child

¹⁵¹ Submission 225, Women’s Legal Services NSW, p 5; Inner City Legal Centre, Answers to questions on notice, p 2

¹⁵² Submission 175, Inner City Legal Centre, p 3

¹⁵³ Ms Moggach, Deputy Senior Manager, Find-a-Family Program , Barnardos, Evidence, 24 February 2009, p 21

¹⁵⁴ Witness L and Witness M, Evidence, 19 March 2009, pp 27-28

¹⁵⁵ Witness M, Evidence, 19 March 2009, pp 27-28

with any parents.¹⁵⁶ The Committee understands that present practice is that in the case of unknown adoptions, where possible and appropriate, the birth mother (and father if he is involved) is presented with the portfolios of a number of couples assessed as suitable to adopt, and then selects the couple with whom she would prefer her child placed. Ms Emily Gray, Co-Convenor of the GLRL, contended, ‘What we are talking about is opening the eligibility criteria, not forcing relinquishing parents to give their child to any particular set of parents.’¹⁵⁷ In this regard the GLRL’s submission suggested:

Relinquishing parents should have the broadest possible range of options for their children. The adoption process is intricately guided by the consent and wishes of the relinquishing parents. It should be left to the relinquishing parents to decide on the best place and parents for their child from the widest possible diversity of families.¹⁵⁸

A broader pool

- 3.66** A number of inquiry participants argued that it is in the best interests of children to broaden the pool of prospective parents eligible for adoption. For example, ACWA suggested that the objectives of the Act are enhanced by allowing same-sex couples to apply for adoption as this would allow the Court to make decisions considering all prospective adoptive parents.¹⁵⁹
- 3.67** Dr Damien W Riggs, a Lecturer in psychology with Flinders University, Research Fellow at the University of Adelaide, and co-author of the Australian Psychological Society’s review of the research literature on parenting by same-sex and other parents, contended that:
- [I]f we are to view this as having less to do with the rights of adoptive parents per se, and much more to do with the rights of all children to a safe and secure home life, then the best interests of children must surely be to provide children with a wide range of placement options.¹⁶⁰
- 3.68** Dr Riggs suggested that the needs of any child cannot be known until the individual child is assessed, and if it happens that a particular couple, whatever their sexuality or gender, represents the best match with that child, then that alone should be the determining issue.¹⁶¹
- 3.69** Barnardos, whose ‘Find-a-Family’ program specialises in the placement of children aged 0-12 with complex needs, addressed this issue in detail. Its submission explained that the children referred to that agency have generally experienced sexual, physical and/or emotional abuse and neglect and as a result, usually have challenging behaviours and emotional difficulties.

¹⁵⁶ Ms Emily Gray, Co-Convenor, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 44; Submission 190, the Hon Penny Sharpe MLC, pp 3-4. See also Professor Jenni Millbank, Faculty of Law, University of Technology, Sydney, Evidence, 25 February 2009, p 57

¹⁵⁷ Ms Gray, Evidence, 24 February 2009, p 44

¹⁵⁸ Submission 183, p 6

¹⁵⁹ Submission 192, p 1. See also Submission 187, Ms Clover Moore MP, p 1.

¹⁶⁰ Dr Damien W Riggs, Answers to questions on notice, p 2

¹⁶¹ Dr Damian W Riggs, Lecturer, Flinders University, Visiting Research Fellow, University of Adelaide, National Convenor, Gay and Lesbian Issues in Psychology Interest Group, Australian Psychological Society, Evidence, 25 February 2009, p 12

They have disrupted care histories and attachments, lack trust in adults, and may also have significant learning difficulties or disabilities. They also have an overwhelming need for the permanence and security provided through adoption.¹⁶²

3.70 Barnardos' submission went on to state that the multiple issues faced by these children means the largest pool of potential carers is desirable to facilitate the best match with potential parents:

Given the complex needs of the children referred to the program, we regularly experience difficulty in recruiting carers and adoptive parents who have the skills required to parent children with such high needs. We therefore have always been open to considering applications from many different types of "families", whether these are single persons or heterosexual or same-sex couples, with or without children. It is our experience that a carer's capacity to parent a child with specific needs is based on a number of factors ... which are related to the individual's skills and capabilities, not their sexual orientation. Barnardos has always focused on the recruitment of a family that best meets the needs of a particular child or sibling group and has decided that the best match for some children is with a single person or same-sex couple. This decision has been based on the specific needs of each child and the capacity of the applicants to meet that child's needs.¹⁶³

3.71 In evidence, Ms Louise Voigt, Chief Executive Officer and Director of Welfare with Barnardos, gave an example of how an individual woman or same-sex couple may be the ideal carer(s) with whom to place a severely sexually abused adolescent.¹⁶⁴

3.72 Witness M, an adoptive father, suggested another scenario where a birth mother who had herself been abused by a male might understandably choose two women to raise her child. He stated, '[t]o force someone like that to put her child that she cannot raise herself into a situation that she does not feel comfortable with, is, I think, abhorrent.'¹⁶⁵

3.73 Numerous participants also pointed out that extending eligibility for adoption to same-sex couples would have a more significant impact in the area of known adoptions than in unknown adoptions.¹⁶⁶ The issue of legal recognition of existing parent-child relationships is discussed in detail in Chapter 5.

3.74 Responding to the suggestion that the number of children available for adoption is very limited, and that opening up eligibility to same-sex couples would disadvantage heterosexual prospective parents, the GLRL made several points:

- Gay and lesbian individuals are already eligible to apply to be assessed for adoption and as such are already present in 'the pool' of eligible persons.

¹⁶² Submission 180, pp 1 and 13

¹⁶³ Submission 180, pp 1-2

¹⁶⁴ Ms Louise Voigt, Chief Executive Officer and Director of Welfare, Barnardos, Evidence, 24 February 2009, p 19

¹⁶⁵ Witness M, Evidence, 19 March 2009, p 26

¹⁶⁶ Submission 183, p 18; Ms Gray, Evidence, 24 February 2009, p 45; Submission 222, p 4

- If same-sex couples become eligible to adopt, take up would be small as same-sex couples only account for 0.7 per cent of all married and de facto couples in NSW.
- Even if eligible to adopt, same-sex couples will not have access to the intercountry adoption system. As a result, the majority of unknown adoptions will continue to only consist of married couples.¹⁶⁷

3.75 The GLRL's submission went on to argue that to speak of a 'queue' to adopt is to imply that adoption is a competition between adults, rather than a child-centred service:

Finally, and most significantly, we would suggest that it is contrary to the objects of the *Adoption Act* to consider the issue of same-sex couple adoption as adding to a "queue" for children. Such an argument removes the emphasis from adoption as being a child-centred service into adoption as a service for adults competing amongst each other to become parents. No adult has the right to adopt a child, and relinquishing parents and their children deserve to be given the greatest diversity of potential households from which to choose the right home for their child.¹⁶⁸

3.76 NCOSS similarly argued that the view that the pool of potential adoptive parents should not be increased is not in keeping with the objects of the *Adoption Act* as it 'views the child as a commodity waiting to be given rather than looking at what is in the best interests of the child or who is best placed to meet the child's needs.'¹⁶⁹

The desirability of permanency for children in foster care

3.77 One of Barnardos' key arguments for adoption by same-sex couples being in the best interests of the child was that the permanency afforded by adoption is desirable for many children in the out-of-home care system. Ms Voigt told the Committee that Barnardos believed it was in the best interests of the children in its foster care program who were being cared for by same-sex foster parents to be adopted by them.¹⁷⁰ She went on to observe:

[T]here has been quite a lot of community concern that children in foster care are available for adoption because for those children are often have a very in-between life in that they do not belong properly to anyone. Many of them move repeatedly. Adoption has been shown to be a much more secure option for children in the welfare system.¹⁷¹

3.78 ACWA cited a court ruling from Florida in the United States in which the judge struck down a statute prohibiting same-sex couples from adopting children whilst allowing gay and lesbian people to provide foster care. In her decision, Lederman J noted, "A law such as the blanket ban on adoptions by homosexuals infringes on the foster child's right to be free from undue

¹⁶⁷ Submission 183, pp 20-21

¹⁶⁸ Submission 183, pp 20-21

¹⁶⁹ Submission 163, p 6

¹⁷⁰ Ms Voigt, Evidence, 24 February 2009, p 19

¹⁷¹ Ms Voigt, Evidence, 24 February 2009, p 20

restraint and to be expeditiously placed in an adoptive home that serves the child's best permanency interest."¹⁷²

- 3.79** The two gay fathers that gave evidence to the Committee, Witness A and Witness B, also raised the issue of permanency. Witness A emphasised the psychological and material security that adoption affords children, whilst also explaining that this was an important factor in the United Kingdom's reforms to allow gay and lesbian people to adopt:

I think undoubtedly it must be better for children to have a "forever parent"—a parent who they know will be their parent forever—than to be in long-term foster care and at the age of 18 be literally put out on the street, which was the situation for many thousands of children in the UK who were in long-term foster care. That was why the law was changed. It was nothing to do with parents who already had children. It was about the number of children who were waiting for adoptive parents. There was a shortage of parents coming forward to adopt. Tony Blair in his infinite wisdom decided he would do something about that and he opened it up to single people and to people in same-gender relationships. That included us.¹⁷³

- 3.80** Witness A went on to talk about his and his partner's willingness to address the complex needs of their two adopted children. He suggested that foster parents, who by definition have a less permanent relationship with the child, may not be so prepared to meet those needs, and could not be fairly expected to do so.¹⁷⁴ Witness B continued:

Another point that was made to us by some highly experienced foster carers in Britain was that for every year that a child is in care with a foster carer it will take double that length of time for the child to build up trust once it is with a permanent carer. Obviously the shorter the time the child spends in care, the quicker they will be in a position to regain trust and the process of development will continue. They have already been through one of the most traumatic things that can happen to a child by this stage; that is the removal from the birth parent. It does not matter how awful the background was it is still a traumatic event. The process of being in care is damaging in itself. To return the child to a position where it can be loved unconditionally and can be given the kind of environment in which it is stimulated and can develop is much better for them than to have them festering in foster care.¹⁷⁵

- 3.81** The issue of the inconsistency between same-sex couples' ability to foster children but not to adopt is discussed in detail in Chapter 5.

Gender roles and role models

- 3.82** Those participants who argued that the best interests of the child were served by decisions about adoption being based on the individual needs of the child, also expressed their views on the issue of gender roles and role models. They acknowledged their importance for children's development but asserted that being parented by two people of the same sex did not mean that children did not have access to role models of both genders.

¹⁷² *John Doe ats John Doe*, Lederman J ruling, p 40, cited in Submission 192, p 2

¹⁷³ Witness A, Evidence, 24 February 2009, pp 1-2

¹⁷⁴ Witness A, Evidence, 24 February 2009, pp 1-2

¹⁷⁵ Witness B, Evidence, 24 February 2009, pp 2-3

- 3.83** For example, each of the three same-sex couples with children who participated in the hearings disagreed that the complementarity of men and women was essential to optimal child development. Asked by a Committee member about this issue, Ms Vicki Harding, the lesbian mother of a 12 year old daughter, Brenna, stated in evidence:

For me it is much more the love and the feeling in the family that is important to the children than who the individuals are in the family. That sort of support can come from two women, two men, one woman, a whole variety, and of course heterosexual couples can give that support to a child.¹⁷⁶

- 3.84** Similarly, Witness A emphasised the quality of parenting over gender as the determinant of child wellbeing, and went on to assert:

The way I look at it, again putting my professional analytical hat on, is that both men and women possess masculine and feminine qualities, and I think it is possible to find those qualities in same-gender couples. I do not think there is an issue, quite frankly.¹⁷⁷

- 3.85** Asked to respond to research which concluded that a daughter has particular needs in relation to her father, in terms of approval of her attractiveness as a person, the confidence to decline drugs and think for herself, and to understand what she can expect in relationships with men, including a healthy view of sexuality, Ms Harding stated:

I do not know that they are the most important things in life but ... They are all things that kids can get from all different places. If they are in a family that has a value system that provides those sorts of messages, they will get those sorts of messages I suppose. There are plenty of families where there are fathers where those sorts of messages are not delivered to their daughters. I can say that absolutely, and I can say that from my own family. So I guess the proof is in the pudding, the children.¹⁷⁸

- 3.86** Ms Jackie Braw, Ms Harding's partner, went on to point out that together they ensure that their daughter Brenna has strong male role models in her life.¹⁷⁹ Similarly, both Witness A and Witness B, along with Ms Silke Bader and Ms Tanya Sale, who have been foster parents to two children for seven years, attested that they actively ensure that their children have role models of the other gender involved in their lives.¹⁸⁰ Witness B also explained that this was an explicit requirement in the adoption of their sons:

I think the process by which we were prepared for adoption did take this into account, in that it did ask us to address how we would ensure that a female influence was present in the lives of the boys. We have taken considerable steps to do that. In fact, in many ways it mirrors the same insistence that a child who is not of the same ethnicity as the adoptive parents ensures that there is some affirmation of the child's ethnicity by having a network of people around them who can reflect the child's ethnicity. We have addressed that. The adoption process asked us to address that, and

¹⁷⁶ Ms Vicki Harding, Evidence, 24 February 2009, p 61

¹⁷⁷ Witness A, Evidence, 24 February 2009, p 3

¹⁷⁸ Ms Harding, Evidence, 24 February 2009, p 64

¹⁷⁹ Ms Jackie Braw, Evidence, 24 February 2009, p 64

¹⁸⁰ Witness A, Evidence, 24 February 2009, p 4; Witness B, Evidence, 24 February 2009, p 4; Ms Silke Bader, Evidence, 25 February 2009, p 71; Ms Tanya Sale, Evidence, 25 February 2009, p 67 and 70

we signed up to that, as has every gay adopter in the United Kingdom that has been through the process.¹⁸¹

- 3.87** Ms Sale talked about her foster children having three or four strong male role models and the special interests they share with their children, while also emphasising the different interests and qualities that she and Ms Bader bring to their parenting roles.¹⁸² She went on to say:

I think it has to be understood here that we are not anti-men. Trust me, we love them, but just not to marry them. We understand the importance of having a male in the children's lives. They are not surrounded by a mad bunch of females. There is a beautiful mixture here. A male is very important—we believe that—and that is why we have male role models in the children's lives.¹⁸³

- 3.88** In his submission, Dr Riggs addressed the suggestion that lesbian and gay parents cannot provide appropriate gender role models for their children, questioning the values underpinning traditional gender norms:

This type of argument reinforces a number of norms about gender within Western cultures. Gender norms typically associate masculinity with men, and femininity with women, and disparage qualities associated with the latter (e.g., emotionality, subjective decisions, fragility) whilst privileging those qualities associated with the former (e.g., rationality, objectivity, strength). Credible research has long refuted these gendered assumptions, not by simply privileging 'feminine' over 'masculine' qualities, but by questioning the association of particular behaviours with particular bodies, and the privilege accorded to the values traditionally attributed to men.¹⁸⁴

- 3.89** Dr Riggs went on to suggest that it is useful to consider how traditional gender norms can negatively impact upon all children, pointing out that such norms have at times been oppressive for children who do not display 'normal' gender behaviours. Instead he proposed that many same-sex parents potentially challenge these traditional norms in positive ways.¹⁸⁵

- 3.90** The GLRL asserted that there are so many individual differences between all parents that generalisations along gender lines are not particularly helpful, also noting that children in gay and lesbian families will have exposure to role models of both genders:

There are simply so many differences between individual men and individual women that making such general claims based on gender differences is entirely unhelpful for determining a particular person's capabilities as a parent or potential parent. Parents and children come in all shapes and sizes, and children interact with people with all different temperaments, interests, talents and abilities throughout their lives. Children have many role models; indeed, whole communities – uncles, aunts, grandparents, cousins, teachers, friends – contribute to the raising of a child. Children in same-sex families simply do not live in a single gender vacuum any more than a child who attends a girls-only or boys-only school. The GLRL simply believes that individuals

¹⁸¹ Witness B, Evidence, 24 February 2009, p 4

¹⁸² Ms Sale, Evidence, 24 February 2009, p 70

¹⁸³ Ms Sale, Evidence, 24 February 2009, p 70

¹⁸⁴ Submission 224, p 1

¹⁸⁵ Submission 224, p 1

should be judged on their own merits without prejudicial or stereotypical understandings of sexuality or gender getting in the way of ascertaining who the best potential parents for a particular child are.¹⁸⁶

Fitness to parent

3.91 Several participants who argued that the best interests of the child are to be assessed on a case by case basis, and that same-sex couples should not be excluded from adoption simply because of their sexuality, also addressed the issue of the fitness of same-sex couples to parent. These participants referred to the positive example of many same-sex parents and suggested that those who question their fitness as a group are influenced by prejudice.

3.92 Barnardos advised the Committee that in its experience, gay and lesbian people are proving very effective in their roles as foster and adoptive parents. Ms Voigt reported that to date, Barnardos has had no instances where gay or lesbian parents have had an adverse impact on a child.¹⁸⁷ In relation to its caseload of same-sex parents as of February 2009, the agency stated:

Barnardos currently has seven children placed with 2 gay and 2 lesbian couples, all of whom have a care plan of adoption. The carers have provided excellent parenting for these children, all of whom have made pleasing and significant progress in areas of their physical, social and emotional development and who have developed a secure and positive attachment to each of their carers.¹⁸⁸

3.93 During the hearings Committee members asked Ms Voigt to respond to submissions citing evidence that children placed in same-sex families are at greater risk because such parents are more likely to experience mental illness, substance abuse, transient relationships and so on. Ms Voigt reported that this was not Barnardos' experience, noting that the rigorous assessment process eliminates inappropriate prospective parents:

I know of no evidence of [higher rates of mental illness, substance abuse, transient relationships and so on among gay and lesbian parents]. I know of many opinions of this but the evidence I do not know. In terms of our direct experience, I would say that we do not have any evidence of this. We are selecting people with stability firstly. Our carers are a very selective group, if you like, because they have been through a careful process of winnowing out. Very many heterosexual couples do not get through the process. We try to get a process which in the beginning they self-select. Once we talk to them about the fact that the children they will be working with will not be idolised little babies who look really sweet; these will be complex and difficult kids who bring baggage and history with them many people just go away because that was not what they wanted to do. My experience both with gay and heterosexual families is that on occasion life gets to them. They have break-ups or divorces or things happen or they get depressed but it is not very high because we have a fairly selective group.¹⁸⁹

3.94 Ms Voigt also pointed out that the systems in place by which accredited foster care organisations are accountable to the Children's Guardian mean that all placements are

¹⁸⁶ Gay and Lesbian Rights Lobby, Answers to questions on notice, p 3

¹⁸⁷ Ms Voigt, Evidence, 24 February 2009, p 22

¹⁸⁸ Submission 180, p 2

¹⁸⁹ Ms Voigt, Evidence, 24 February 2009, p 23

regularly and carefully monitored, including in relation to the quality of the relationship between the foster parent(s) and child.¹⁹⁰ The Committee understands that this supervision and support for foster families is mandated by the *Children and Young People (Care and Protection) Act 1998* on the basis that while in care, the child becomes the responsibility of the Minister for Community Services. As noted in Chapter 2, once a child is placed with the prospective adoptive parents, post-placement supervision is carried out by an adoption caseworker and this supervision informs a report to the court when the adoption order is sought.¹⁹¹ Once a child is legally adopted there is no requirement for ongoing supervision and support under the *Adoption Act* as the child is then the legal responsibility of the adoptive parent(s). However, supervision and support may occur on a case-by-case basis.¹⁹²

- 3.95** Ms Bader and Ms Sale spoke in evidence about their successful track record as foster parents in comparison with the placements of each of the brothers and sisters of their foster children:

We are here today to show you a family who has given our children a very stable, secure and loving family environment. One example I wanted to bring up was when we fostered seven years ago we had Jardin and Mahalia out of a group of seven siblings that all went to foster care. Six years later we are the only family who has been like a stable family. All the other siblings have been to at least three or four other placements. I think we are living proof that as a same-sex couple we are able to provide a loving and stable environment for our children.¹⁹³

- 3.96** Ms Bader and Ms Sale spoke of the extra support they have provided to their foster children, attesting to their preparedness to address the children's complex needs:

[T]he vision will never leave when we saw those two little kids come up the stairs ... they were so neglected, they were undernourished, and Mahalia had a deep cut in her face because she was attacked by another little boy. It is unbelievable what they have had to go through. It was not anybody else but us sitting at the hospital when Mahalia had to go under anaesthetic for an operation. It was not anybody else but us when we saw, in our eyes, our daughter gagging on the gas. It was us that had to teach them to eat vegetables and fruit, because they had never had it before; all they knew was KFC and McDonald's. It was us that had to take them to the speech therapist because Mahalia was so far behind because she had this ear problem that meant she had a learning disability. All those things we had to do, and we did it as parents ... It is irrelevant to us whether we are male or female, or two females, or whoever. These children came to us very, very, very neglected.¹⁹⁴

- 3.97** Ms Bader and Ms Sale also advised the Committee that DoCS has indicated it will be recommending them for adoption of their foster children (as individuals).¹⁹⁵

¹⁹⁰ Ms Voigt, Evidence, 24 February 2009, p 22

¹⁹¹ Department of Community Services, Answers to question on notice, p 1

¹⁹² Telephone conversation between Principal Council Officer and Ms Danielle Woolley, Director, Out-of-Home Care Policy, Department of Community Services, 1 April 2009; Department of Community Services, Answers to question on notice, p 2

¹⁹³ Ms Bader, Evidence, 25 February 2009, p 68

¹⁹⁴ Ms Sale, Evidence, 25 February 2009, p 70

¹⁹⁵ Ms Bader, Evidence, 25 February 2009, p 63; Ms Sale, Evidence, 25 February 2009, p 63

3.98 Dr Riggs' submission addressed what he saw as the myth that 'being lesbian or gay is inherently deviant, disordered and unhealthy' and that same-sex parents will abuse or corrupt children as a result of their own pathology. He responded that for several decades psychology has recognised that 'non-heterosexuality is part of a spectrum of diverse sexualities, all of which are healthy and positive'.¹⁹⁶ He acknowledged that some lesbians and gay men may experience mental health issues just as heterosexual people do, and went on to suggest:

If we are to recognise that the behaviours exhibited by lesbian and gay parents typically fall within a spectrum within which heterosexual parents also typically fall, then we can see that claims of pathology or damage are no more accurate to make about the majority of lesbian and gay parents than they are to make about the majority of heterosexual parents. Unfortunately, however, research has shown that accusations about the supposed pathology of lesbian and gay parents are not simply countered with assertions of non-pathology. In other words, whilst it is possible to counter anti-gay statements with proof of the fitness of lesbians and gay men to parent (as has been established in a now considerable body of empirical research), this 'proof' is not always sufficient to convince those who are sceptical of, or explicitly in opposition to, lesbian or gay parents.¹⁹⁷

3.99 In relation to the assertion that same-sex partners experience high levels of domestic violence, Mr Paul Boers, Solicitor and Board Member of the Inner City Legal Centre and a family law specialist, indicated that in his considerable experience advising same-sex parents, none had features of domestic violence in their relationship.¹⁹⁸

3.100 During oral evidence, Dr Riggs referred to research evidence from the United Kingdom that domestic violence and sexual abuse is actually more likely to occur in heterosexual families:

I would imagine many people would be aware of the high incidence of domestic violence in heterosexual families comparatively to lesbian and gay families. The research body that I am aware of makes it very clear that there is a longitudinal large sample of United Kingdom research recently completed in 2005 and the quote from the authors was a strikingly low incidence of sexual abuse—and the actual number was zero—of sexual abuse in lesbian-headed families.

If we look at some of those things and do not, per se, discuss the characteristics of individual men and women but just look at what we know about heterosexual-headed families, we know that the vast majority of them are fantastic places to raise children but we also know that a significant minority of them involve domestic violence and sexual abuse of children and when we compare that to what we know about non-heterosexual-headed families we do not have any evidence of high incidences or even comparative incidences of domestic violence or sexual abuse of children.¹⁹⁹

3.101 In response to the suggestion that gay and lesbian relationships are less stable and long-term than heterosexual ones and less characterised by monogamy, the GLRL asserted:

¹⁹⁶ Submission 224, p 1

¹⁹⁷ Submission 224, pp 1-2

¹⁹⁸ Mr Paul Boers, Solicitor and Board Member, Evidence, 25 February 2009, p 21. See also Ms Yasmin Hunter, Solicitor, Inner City Legal Centre, Evidence, 24 February 2009, p 21

¹⁹⁹ Dr Riggs, Evidence, 25 February 2009, pp 12-13

Such generalisations about a whole class of people are again completely unhelpful for ascertaining which persons will make the best parents for a child. Some heterosexual families are also prone to family breakdowns and relationship conflict and it would be equally unhelpful to exclude all heterosexual couples as a result of the circumstances of some.

Opening eligibility to as wide a pool of potential parents as possible does not give any person the right to adopt – it simply allows a greater number of people the opportunity to be considered. All couples and individuals should be judged on their particular circumstances and whether they can provide a loving, suitable and stable home to a child. Such an analysis of their capability as potential parents should not be made on the basis of stereotypes or judgements made about the class of persons they belong to. Indeed, if *any* relationship is unstable or not long term the couple would be unlikely to be eligible to adopt.²⁰⁰

The potential for ostracism

- 3.102** When asked by Committee members whether their children had experienced bullying or ostracism as a result of having gay or lesbian parents, each of the same-sex couples who gave oral evidence indicated that it had not been a significant issue for their family, but that, rather, they had generally found their communities to be accepting and supportive.²⁰¹ Brenna Harding, the 12 year old daughter of Ms Harding and Ms Braw, told the Committee that on a couple of occasions other children had made a point of her parents' sexuality, but went on to suggest that this was generally an issue of ignorance that was soon addressed:

There were probably two times that the kids in my grade have not taken it perfectly. They have either misunderstood or they have just never heard of it before. I think it is because they are confused about it. Most kids are totally accepting but there are some that are not as great ... I have only had to deal with it twice. One of the times the girl straightaway realised what she had said was totally irrelevant. I just had to explain to them what it is. When I say I have lesbian parents they are just confused. I explain to them that really it is just like any other family, it is just that I do not have a mum and dad but have two mums. Once they figure that out they are more accepting of it because they realise it is just like anyone else.²⁰²

- 3.103** On this issue, the National Children's and Youth Law Centre cited the recent Victorian Law Reform Commission report on the rights and best interests of children conceived through assisted reproduction, which reported that, '[s]tudies about the experience of children living with single lesbian mothers when compared to children living with heterosexual single mothers have revealed the former are no more likely to be teased or ostracised by their peers'.²⁰³

²⁰⁰ Gay and Lesbian Rights Lobby, Answers to questions on notice, p 5

²⁰¹ Ms Bader and Ms Sale, Evidence, 25 February 2009, p 64; Ms Harding and Ms Braw, Evidence, 24 February 2009, p 61; Witness A and Witness B, Evidence, 24 February 2009, p 6

²⁰² Miss Brenna Harding, Evidence, 24 February 2009, p 62

²⁰³ Victorian Law Reform Commission, 'The Convention on the Rights of the Child: the rights and best interests of children conceived through assisted reproduction', Occasional Paper, 2004, Note 3 at 16, cited in Submission 215, p 11

- 3.104** Dr Briggs suggested in his submission that the proposition that children of lesbian or gay parents will be unnecessarily subjected to discrimination on the basis of their parents' sexuality was a powerful but misguided argument:

This type of argument is a powerful one, as it does not explicitly talk about lesbian or gay parents in terms of pathology, but rather talks about the consequences of being raised by a lesbian or gay parent. In this way it professes concern for children raised in lesbian or gay headed households, without having to actually say that lesbians or gay men are inherently bad.²⁰⁴

- 3.105** Barnardos acknowledged that having same-sex parents may add to the complex issues faced by many adopted children, but expressed confidence in parents' and children's capacity to deal with this. It also suggested that it was important to challenge such discrimination:

Same-sex couples face the additional challenges of discrimination, stereotyping and legal inequities which, in turn, impact on a child placed in their care for either fostering or adoption. This however must not be seen as an argument for the exclusion of same-sex couples from applying to adopt. Adopted people face a number of issues related to their adoption, particularly their sense of grief, loss and rejection. These issues are further compounded for some groups of children: those adopted from overseas (mainly trans-racially), older children and children who have been physically, sexually or emotionally abused. Children placed with same-sex couples may also face additional issues; however, as with other adopted children, they and their adoptive parents will develop a range of strategies and skills to deal with this in a constructive way. In addition, it is the responsibility of law-makers, governments and public social and welfare organisations and policy-makers to foster a respect for all individuals and an acceptance of the value of people's differences, so that we can work towards a society where there is no discrimination.²⁰⁵

- 3.106** The issue of discrimination against same-sex couples and their children is explored in detail in Chapter 5.

Children's views

- 3.107** The Committee is conscious that an important principle of the *Adoption Act* is that in determining the best interests of a child, the wishes of that child should be taken into account.²⁰⁶ In this section the views expressed by the children and young people who participated in the inquiry are canvassed. The Committee acknowledges the limited evidence available to the inquiry about the views of children and believes that this is an important area where more empirical research should be undertaken.

- 3.108** Of the three children of same-sex parents who gave evidence during the inquiry, each attested that they are very happy with their parents. Witnesses C and D both told the Committee that they liked having two dads,²⁰⁷ while Brenna Harding explicitly called for the legal recognition of Ms Braw as her second parent:

²⁰⁴ Submission 224, p 2

²⁰⁵ Submission 180, p 4

²⁰⁶ *Adoption Act 2000*, s 8(2)(a)

²⁰⁷ Witnesses C and D, Evidence, 24 February 2009, p 8

I have two mothers but only one of them is my legal parent. My biological mum, Vicki, was a single lesbian when I was born so there is only one name on my birth certificate. My other mum, Jackie, has been living with me since I was 5, over half my life, and I can hardly remember the time when she wasn't living with me! I think it is really unfair that Jackie isn't legally recognised as my mum just because she isn't a man. She does all the things that a man would do (if not more)! She cooks, cleans, takes me to soccer, listens to my never-ending stories about school, jokes with me and tells me to get out of the bathroom just as well as a man would. There is no reason why she shouldn't be able to adopt me. I hope you will take my opinion into account.²⁰⁸

- 3.109** When Witnesses J and K, the young adults who had been adopted into a heterosexual parented family, appeared before the Committee they did not make specific comments in relation to adoption by same-sex couples. However, both spoke of the specific qualities that their mother and father provide them as young women and men. When asked about the value of male and female role models in the lives of children, both witnesses expressed concern at the prospect of not having both a constant male and female role model as their parents. Witness J spoke of the security that having a mother and father brings to his life:

It would be extremely different to what I have with a mother and father. I have the security and I know that mum and dad are always going to be there. I cannot speak about other people in that situation but I would imagine that if dad was a fleeting figure and was here sometimes and then he was not it would not feel like a secure relationship. I would not feel like I had the same level of trust. The fact that they are married and support me - I think the level of security would make a big difference.²⁰⁹

- 3.110** Similarly, Witness K expressed her view that the absence of either a mother or father may result in confusion for a child as they may have multiple role models who are of equal importance, rather than one definitive male and female gender role model in the form of a mother or father.²¹⁰

- 3.111** When the NSW Commissioner for Children and Young People, Ms Calvert, gave evidence to the Committee, she reported that she had asked the Commission's Young People Reference Group for their views on adoption by same-sex couples. Ms Calvert indicated that the Reference Group looked positively on the issue, recounting their responses in some detail:

[The Young People Reference Group] had a very positive view about same-sex adoption. They told me that they thought the most important thing was for children and young people to have a safe and loving home. The sexuality of the parents was not important to them ... What they did think was important about adoption was the motivation of the parent - whether they were going to provide a stable, safe and loving environment that that children could grow up in. They also thought that matching children with potential parents was important and that children should have a say about how they were matched with their parents if they were old enough to do so.

They also thought that the adoptive parents should be people that the children could connect with and who understood their background and culture. They identified that a

²⁰⁸ Submission 64, Ms Vicki Harding, Ms Jackie Braw and Miss Brenna Harding, p 5

²⁰⁹ Witness J, Evidence, 19 March 2009, p 14

²¹⁰ Witness K, Evidence, 19 March 2009, p 14

positive thing about having same-sex parents was that it could make children more diverse and appreciative of diversity. They also thought it was important that adopted children be able to find out about their biological parents or family for health and cultural reasons and maintain relationships with them if they chose to. The young people finished that part of the meeting by saying to me that they thought, given that society has changed and we now have families with two mums and two dads in them, that the law needed to catch up with where we are now.²¹¹

- 3.112** Following the hearing, the Commission's Young People Reference Group was asked to provide feedback on four scenarios in relation to adoption by same-sex couples. The first scenario concerned whether either a heterosexual, gay or lesbian couple should be given priority in the adoption of an unknown infant, all other things being equal. The second concerned whether the same-sex partner of a woman with a baby from a previous relationship should be able to adopt the child. The third concerned whether a gay couple should be able to adopt a child they have been fostering, while the fourth concerned whether a lesbian couple should be able to adopt an unknown child.²¹²
- 3.113** The Commission reported that, in relation to the first scenario, 14 out of 15 written responses indicated that priority for adoption should not be given on the basis of a couple's sexuality, and that the most important thing was the ability to provide a safe and loving environment. In relation to the second scenario, all of the young people who responded believed that the partner of the mother should be able to adopt the child if that will benefit the child, noting that in the event of the mother's death, the child would be able to stay with the partner with whom it has an existing relationship. All of the respondents to the third scenario believed that the two men should be able to adopt their foster children. Finally, all of the respondents to the fourth scenario stressed that the couple's ability to provide a safe and loving environment is the most important issue, along with their motivation for adopting and the match between the prospective parents and child. They also emphasised that these requirements should apply to all couples, irrespective of their sexuality.²¹³
- 3.114** The National Children's and Youth Law Centre also reported to the Committee on the experience and opinions of young people, expressed via its web-based LawMail service, which allows children and young people across Australia to ask questions about their rights and the law as it affects them. According to the Centre, the service receives around 4 million hits per year. The Centre's submission suggested that participants' contributions indicate that, 'they conceive of family in terms of the relationships that they have with those that they live with on a day-to-day basis. What matters is not the sexuality of the parent but the relationship between the adult who performs the role of a parent to the child.'²¹⁴ It went on to state:

In our experience children link their experience of family to those people:

- they know and live with;
- who they consider play the role of parent;

²¹¹ Ms Calvert, Evidence, 25 February 2009, p 36

²¹² Commission for Children and Young People, Answers to questions on notice, p 1, 3, 5 and 7

²¹³ Commission for Children and Young People, Answers to questions on notice, pp 1-9

²¹⁴ Submission 215, p 5

- who they have a parent-child relationship with;
- who treat them like their child;
- who other people know and recognise as their parent or family; and most importantly,
- who are there when they need them.²¹⁵

Conclusion

- 3.115** Once again the Committee acknowledges that the views documented in this chapter are informed by beliefs about fundamental and sensitive issues to do with family, the wellbeing of children, and indeed, the sort of society we ought to aspire to be. The views on both sides of the debate are by nature deeply and strongly held.
- 3.116** As noted at several points in this chapter, participants' assertions about the best interests of the child, whatever their views, were often made with reference to research evidence. The social science research evidence presented to the Committee in respect of whether family form or family functioning is the primary determinant of outcomes for children is discussed in detail in Chapter 4.
- 3.117** It is not possible to entirely disentangle the arguments presented in this chapter from the research evidence documented in the following one. Nevertheless, the Committee has drawn some conclusions at this stage with regard to the various views, beliefs and reasoned arguments documented in this chapter about the perceived best interests of the child in respect of adoption by same-sex couples, as well as the arguments reflecting the way that the adoption system works in practice. Our conclusions with regard to the research evidence are made in Chapter 4.
- 3.118** Some members of the Committee share the views expressed by many during the inquiry that the best interests of children are met in the context of a family comprised of a mother and a father in a permanent, preferably married relationship, where children can experience on a daily basis the fundamental complementarity of motherhood and fatherhood. These members consider that mothers and fathers bring unique qualities to their parenting roles, both of which are essential to optimal child development. These members agree with numerous participants that the state has a duty of care to ensure that children are adopted into families that will provide 'optimal care', believing strongly that same-sex parenting denies children such care, to their detriment in the short and longer term. Correspondingly, these members consider that the Government has a responsibility to adoptive children and to broader society to maintain the status quo and prevent adoption by same-sex couples.
- 3.119** The majority of Committee members, however, consider that the gender of parents is not a significant determinant of children's wellbeing, and that as such, the sexual orientation of prospective parents is of no material relevance to the best interests of adoptive children. Nor do the majority consider that the sexuality of gay and lesbian people precludes them from being fit and proper parents, or that children in same-sex families necessarily have insufficient

²¹⁵ Submission 215, p 6

access to both male and female role models. The majority of Committee members are persuaded by the argument that an adoptive child's best interests are determined in the context of an assessment of the individual child's needs and the individual parents' capacity to meet those needs. Same-sex parents should be able to be assessed on exactly the same basis as other prospective parents.

- 3.120** The majority note that if legally eligible to adopt, gay and lesbian people will, like all prospective parents, be subject to a rigorous assessment process by accredited adoption agencies to determine their suitability to adopt; they will also be subject to the preferences of relinquishing parents; and they must ultimately satisfy a court that they can fulfil the best interests of the child concerned. The majority of Committee members are confident in the rigour of the adoption system to continue to ensure that only those who would make fit and proper parents go on to adopt.
- 3.121** In addition, the majority of Committee members are persuaded by a number of other arguments examined in this chapter that adoption by same-sex couples is in the best interests of the child. It is highly desirable to broaden the pool of adoptive parents in order to increase the likelihood of the best match between individual child and prospective parent. Also, the permanency that is so desirable for many children in out-of-home care would be facilitated by enabling same-sex couples to adopt their foster children.
- 3.122** The majority of Committee members are also mindful that the views of children and young people either expressed directly to the Committee, or reported to us, suggest that most are supportive of adoption by same-sex couples. Other Committee members believe that the evidence from children to the inquiry was limited and should not be used to assert a generalised position by children in NSW towards adoption by same-sex couples.
- 3.123** The Committee members who form the majority are conscious that the views presented in this chapter were quite clearly delineated along religious versus secular lines. They uphold the right of church-based organisations to voice their beliefs with a view to influencing policy, and acknowledge the validity of those views. At the same time, it is their view that the more secular views presented in this chapter, which accept parenting by gay and lesbian people as valid and support adoption by same-sex couples as being in the interests of children, are more aligned with prevailing standards and community aspirations about parenting, the welfare of children and the inclusiveness of society. Other Committee members reject the argument that the debate about adoption by same-sex couples is a religious versus secular contest. Many of the participants in the inquiry who expressed belief-based views also articulated reason-based arguments as to why they opposed adoption by same-sex couples. For many of these participants the key issue is the importance of a child having the opportunity to be raised by a mother and a father in a permanent, preferably married relationship, a view to which a number of people subscribe, not just theists or those of religious persuasion.
- 3.124** Finally, the majority of Committee members also observe that the focus of many participants' evidence, as captured in this chapter, was on the adoption of unknown young infants. It is clear that a larger number of other children stand to benefit from adoption: first, (generally older) children who as a result of abuse and/or neglect are in foster care; and second, children who are already parented by gay and lesbian people but whose parental relationship with their non-biological parent is not legally recognised. This divergence in the evidence becomes more apparent in subsequent chapters. For now, the majority of the Committee suggest that there may be a certain protectiveness felt towards young infants relinquished for adoption that

obscures the broader picture of adoption generally and adoption by same-sex couples in particular.

- 3.125** The majority of Committee members conclude that the best interests of the child in the adoption context will be served by decisions based on the individual needs of the child and the particular capacities of the parents, without regard to the sexual orientation of the parents. We now turn to examine the research evidence to ascertain what light it sheds on these preliminary conclusions.

Chapter 4 **Research on families**

As noted in the previous chapter, many inquiry participants, whether supportive of, or opposed to adoption by same-sex couples, referred to research to support their views with regards to the best interests of the child. While that chapter focused on the views and assertions expressed in this debate, this chapter focuses on the social science research presented to the Committee through submissions and oral evidence in respect of whether family types are the primary determinant of outcomes for children. The chapter then considers the criticisms made by participants with regard to the methodology and ideology of various studies. A framework for objectively evaluating the available research is also outlined in brief. The chapter then concludes by presenting the suggestions of key witnesses as to the most appropriate policy response to the research.

The Committee decided to deal with the research evidence in this chapter, separate to its analysis of the belief-based arguments documented in Chapter 3, because the arguments with respect to the findings of various research studies and their methodological limitations were of such complexity as to warrant detailed consideration in their own right. However, the Committee notes at the outset its limitations with regard to conducting its own thorough analysis of the literature. The Committee did not undertake its own review of the research literature.²¹⁶

Family form and family functioning

- 4.1** The key debate that has emerged from the literature and which was explored during the inquiry focuses on the extent to which family form and/or family functioning impacts upon a child's development in the short and longer term. Many participants, whether supportive of or opposed to adoption by same-sex couples, referred to this literature.
- 4.2** As noted in the previous chapter, proponents for family form argued very strongly that a family that is parented by a mother and father in a permanent, preferably married relationship is the optimal environment for a child's development and that the absence of a mother or father is associated with poorer outcomes for children. Proponents of family form did not discount the importance of family functioning, but rather saw the optimal development of positive family relationships and dynamics as intrinsically linked to the presence of both a mother and a father.
- 4.3** Advocates of family functioning argued that it is the quality of relationships, and the provision of a stable and nurturing environment, regardless of family structure or the sexual orientation of parents, which is most important to the development of children. They asserted that the potential for positive family processes and the development of positive, nurturing relationships is just as likely in a same-sex parented family or heterosexual parented family, or other family structures.
- 4.4** As noted in the previous chapter, the views expressed in this debate are strongly held and keenly felt. It became apparent during the inquiry that the research was often cited in a way that reflected participants' values and beliefs. In addition, some participants who held widely

²¹⁶ A list of research references presented to the Committee can be found in Appendix 4

divergent views pointed out that some of the research itself was not value neutral. For example, Anglicare Diocese of Sydney, noted in its submission that the concepts of family and optimal environments for children are inherently ideological and value-based. Accordingly, it called on researchers to acknowledge how their views might influence their work:

The inescapably ideological and emotional nature of this subject makes it incumbent on scholars to acknowledge the personal convictions they bring to the discussion.²¹⁷

Parenting by a mother and a father

4.5 Many submissions to the inquiry provided or referred to research suggesting that the optimal environment for the development of children is provided in a family parented by a heterosexual couple in a committed, preferably married, relationship.

4.6 For example, Family Voice Australia cited research into foster care by George Rekers, Professor of Neuropsychiatry and Behavioural Science at the University of South Carolina School of Medicine. Family Voice Australia quoted Professor Rekers' conclusion about the impact of family structure on child adjustment:

The best child adjustment results from living with a married man and woman compared to other family structures. It is clearly in the best interest of foster children to be placed with exclusively heterosexual married couple foster families because this natural family structure inherently provides unique needed benefits and produces better child adjustment than is generally the case in households with a homosexually behaving adult.²¹⁸

4.7 In their submission, Salt Shakers point to a research review conducted by Dr Robert Lerner and Dr Althea Nagai, from Lerner and Nagai Quantitative Consulting, to state:

Research shows that a heterosexual married couple will provide the best environment for bringing up a baby. Married couples provide a better environment than one parent families ...²¹⁹

4.8 The Australian Christian Lobby referred to the research of Sotirios Sarantakos, Associate Professor of Sociology at Charles Sturt University, to support its view that the best environment for children is in a heterosexual parented family.²²⁰

Parenting skills of mothers and fathers

4.9 Various participants cited research to support their view that the presence of a mother and a father is critical to optimal child development, and that men and women have a fundamental complementarity expressed in parenting.

²¹⁷ Submission 151, Anglicare Diocese of Sydney, p 9

²¹⁸ Rekers G, *Review of Research on Homosexual Parenting, Adoption and Foster Parenting*, p 2, cited in Submission 30, Family Voice Australia, p 4

²¹⁹ Lerner R & Nagai A, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting, Marriage Law Project 1991*, cited in Submission 194, Salt Shakers, p 2

²²⁰ Submission 185, Australian Christian Lobby, p 5

- 4.10** CatholicCare and the Life, Marriage and Family Centre, both representing the Catholic Archdiocese of Sydney included this quotation from David Popenoe, Professor of Sociology at Rutgers University, to support their view:

We should disavow the notion that ‘mummies can make good daddies’ just as we should disavow the notion of radical feminists that ‘daddies can make good mummies’ ... The two sexes are different to the core and each is necessary - culturally and biologically - for the optimal development of a human being.²²¹

- 4.11** Family Voice Australia presented research evidence to the Committee regarding the difference between men and women in parenting technique and skill, referring specifically to the findings of W Bradford Wilcox, Associate Professor of Sociology at the University of Virginia, into the role that fathers and mothers play in a child’s upbringing:

Fathers excel when it comes to discipline, play, and challenging their children to embrace life’s challenges ... Engaging in rough physical play with dad teaches children how to deal with aggressive impulses and physical contact without losing control of their emotions ... Compared to mothers, fathers are more likely to encourage their children to take up difficult tasks, to seek out novel experiences, and to endure pain and hardship without yielding.²²²

In sum, mothers are better able than fathers to read their children’s words, deeds, and appearance to determine their emotional and physical state. This maternal sensitivity to children helps explain why mothers are superior when it comes to nurturing the young, especially infants and toddlers.²²³

Father absence

- 4.12** A significant proportion of the research into the child development outcomes of same-sex parenting presented to the Committee has focused on the impact of both a mother and father, and the impact that the loss of one gender among parents, particularly the absence of a father, may have on the development of children.
- 4.13** For example, Family Voice Australia referred to findings on the adverse impact of father absence on adolescent boys and girls, citing the research of Ellis et al and Harper et al respectively:

²²¹ Popenoe D, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage are Indispensable for the Good of Children and Society*, New York, The Free Press, 1996, p 197, quoted in Submission 213, Life, Marriage and Family Centre and CatholicCare, Catholic Archdiocese of Sydney, p 4 and Submission 185, p 8. Hereafter this submission is referred to as that of the Catholic Archdiocese of Sydney.

²²² Wilcox B, ‘Reconcilable differences: What social sciences show about the complementarity of the sexes and parenting’, *Touchstone*, Vol 18, Issue 9, cited in Submission 30, p 2

²²³ Wilcox B, ‘Reconcilable differences: What social sciences show about the complementarity of the sexes and parenting’, *Touchstone*, Vol 18, Issue 9, cited in Submission 30, p 2

Girls whose fathers left the family early (before age 5) were five times more likely in the U.S. and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.²²⁴

Male adolescents in all types of families without a biological father (mother only, mother and stepfather, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.²²⁵

- 4.14** In evidence, Mr Chris Meney, Director of the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney, argued that fathers have been shown to be vital in terms of sociological outcomes for children. He acknowledged that much of the research on father absence examines heterosexual families where the parents have separated or where fathers have abdicated parental responsibility, but maintained that the research showed the ‘absence of a father figure has a deleterious effect on outcomes for kids.’²²⁶

Outcomes for children

- 4.15** Family Voice Australia cited the research of Professor Lynn D Wardle, Professor of Law at Brigham Young University, as to the potential psychological and behavioural outcomes for children of same-sex parents. According to Family Voice Australia, Professor Wardle concluded that:

There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).²²⁷

- 4.16** The Australian Family Association cited Associate Professor Wilcox’s findings. According to its submission, Associate Professor Wilcox demonstrated that:

[S]ex-differentiated parenting has been linked with the reduction of psychological, academic and social problems in children and young adults, as well as reducing propensity for criminal behaviour, particularly in boys.²²⁸

- 4.17** The Catholic Archdiocese of Sydney cited research from Associate Professor Sarantakos which focused on the impact of family form on the academic and social outcomes of children. It quoted from the findings of this academic as follows:

²²⁴ Ellis B, et al, ‘Does father absence place daughters at special risk for early sexual activity and teenage pregnancy?’, *Child Development*, Vol 74, 2003, pp 801-821, cited in Submission 30, p 2

²²⁵ Harper C, and McLanahan S, *Father absence and youth incarceration*, Center for Research on Child Wellbeing, Working Paper 99-03, 2003, cited in Submission 30, p 3

²²⁶ Mr Chris Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 24 February 2009, p 42

²²⁷ Submission 30, p 3

²²⁸ Submission 207, Australian Family Association, p 4

Overall, the study has shown that children of married couples are more likely to do well at school, in academic and social terms, than children of co-habiting heterosexual and homosexual couples ... In this study, married couples seem to offer the best environment for a child's social and educational development.²²⁹

- 4.18** The Catholic Archdiocese also presented findings relating to gender expression and sexuality of children. It referred to a study by Dr Richard Green, Professor of Psychiatry and Law at the University of California, which found:

developmentally important statistically significant differences between children reared by homosexual parents compared to heterosexual parents. For example, children raised by homosexuals were found to have greater parental encouragement of cross-gender behaviour (and) greater amounts of cross-dressing and cross-gender role-play behaviour.²³⁰

Parenting by same-sex couples

- 4.19** Advocates of same-sex parenting presented research to the Committee to support their views that it is the processes within families, the quality of relationships and the provision of a stable and nurturing environment, irrespective of the gender of parents or structure of the family, that is most important to a child's development.

- 4.20** In speaking of her knowledge of outcomes in relation to permanent care, fostering and adoption (as opposed to families generally), Ms Mary Griffin, Director of Adoption and Permanent Care Services from the Department of Community Services (DoCS) outlined her understanding of the factors identified by research that are central to positive outcomes for children who have been adopted:

[T]he key things for a family such as their commitment to the child, their flexible parenting style, realistic expectations, their ability to relate to the birth family and to help the child deal with the fact that they have two families. Those are the things that have been shown very clearly to lead to good outcomes for children. That is documented in the academic research.²³¹

- 4.21** Ms Griffin further stated that her understanding of the research was that marital status is not associated with poor outcomes for children stating, 'Marital status, from what I have read recently in the research, for example, is increasingly irrelevant to the capacity of people to provide nurturing care.'²³²

²²⁹ Sarantakos S, 'Children in three contexts: Family, Education and Social Development', *Children in Australia*, Vol 21, No 3, 1996, p 23, cited in Submission 213, p 9

²³⁰ Green R, et al, 'Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children', *Archives of Sexual Behaviour*, Vol 15, 1986, pp 167-184, cited in Submission 213, p 4

²³¹ Ms Mary Griffin, Director, Adoption and Permanent Care Services, Department of Community Services Evidence, 24 February 2009, p 7. See also Department of Community Services, Answers to questions on notice, p 11 and Rice J, 'Building Futures – Adoption to Permanent Care: what does the research tell us?', Forum on Emerging Australian Practice – Growing Permanent Care from Adoption, Department of Community Services, 27 June 2008

²³² Ms Griffin, Evidence, 24 February 2009, p 13

4.22 The Castan Centre for Human Rights Law at Monash University cited Dr Ruth McNair, Senior Lecturer at the University of Melbourne, who was commissioned by the Victorian Law Reform Commission (VLRC) to conduct a review of the literature on same-sex parenting. Dr McNair's review concluded that, 'family functioning (processes) rather than family structure is the critical factor in determining children's outcomes.'²³³

4.23 Similar research regarding the importance of family processes, from a study of same-sex relationships in Western Australia, was provided by the Federation of Parents and Citizens' Associations of NSW in its submission:

The study found that children in all family constellations have been described by parents and teachers to have more behavioural problems when parents report more personal distress and more dysfunctional parent-child interactions. In contrast, children are rated as better adjusted when their parents report greater relationship satisfaction, higher levels of love, and lower inter-parental conflict regardless of their parents' sexual orientation. Children apparently are more powerfully influenced by family processes and relationships than by family structure.²³⁴

4.24 In evidence, Dr Damian W Riggs, a Lecturer in psychology with Flinders University, Research Fellow at the University of Adelaide and co-author of the Australian Psychological Society's literature review, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families*, spoke on behalf of the Australian Psychological Society. He stated that research evidence shows that children in heterosexual households are not advantaged over other children. He reported that this is because children are benefited by positive family processes and the evidence suggests that the processes are as positive in lesbian and gay families as they are in heterosexual families.²³⁵ Dr Riggs contended that:

[A]ll of the parenting psychology research says that what children need are safe, stable and secure environments in which they are loved, cared for and nurtured ... The research and evidence holds out that lesbian or gays and other non-heterosexual parents can do that.²³⁶

4.25 This is consistent with the review conducted by the Australian Psychological Society, which concluded that:

[T]he literature discussed here indicates that the family factors that are important for children's outcomes and wellbeing are family processes and the quality of interactions and relationships. The research indicates that parenting practices and children's outcome in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that

²³³ Submission 221, Castan Centre for Human Rights Law, Monash University, p 9

²³⁴ Kendall C, et al, *Same-Sex Relationships in Western Australia*, 2000, p 213, cited in Submission 228, Federation of Parents and Citizens' Associations of NSW, p 4

²³⁵ Dr Damian W Riggs, Lecturer, Flinders University, Research Fellow, University of Adelaide, co-author of the Australian Psychological Society's literature review, *Lesbian, Gay, Bisexual and Transgender Parented Families*, speaking on behalf of the Australian Psychological Society, Evidence, 25 February 2009, p 16

²³⁶ Dr Riggs, Evidence, 25 February 2009, p 11

considerable legal discrimination and inequity remain significant challenges for these families.²³⁷

Outcomes for children

4.26 When questioned about outcomes-based research on same-sex parenting, Ms Louise Voigt, Chief Executive Officer and Director of Welfare at Barnardos, argued that to her knowledge, the research has not demonstrated that same-sex parenting results in detrimental effects upon children.²³⁸

4.27 In advocating support for adoption by same-sex couples, Barnardos included the following statement from Professor Gerald P Mallon from the School of Social Work at the City University of New York and Bridget Betts from Child Care Training and Consultancy Ltd, in its submission:

In summary, all the relevant research examining the impact on children of having a lesbian or gay parent shows parental sexual orientation to have no measurable effect on the quality of parent-child relationships or on children's social adjustment or mental health.²³⁹

4.28 The National Children's and Youth Law Centre at the University of NSW included a quotation from the Occasional Paper, *The Convention on the Rights of the Child: the Rights and Best Interests of Children Conceived Through Assisted Reproduction* (2004), prepared by the VLRC and based on the literature review by Dr McNair:

[T]here is simply no credible evidence that (same-sex) relationships cause harm to the intellectual, emotional, psychological or sexual development of children by virtue of the sexuality of their parents.²⁴⁰

4.29 Women's Legal Service NSW noted in its submission that a significant amount of research into the wellbeing of children with lesbian and gay parents has been undertaken, which demonstrates that the mere fact of a child having a gay or lesbian parent does not disadvantage a child. In their submission, they quote a research review by the NSW Gay and Lesbian Rights Lobby entitled *Meet The Parents*.²⁴¹ This report stated:

Over the past 25 years a considerable body of credible social science research on lesbian and gay parents and their children has built up. It shows convincingly that lesbian and gay parents are 'like' heterosexual parents in that their children do not

²³⁷ Australian Psychological Society, *Lesbian, Gay Bisexual and Transgender Parented Families*, August 2007, p 25

²³⁸ Ms Louise Voigt, Chief Executive Officer and Director of Welfare, Barnardos, Evidence, 24 February 2009, p 24

²³⁹ Mallon G P and Betts B, *Recruiting, assessing and supporting lesbian and gay carers and adopters: A good practice guide for social workers*, BAAF Adoption and Fostering, London, 2005, p 24, quoted in Submission 180, Barnardos, p 2

²⁴⁰ Submission 215, National Children's and Youth Law Centre, University of NSW, p 9

²⁴¹ Submission 225, Women's Legal Services NSW, p 5. See also Submission 222, Professor Jenni Millbank, p 5

demonstrate any important differences in development, happiness, peer relations or adjustment.²⁴²

- 4.30** Professor Jenni Millbank, Professor of Law at the University of Technology, Sydney, who wrote the research review which informed the *Meet the Parents* report, contended that, ‘Children are not harmed, or disadvantaged, through being raised by lesbian mothers or gay fathers.’²⁴³
- 4.31** Professor Millbank also pointed to the research of Professor Charlotte Patterson et al and Professor Susan Golombok et al, which she argued is highly rigorous research supporting same-sex parenting.²⁴⁴
- 4.32** The Federation of Parents and Citizens’ Associations of NSW referred to evidence from the American Academy of Pediatrics whose research revealed the behavioural, personality and parenting attitudes of same-sex couples to be quite similar to those of heterosexual parents. The Federation’s submission quoted the research as follows:

Empirical evidence reveals in contrast that gay fathers have substantial evidence of nurturance and investment in their paternal role and no differences from heterosexual fathers in providing appropriate recreation, encouraging autonomy, or dealing with general problems of parenting. Compared with heterosexual fathers, gay fathers have been described to adhere to stricter disciplinary guidelines, to place greater emphasis on guidance and the development of cognitive skills, and to be more involved in their children’s activities.²⁴⁵

Lesbian mothers strongly endorse child-centered attitudes and commitment to their maternal roles and have been shown to be more concerned with providing male role models for their children than are divorced heterosexual mothers. Lesbian and heterosexual mothers describe themselves similarly in marital and maternal interests, current lifestyles, and child-rearing practices. They report similar role conflicts, social support networks, and coping strategies.²⁴⁶

Fathers and child development

- 4.33** In her submission, Professor Millbank referred to a critique of the available literature on father absence which suggested that this research is methodologically flawed:

It is well documented that in Australia and elsewhere, American literature on ‘father absence’ has been much misused. Louise Silverstein and Carl Auerbach argue

²⁴² Submission 225, p 5

²⁴³ Submission 222, p 5

²⁴⁴ Golombok S, Perry B, Burston A, Murray C, Mooney-Somers J, Stevens M & Golding J, ‘Children with lesbian parents: a community study’, *Developmental Psychology* 20, 2003, Vol 39, No 1, pp 20-33 and MacCallum F & Golombok S, ‘Children raised in fatherless families from infancy: a follow-up of children of lesbian and single heterosexual mothers at early adolescence’, *Journal of Child Psychology and Psychiatry*, 2004, Vol 45, No 8, pp 1407-1419, both cited in Submission 222, p 6

²⁴⁵ Kendall, C, et al, *Same-Sex Relationships in Western Australia*, quoted in Submission 228, p 3

²⁴⁶ Perrin, E, *Technical Report: Coparent or Second Parent Adoption by Same Sex Parents*, American Academy of Paediatrics, Vol 109, No 2, 2002, p 341, quoted in Submission 228, p 3

concisely that much literature on ‘father absence’ represents an essentialist view of fathers and a ‘dramatic oversimplification of the complex relations between father presence and social problems.’ They make the point that studies positing the detrimental effects of ‘father-absence’ are in fact explicable as a direct result of maternal poverty. When poverty is controlled for in studies there is no demonstrable difference in the well being of children in father-present and father-absent families.²⁴⁷

- 4.34** Dr Riggs provided the Committee with a literature review conducted by Stacey and Biblarz on the research on same-sex parenting. In this review, Stacey and Biblarz concluded that non-biological lesbian mothers of donor inseminated children scored higher than heterosexual fathers, both those whose children were conceived naturally and those who accessed donor insemination, on measures of parenting skills and practices and quality of interactions with children. They also spent more time than heterosexual fathers in child care activities, including discipline and limit setting.²⁴⁸

Gender identity and sexuality of children

- 4.35** The Federation of Parents and Citizens’ Associations of NSW submission cited a review of the literature on co-parent and step-parent adoption by same-sex parents from the American Academy of Pediatrics, which concluded that extensive studies have found no evidence of gender confusion or differences in gender identity between children raised in same-sex and heterosexual families:

The gender identity and sexual orientation of children who have been raised by same sex couples has been found to be consistent to children raised in heterosexual families. ‘None of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behaviour. No differences have been found in the toy, game, activity, dress, or friendship preferences of boys or girls who had lesbian mothers, compared with those who had heterosexual mothers.’²⁴⁹

- 4.36** The Federation also referred to research regarding the impact of same-sex parenting on the sexual orientation and gender expression of children. It stated that this research had found:

Children of same sex relationships were more open to and were slightly more likely to consider the possibility of having a same sex partner. However, both children from heterosexual parents and same sex relationships had similar proportions that identified themselves as homosexual.²⁵⁰

²⁴⁷ Submission 222, p 8

²⁴⁸ Stacey and Biblarz, *(How) Does the sexual orientation of parents matter?*, American Sociological Review, 2001, Vol 66, pp 159-183, p 174

²⁴⁹ Perrin, E, *Technical Report: Coparent or Second Parent Adoption by Same Sex Parents*, American Academy of Pediatrics, Vol 109, No 2, 2002, p 341, cited in Submission 228, pp 3-4

²⁵⁰ Submission 228, pp 3-4

Criticisms of the research

- 4.37 During evidence, participants on both sides of the debate about adoption by same-sex couples criticised the methodological rigor and ideological integrity of the research that each side presented.

Methodological limitations

- 4.38 Numerous participants who supported parenting by a mother and a father spoke against adoption by same-sex couples and criticised the methodology of studies used to support adoption by same-sex couples.

- 4.39 In evidence, Mr Chris Meney of the Catholic Archdiocese of Sydney quoted various critiques of the literature. He referred to a critique by Professor Philip Belcastro, from the City University of New York, who in a review of 14 studies reported that ‘all of the studies lacked external validity’, along with that of Drs Lerner and Nagai, whose review of 49 empirical studies concluded that, ‘The methods used in these studies is so flawed that these studies prove nothing.’²⁵¹ Mr Meney also quoted Professor Steven Nock, Commonwealth Professor of Sociology at the University of Virginia, who concluded that his analysis of same-sex parenting literature revealed fatal methodological flaws across many of the studies, and a 2003 paper from the Australian Institute of Family Studies which concluded that:

Much of the available research has involved small, unrepresentative samples that are predominantly well educated, middle class and American. The degree to which results reflect sampling biases of the research, and their applicability in the Australian context, are thus difficult to evaluate.²⁵²

- 4.40 The research review conducted by Drs Lerner and Nagai was also referred to in the Australian Christian Lobby’s submission:

Drs Robert Lerner and Althea K. Nagai, professionals in the field of quantitative analysis, reviewed 49 studies on same sex parenting that concluded there is no difference whether a child is raised by a mother and a father, two fathers or two mothers.

Evaluating six key components of each study, including hypothesis and design, sampling and controlling unrelated effects, Lerner and Nagai found at least one fatal research flaw in each of the 49 studies. They argue that ‘no generalizations can reliably be made on any of these studies. For these reasons the studies are no basis for good science or good public policy.’²⁵³

- 4.41 In its submission and oral evidence, Anglicare referred to an article by Professor George Rekers and Dr Mark Kilgus, specialist in child and adolescent psychiatry, offering a comprehensive critique of the methodologies used in studies of same-sex parenting to date:²⁵⁴

²⁵¹ Mr Meney, Evidence, 24 February 2009, p 37

²⁵² Mr Meney, Evidence, 24 February 2009, p 37

²⁵³ Submission 185, p 5

²⁵⁴ Submission 151, p 8

One of the references in our submission is to a paper by George Rekers and Mark Kilgus, 'Studies of Homosexual Parenting—a critical review'. As the title implies, they examine and review a number of studies. When you read the article you can see that they are really looking at it purely from a methodological point of view and drawing real question marks over a lot of studies and saying: Are these adequate in terms of meeting the basic sorts of things to do with sampling size, sampling strategies, and so on? The whole article really is devoted to that single issue.²⁵⁵

4.42 Similarly, the Catholic Archdiocese of Sydney commented that conducting research in the homosexual community is fraught with methodological problems.²⁵⁶

4.43 In their submission, Salt Shakers referenced three reviews, each of which concluded that research supporting gay and lesbian parenting is methodologically flawed. These included literature reviews by Lerner and Nagai, Stacey and Biblarz, and Patricia Morgan, Senior Research Fellow at the Institute for the Study of Civil Society.²⁵⁷

4.44 An inquiry participant raised particular concerns about certain research methods used to advance the case in support of adoption by same-sex couples.²⁵⁸

4.45 The Women's Action Alliance (NSW) noted the comments of the American College of Pediatricians:

Heterosexual parenting is the normative model upon which most comprehensive longitudinal research on childrearing has been based. Data on long-term outcomes for children placed in homosexual households are very limited and the available evidence reveals grave concerns. Those current studies that appear to indicate neutral to favourable results from homosexual parenting have critical flaws such as non-longitudinal design, inadequate sample size, biased sample selection, lack of proper controls, and failure to account for confounding variables ... Therefore the burden is on the proponents of homosexual parenting to prove that moving further away from the heterosexual parenting model is appropriate and safe for children.²⁵⁹

4.46 In turn, those participants who support same-sex parenting criticised the methodologies of studies emphasising family structure. They also criticised the research that had rejected the findings of studies in support of family functioning, and contended that the veracity of research on parenting by same-sex couples has improved significantly over time.

4.47 Professor Millbank contended in her submission that critics of same-sex parenting research do not argue that children are harmed as a result of same-sex parenting, but that the evidence which suggests children are not harmed is insufficient:

The most common argument raised by those who critique the existing body of research is not that there is any convincing evidence that children are harmed by same

²⁵⁵ Dr John Bellamy, Researcher, Anglicare Diocese of Sydney, Evidence, 24 February 2009, p 33

²⁵⁶ Submission 213, p 4

²⁵⁷ Submission 194, pp 6-8

²⁵⁸ Witness E, Evidence, 25 February 2009, p 2; Confidential submission 220, pp 3 and 6-12

²⁵⁹ American College of Paediatricians, 'Homosexual parenting: is it time for change?', quoted in Submission 152, Women's Action Alliance, p 8

sex parents, rather they argue that there is insufficient evidence that they are not harmed. Wardle for example argues that studies through to the mid-1990s were methodologically flawed because of small sample sizes, lack of comparator groups and self-select methodology.²⁶⁰

- 4.48** The Gay and Lesbian Rights Lobby (GLRL) referred to the literature review conducted by Dr Ruth McNair for the VLRC, reporting that the research methods of studies of gay and lesbian parents were improving over time:

The occasional paper states that the same-sex parenting literature is improving in its methodological design, with some of the most sophisticated studies finding no negative emotional, psychological or behavioural development differences for lesbian and gay families. McNair also engaged with critics of the same-sex parenting literature and revealed flaws in the arguments made by the critics concerning the literature's methodology.²⁶¹

- 4.49** In her submission, Professor Millbank addressed in detail the research review of Stacey and Biblarz, which she commended as a 'highly readable and rigorous review' of the body of research.²⁶² Professor Millbank reported that Stacey and Biblarz took issue with overall findings of 'no difference' in the same-sex parenting literature, instead concluding that the picture is more subtle and complex:

[Children from gay and lesbian families] do differ in modest and interesting ways ... Most of these differences, however, are not causal, but are indirect effects of parental gender or selection effects associated with heterosexist social conditions under which lesbian-gay-parent families currently live.²⁶³

- 4.50** Professor Millbank also stated that Stacey and Biblarz confirmed that they could uphold the original findings of the research that there is no difference in children's wellbeing:

[T]here is no difference in children's psychological wellbeing, cognitive functioning, mental health and social adjustment, nor in parenting styles and investment with children based on parents sexual orientation.²⁶⁴

- 4.51** In evidence, Mr Rod Best, Director of Legal Services from the Department of Community Services, acknowledged that part of the reason for the relative lack of research on the impact of same-sex parenting on children is because the phenomenon of parenting by same-sex couples is still relatively new and reasonably uncommon. He also acknowledged that different types of research exist, the most helpful being longitudinal studies, which by nature, can take decades.²⁶⁵

²⁶⁰ Submission 222, p 7

²⁶¹ Submission 183, Gay and Lesbian Rights Lobby, p 30

²⁶² Submission 222, p 5

²⁶³ Stacey and Biblarz, *(How) Does the sexual orientation of parents matter?*, American Sociological Review, 2001, Vol 66, no 2, pp 159-183, p 159, quoted in Submission 222, p 5

²⁶⁴ Stacey and Biblarz, *(How) Does the sexual orientation of parents matter?*, American Sociological Review, 2001, Vol 66, no 2, pp 159-183, cited in Submission 222, p 5

²⁶⁵ Mr Rod Best, Director, Department of Legal Services, Department of Community Services, Evidence, 24 February 2009, p 17

- 4.52 The GLRL referred to research on same-sex parenting having grown in sophistication and veracity over time. They also confirmed the emergence of longitudinal studies that follow child development over a period of time and which provide evidence on the long term impact of same-sex parenting:

There are some longitudinal studies developing. Those studies have developed in sophistication. The main studies previously, 30 or so years ago, looked at children who were brought up by lesbian or gay parents who were previously in heterosexual relationships. More so, research has looked at children who are born into same sex families.²⁶⁶

Ideological limitations

- 4.53 The second major area of criticism made by both groups of participants concerned the values or ‘ideology’ potentially influencing research in the area of parenting and outcomes for children. Both groups asserted that research is informed, whether deliberately or inadvertently, by the ideology of the researcher, and consequently questioned our ability to trust the conclusions and contributions of much research.

- 4.54 As noted earlier in this chapter, Anglicare observed a tendency for ideology to influence the research on either side of the debate. Dr Bernadette Tobin from the Plunkett Centre for Ethics suggested that, ‘the empirical data is infected by ‘advocacy science’: that is to say, studies are undertaken with a view to supporting a particular ideological position.’²⁶⁷

- 4.55 Dr John Bellamy, Researcher with Anglicare, referred in evidence to Stacey and Biblarz’s comments on ideology:

Stacey and Biblarz go a bit further in their comment and say that these things are actually constraining intellectual development in the field. They talk about the sort of assumptions that their opponents have and they see that as a constraint. They also say that because their opponents have certain assumptions, these same assumptions are taken on board by those who would be in favour of same-sex couples being carers.²⁶⁸

- 4.56 Dr Riggs also cautioned that the perspective of the researcher can influence their work:

I think that all researchers review their research and other people’s research through their own lenses. I think that we need to be critical of all the lenses that all researchers bring to their findings.²⁶⁹

- 4.57 The Australian Family Association presented comments by Associate Professor Wilcox and Professor Wardle which claim that a majority of studies purporting to show that the children of same-sex couples do not suffer any detriment as a result of the sexual orientation of their parents, are hampered by ideological bias as well as methodological flaws. It argued that

²⁶⁶ Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 50

²⁶⁷ Submission 226, Plunket Centre for Ethics, p 2

²⁶⁸ Dr Bellamy, Evidence, 24 February 2009, p 33

²⁶⁹ Dr Riggs, Evidence, 25 February 2009, p 15

Wardle's conclusions correspond with those of Stacey and Biblarz, who concluded that research claiming that same-sex parenting has no discernable impact on children is permeated by ideological bias and is 'generally defensive in nature.'²⁷⁰

4.58 The Castan Centre for Human Rights Law referred to the findings of the Tasmanian Law Reform Institute in a report on adoption by same-sex couples:

While the Institute acknowledged that much of the research was controversial and flawed, they found that it was no less reliable than equivalent research into other areas of child development and psychology, and stated that:

The problem appears to be that anti-gay scholars either have a tendency to view any evidence of difference as evidence of harm or alternatively they employ double standards by attacking the studies, not so much because their research methods are inferior to most studies of family relationships, but because these critics oppose equal family rights for lesbians and gays.²⁷¹

4.59 Professor Millbank contended that numerous researchers cited by those in support of family form over family functioning were associated with extreme religious and anti-gay groups:

The only individuals and bodies who have continued to argue that this body of research is flawed or should not be accepted are those motivated by strong anti-gay and lesbian sentiment, and are often associated with extreme religious splinter groups. Vocal in the US, for example, are Joseph Nicolosi, Paul Cameron and Lynn Wardle and others associated with Christian think-tanks such as the 'Marriage Institute'.²⁷²

4.60 By contrast, Professor Millbank suggested that the research which supports same-sex parenting is widely accepted by professional bodies and secular organisations:

This research is accepted by all of the relevant professional organisations which have expertise in this field, such as the American Psychological Association, the Australian Psychological Association and the Australian Medical Association. It is also not disputed by any secular scholars in these or related fields.²⁷³

4.61 The Association of Child Welfare Agencies (ACWA) also reported that the American Psychiatric Association and American Academy of Child and Adolescent Psychiatry have accepted that the research in support of family functioning is sufficiently robust.²⁷⁴

²⁷⁰ Submission 207, p 4

²⁷¹ Submission 221, pp 8-9

²⁷² Submission 222, pp 6-7

²⁷³ Submission 222, p 5

²⁷⁴ Submission 192, Association of Children's Welfare Agencies (ACWA), pp 3-4. ACWA has noted that the views in its submission do not reflect the views of all ACWA members, particularly faith-based member organisations.

An objective framework for reputable research

- 4.62** Professor Millbank observed that many of the past inquiries that have examined issues relating to same-sex parenting have resulted in lists of references from advocates or opponents to support or refute their positions, and that this has often led to the perception that the research is inconclusive, thus precluding the reviewing body from forming a view.²⁷⁵
- 4.63** Professor Millbank contended that despite the first appearance that the research literature is equivocal, her view was that there is sufficiently definitive and reputable evidence supporting the parenting ability of gay and lesbian couples and individuals. Professor Millbank drew this conclusion on the basis of a framework for evaluating research studies which she presented to the Committee.²⁷⁶

Criteria for reputable research

- 4.64** Professor Millbank outlined several objective criteria against which the quality and reliability of social science research can be assessed. The first is that the research should be conducted by professionals who are highly qualified and experienced in their field of expertise, and secondly, who are employed in universities or other reputable scholarly institutions, as opposed to think tanks and lobby groups. Their research should be published in peer reviewed, high quality journals that expose their research to the scrutiny and commentary of other experts.²⁷⁷
- 4.65** The fourth critical factor is the funding source. Professor Millbank contended that research that is funded by an external competitive funding body, such as a government agency, has a higher degree of reliability than research which is not. She gave the example of the Australian Research Council or the National Health and Medical Research Council as highly competitive external funding bodies in Australia, and described their funding processes as highly competitive, involving reviews by peers and a college of experts.²⁷⁸

Methodological rigour

- 4.66** Professor Millbank highlighted the use of standardised psychological assessment instruments, 'blind' studies, repeat studies, longitudinal studies and meta analyses as rigorous research methods, going into some detail in evidence. She noted that earlier studies often compared children of divorced parents, who have likely experienced considerable conflict as a result, with children of married parents in intact family units. Professor Millbank stated that later studies take greater care in ensuring there are multiple, appropriate comparison groups.²⁷⁹

²⁷⁵ Professor Jenni Millbank, Professor of Law, University of Technology Sydney, Evidence, 25 February 2009, p 52

²⁷⁶ Professor Millbank, Evidence, 25 February 2009, p 52

²⁷⁷ Professor Millbank, Evidence, 25 February 2009, p 52

²⁷⁸ Professor Millbank, Evidence, 25 February 2009, p 52

²⁷⁹ Professor Millbank, Evidence, 25 February 2009, p 53

- 4.67** As an example of how to apply the above criteria to distinguish between one set of research and another, Professor Millbank compared the research of Professor Susan Golombok and Associate Professor Sotirios Sarantakos in evidence, concluding that Professor Golombok's research has much greater objective credibility.²⁸⁰ Again, she emphasised that it is possible to delineate robust research in this area.²⁸¹
- 4.68** Another inquiry participant emphasised the importance of applying the 'scientific method' in quantitative studies to minimise the influence of the researcher's perspective, thus mitigating against subconscious bias. This participant described the scientific method as involving random assignment to an experimental group (which has something done to it) and a control group (which has nothing done to it). Any differences that appear are statistically assessed and are rejected unless they reach the 0.05 level of significance. This means that there is less than 5 percent probability that the differences have appeared by chance.²⁸²

An appropriate response to the literature

- 4.69** Participants who provided oral evidence to the Committee were canvassed on their opinion as to the appropriate response to the literature and how to proceed. Opponents to adoption by same-sex couples primarily argued that there is a burden of proof on advocates of change to demonstrate that same-sex parenting is not harmful to children and that on the basis of the available research, that burden of proof has not been discharged.
- 4.70** For example, Anglicare urged that in the perceived absence of certainty within the literature, a conservative approach is necessary:²⁸³
- Adoption involves raising someone else's child and should not be a laboratory for solving vexed issues. The importance of both genders should only be discarded when it is certain it is not relevant to optimal development.²⁸⁴
- 4.71** Mr Meney from the Catholic Archdiocese of Sydney contended that there is a lack of evidence, particularly longitudinal studies and that without this evidence legislative change should not be considered.²⁸⁵
- 4.72** Revd Dr Andrew Ford from the Anglican Church Diocese of Sydney expressed a similar view, stating that where there is no consensus in the research evidence, the wise approach would be to err on the side of caution.²⁸⁶

²⁸⁰ Professor Millbank, Evidence, 25 February 2009, p 54

²⁸¹ Professor Millbank, Evidence, 25 February 2009, p 55

²⁸² Confidential submission 220, pp 5-6

²⁸³ Dr Bellamy, Evidence, 24 February 2009, p 33

²⁸⁴ Ms Jane West, Principal Officer, Adoptions, Anglicare Diocese of Sydney, Evidence, 24 February 2009, p 27

²⁸⁵ Mr Meney, Evidence, 24 February 2009, p 37

²⁸⁶ Revd Dr Andrew Ford, Lecturer and Member of Social Issues Executive, Anglican Church, Diocese of Sydney, Evidence, 25 February 2009 p 50

4.73 Advocates of change primarily argued that the reputable research does demonstrate that being raised by same-sex parents does not disadvantage children, that such research is conclusive and reliable, and that any public policy decision made on the basis of a presumed lack of evidence is unsound.

4.74 The GLRL was asked to respond to suggestions that the research evidence is inconclusive and that caution, in the form of maintaining the status quo, should be exercised. In its response, the GLRL placed these suggestions into an historical context, suggesting that both research evidence and social attitudes change over time:

Historically there has been lots of research about lots of different minority groups saying they are not fit to be parents or not fit to marry people of another race. There is research, for example, going back decades in America not allowing African Americans to marry white people. That kind of research has a place in time and I think the majority of Australians now realise that it is the love and care that a child receives rather than the gender of their parents that determines their well being.²⁸⁷

4.75 When questioned on the argument of caution, Dr Riggs of the Australian Psychological Society did not agree that maintaining the status quo was a cautious approach:

If we are being cautious, what we want to do in our caution is ensure that children have the widest range of placement options available. To me, that is a cautious approach. To make as many placement options available to children as is possible, if we are focusing on children's needs, that would be a cautious approach. But excluding some people to me is not being cautious. It is actually failing to provide a wide range of placement options for children.²⁸⁸

4.76 In reply to a question on what she deemed, in her opinion, to be a cautious approach, Professor Millbank again contended that the research supporting same-sex parenting is adequate and conclusive, and argued that, 'it is not appropriate for a legislative body to take the suggestion of harm that has not been demonstrated and discriminate on that basis as though that is a cautious and careful thing to do.'²⁸⁹

4.77 Similarly, in her submission Professor Millbank maintained her view that there was no sound evidence that parenting by same-sex parents is harmful to children:

Yet even if the research could be considered methodologically flawed or inconclusive, as some critics contend, it is an inappropriate legal policy approach to assume that any class of people are harmful to children or deficient parents in the absence of clear evidence. There is no such evidence in 30 years of research.²⁹⁰

4.78 The complexity of the task which faces the Committee, to appropriately respond to the overwhelming amount of research with which it has been presented, is apparent in the contrasting statements of Professor Popenoe which were supplied by the Australian Christian

²⁸⁷ Ms Emily Gray, Co-Convenor, Gay and Lesbian Rights Lobby Evidence, 24 February 2009, p 53

²⁸⁸ Dr Riggs, Evidence, 25 February 2009, p 16

²⁸⁹ Professor Millbank, Evidence, 25 February 2009, p 61

²⁹⁰ Submission 222, p 8

Lobby in its submission, and of Professor Stacey which were presented in the Australian Psychological Society's literature review.

- 4.79** The Australian Christian Lobby quoted Professor David Popenoe's comment on the perceived weight of evidence in social science research, which suggests that two-parent, heterosexual families are the best environments for children:

Social science research is almost never conclusive. There are always methodological difficulties and stones left unturned. Yet in three decades of work as a social scientist, I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent (father and mother, not same sex coupling) families are preferable ... If our prevailing views on family structure hinged solely on scholarly evidence, the current debate would never have arisen in the first place.²⁹¹

- 4.80** By contrast, the Australian Psychological Society's literature review included this quote from Professor Judith Stacey, in which she comments on the consensus in social science research which supports and affirms same-sex parenting:

Rarely is there as much consensus in any area of social science as in the case of gay parenting, which is why the American Academy of Pediatrics and all of the major professional organisations with expertise in child welfare have issued reports and resolutions in support of gay and lesbian parental rights.²⁹²

- 4.81** The Committee also notes that in 2007, the Ministerial Advisory Committee asked by the then NSW Minister for Community Services to further consider and provide advice on the issue of adoption by same-sex couples following the Department's review of the *Adoption Act 2000* advised the Minister that on the basis of the available research, it strongly supported adoption by same-sex couples:

The Committee is strongly of the view that parenting capacity should be the only criteria applied to who can adopt and that adoption should be open to same-sex couples. The Committee considered the findings of various research papers on the issue and concluded that there is no concrete evidence to suggest that children raised in same-sex households are in any way disadvantaged compared to children raised in heterosexual households. Rather, available research suggests that whether or not it is in the best interests of a child to be parented by a gay or lesbian couple will depend not on the couple's sexuality, but on other attributes that affect parenting capacity, against which heterosexual couples must also be assessed.²⁹³

- 4.82** The majority of Committee members note that an alternative approach to the literature was recently provided by the Tasmanian Law Reform Institute. Prior to legislative change in Tasmania to allow same-sex couples to adopt, the Tasmanian Law Reform Institute released its final report, *Adoption by same sex couples*.²⁹⁴ Included in the report were the findings of the

²⁹¹ Submission 185, pp 4-5

²⁹² Australian Psychological Society, *Lesbian, Gay Bisexual and Transgender Parented Families*, August 2007, p 7

²⁹³ Department of Community Services, Answers to questions on notice, p 5

²⁹⁴ Tasmanian Law Reform Institute, *Adoption by same sex couples: Final report No 2*, May 2003

Institute's review of the social science research into same-sex parenting. Its approach to the research was as follows:

The Institute's view is that it does not have to be satisfied that homosexual parenting *in general* is as good for children as being raised by a married heterosexual couple before recommending that gay and lesbian couples be eligible for adoption. It is our opinion that it is in the best interests of children for parents to be evaluated individually on the basis of their ability to be good parents and not to be assessed on assumptions based on their sexual orientation. If the social science is so flawed, it presents no obstacles to same sex adoption which involves decisions made on a case-by-case basis. On the other hand if it is accepted, allegations of greater instability, promiscuity and higher levels of violence in same sex couples compared with heterosexual couples are irrelevant given that same sex couples applying for adoption will have their relationship assessed on a case-by-case basis.²⁹⁵

Conclusion

- 4.83** This chapter has focused on the social science research presented to the Committee through submissions and oral evidence in respect of whether family types are the primary determinant of outcomes for children, and has included some examples of the literature. The chapter also provided an overview of the criticisms made by participants with regard to the methodology of and ideology underpinning various studies, and included a framework by which to objectively evaluate the available research. In addition, it has considered the suggestions of key witnesses as to the most appropriate policy response to the research, as well as presenting the policy response of two government reviews conducted in Australia.
- 4.84** As mentioned previously, the Committee did not undertake its own review of the research literature.
- 4.85** Some members of the Committee are persuaded by research suggesting that the interests of children are best served in a family parented by both a mother and father in a permanent, preferably married relationship. These members are also persuaded by research reviews that question the methodology and validity of studies in support of same-sex parenting. These members conclude that there is insufficient research to suggest that children are not harmed or disadvantaged by being raised in a same-sex parented family, and accordingly, they consider that a cautious approach which maintains the status quo and continues to preclude adoption by same-sex couples is essential.
- 4.86** The majority of Committee members, however, are persuaded that the research evidence is weighted in favour of family functioning, regardless of parents' gender and sexuality. These members are convinced that the research demonstrates that the development of positive relationships, and the provision of a supportive, nurturing and loving environment, benefit children most in both the short and longer term. Moreover, these members believe that the evidence suggests that sexual orientation is no indicator of parenting fitness or ability, and that there is no substantial research evidence to suggest that children are disadvantaged or harmed by being raised by same-sex parents. In addition, the majority of members do not consider that a perceived lack of evidence to suggest that children are not harmed or disadvantaged is a sufficient argument to maintain the status quo.

²⁹⁵ Tasmanian Law Reform Institute, *Adoption by same sex couples: Final report No 2*, May 2003

- 4.87** As noted earlier in this chapter, the values and beliefs that have informed the debate around adoption by same-sex couples are also evident in the way in which participants have cited research findings and may be reflected in the research itself. The Committee members who form the majority note that much of the research presented to the Committee reflects the delineation of participants' values and beliefs along religious versus secular lines. The majority of members acknowledge the contribution of both sides of the research to this debate and to the growth and development of social science research on parenting practice and family structure. The majority of members are, however, persuaded that social science research in this field has grown in sophistication and methodological rigour over time, and that the weight of the up-to-date social science research suggests that same-sex parenting is as likely to result in positive developmental outcomes for children as opposite-sex parenting.
- 4.88** The majority's analysis of the available literature on the impact of family structure and functioning on children's developmental outcomes thus confirms our opinion that it is in the best interests of adoptive children for prospective parents to be evaluated individually on the basis of their ability to provide the best environment for a particular child.
- 4.89** The following chapter examines the human rights of children and parents, along with other legal issues in respect of adoption by same-sex couples. At the end of Chapter 5 the Committee draws together the discussion in Chapters 3, 4 and 5 to form its key recommendations, before turning to the issue of exemptions in Chapter 6.

Chapter 5 Human rights and legal issues

Having considered in detail the belief-based arguments and research about the best interests of the child in relation to adoption by same-sex couples, the Committee now turns to the evidence it gathered with respect to the human rights of children and prospective parents in the adoption context, along with several other legal issues. The chapter commences by documenting the rights-based arguments in respect of anti-discrimination and the legal recognition of existing parent-child relationships. It then considers the evidence presented to the Committee about inconsistencies in the present legislation which allow for foster care by same-sex couples but not adoption, adoption by gay and lesbian individuals but not couples, and the presumption of parentage that applies only to certain same-sex parents. The chapter then examines arguments about the implications of adoption by same-sex couples for the intercountry adoption program.

Anti-discrimination

- 5.1 A range of participants in support of adoption by same-sex couples emphasised that the present adoption law is discriminatory against same-sex couples and should be changed. These participants also adhered to the view that it is in the best interests of the child to allow same-sex couples to adopt.
- 5.2 The Gay and Lesbian Rights Lobby (GLRL) stated in both its submission and in evidence that it was not arguing that gay and lesbian parents had a right to adopt children, but rather, that they had a right to be free from discrimination, in this area of life as in others:

The GLRL notes that, consistent with the objects of the *Adoption Act*, no adult has the right to adopt a child. Adoption is not a service for adults - whether gay or straight - but a service for the child concerned. Therefore, the debate about same-sex adoption is not about the *right to adopt* a child, as there is no such right. The issue of same-sex couple adoption is purely about **eligibility**; namely, the *opportunity* for same-sex couples to be objectively assessed - in the same way as any other couple or person - on their individual merits, ability and capacity to provide a loving and stable home to a child.²⁹⁶

- 5.3 It was also argued that it is in the best interests of children to address discrimination and to enable legal recognition of existing parentage by gay and lesbian people. The latter reason is discussed in detail in a later section of this chapter.

Discrimination against same-sex couples

- 5.4 The specific provisions of the *Adoption Act 2000* by which same-sex couples are ineligible to apply to adopt are set out in Chapter 2. The GLRL noted that the definitions of couple and de facto relationship in the *Adoption Act* are discriminatory, such that 'same-sex couples are

²⁹⁶ Submission 183, Gay and Lesbian Rights Lobby, pp 17-18 (emphases in original). See also Ms Emily Gray, Women's Convenor, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 44; Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 45

prevented from even making an adoption application at the outset, let alone being considered on their individual merits'.²⁹⁷ It advised that the definition of de facto relationship dates back to 1984 and has since been superseded across all NSW laws except the *Adoption Act*.²⁹⁸

- 5.5** The GLRL contended that such discrimination is arbitrary and not in the interests of children, asserting that sexual orientation is not a valid basis on which to determine whether a person should be a parent:

Discrimination on the basis of same-sex relationship status is arbitrary and does nothing to protect the best interests of children. A prohibition against even the consideration of adoption applications by same-sex couples is arbitrary discrimination on the basis of sexual orientation ... The GLRL believes couples should be assessed on their individual merits according to objective criteria in order to ascertain each couple's true capacity to provide a loving and stable home to a child. Sexual orientation is simply not a determinant of whether a person makes a good parent ...²⁹⁹

- 5.6** The GLRL's submission went on to assert:

The GLRL strongly believes that all discrimination against same-sex couples must be removed from the *Adoption Act* and same-sex couples should be eligible to apply to be assessed for adoption on equal terms with other couples and individuals.³⁰⁰

- 5.7** The GLRL highlighted that the greatest impact of reform to allow same-sex couples to adopt would be felt in relation to known adoptions, that is, by existing families parented by gay and lesbian people. It acknowledged that even if permitted, unknown child adoption by same-sex couples is likely to be rare, given that there are very few children available for adoption in Australia, and that same-sex couples would continue to be excluded from intercountry adoption programs.³⁰¹

- 5.8** Aside from the GLRL, numerous other inquiry participants rejected the exclusion of same-sex couples from adoption as discriminatory. For example, in its submission the Castan Centre for Human Rights Law at Monash University echoed the accusation of arbitrary discrimination and the call for all couples to be assessed on an equal basis:

The *Adoption Act 2000 (NSW)*, in its existing form, arbitrarily discriminates against same-sex couples. Whilst heterosexual couples are eligible to adopt children if they are 'of good repute and are fit and proper persons to fulfil the responsibilities of parents', same-sex couples are ineligible, even if they are 'of good repute and are fit and proper persons to fulfil the responsibilities of parents'.

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* must be amended so that same-sex couples are eligible to adopt, subject to the same eligibility criteria as opposite sex couples. Prospective

²⁹⁷ Submission 183, p 35

²⁹⁸ Submission 183, p 34

²⁹⁹ Submission 183, p 18

³⁰⁰ Submission 183, p 11

³⁰¹ Submission 183, p 18

parents should be evaluated individually and by reference to their ability to parent, rather than their sexual orientation.³⁰²

- 5.9** Similarly, Professor Jenni Millbank of the Faculty of Law, University of Technology, Sydney, stated in her submission:

Excluding same-sex couples from eligibility to apply to adopt is neither legitimate nor proportional. It targets a class of people based upon an irrelevant characteristic and discriminatorily excludes them from detailed evaluation and consideration as individual applicants ... none of the reputable research emerging from academic institutions supports the view that having two parents of the same-sex is in any way harmful to children's emotional and intellectual development or wellbeing.³⁰³

- 5.10** The Inner City Legal Centre pointed out that this is one of the last areas of NSW law where discrimination on the basis of sexuality still exists:

Adoption for same-sex couples, and step-parent adoption for same-sex couples are one of the last areas under NSW law where there is discrimination on the basis of sexuality. The restrictions on adoption are inconsistent with other Australian law. Amendments to the Act to allow same-sex couples to adopt will ensure that a child is placed with the parents who are most suitable, regardless of the sexuality of the parents.³⁰⁴

- 5.11** Ms Clover Moore MP suggested that such discrimination denigrates gay and lesbian people and their relationships with their children:

This encourages the community to view gay men and lesbians as lesser people who deserve lesser rights, and it disrespects the value of parent-child bonds between same-sex couples and their children.³⁰⁵

- 5.12** Similarly, Ms Vicki Harding, one of the lesbian mothers who gave evidence to the Committee, stated that discrimination perpetuates hurtful myths about lesbians and gay men:

In fact I believe that discrimination against gays and lesbians in adoption law perpetuates hurtful myths that lesbians and gay men pose a risk to children. This reflects unfairly on the valuable contributions of many same-sex parents and denies equal rights for our children. Same-sex couples should be objectively assessed according to their individual merits on their ability to provide a loving and stable home to a child.³⁰⁶

- 5.13** Anticipating a suggestion that to argue for same-sex couples to adopt is to place the rights of an adult above those of a child, the Hon Penny Sharpe MLC echoed the observation that no person has a right to adopt a child and went on to point out that any decision in respect of a child will need to satisfy the court that the child's best interests are being served:

³⁰² Submission 221, Castan Centre for Human Rights Law, Monash University, p 14

³⁰³ Submission 222, Professor Jenni Millbank, p 2

³⁰⁴ Submission 175, Inner City Legal Centre, p 7

³⁰⁵ Submission 187, Ms Clover Moore MP, p 3

³⁰⁶ Submission 64, Ms Vicki Harding, Ms Jackie Braw and Miss Brenna Harding p 5

If adoption laws in NSW were amended to give same-sex couples and stepparents in same-sex families the right to apply to adopt, under the same provisions as heterosexual couples and stepparents in heterosexual families, the best interests of the child would remain the overriding consideration for the Court. The Court is not empowered to make adoption orders unless it determines that such orders are in the best interests of the children affected and ending the arbitrary exclusion of same-sex couples and same-sex stepparents would not alter this. Therefore, the idea that lifting the blanket ban on same-sex couple adoptions put adults' rights ahead of children's rights is entirely misconceived.³⁰⁷

- 5.14** Other organisations who see the current law as discriminatory included Barnardos, the Federation of Parents and Citizens Associations of NSW, Women's Legal Services NSW, Rainbow Labor, the Parents and Friends of Lesbians and Gays (NSW) and the Association of Children's Welfare Agencies (ACWA).³⁰⁸
- 5.15** Numerous participants also held that the present laws are discriminatory against the children of gay and lesbian people, in that they do not afford their parental relationships the same recognition as those in other families. This evidence, also based on human rights arguments, is discussed in detail a later section of this chapter.
- 5.16** Participants who contended that the present law should be amended to address discrimination against same-sex couples did so on the basis of five key arguments discussed in turn below: that law reform would promote the human rights of gay and lesbian people; that it would address discrimination against the children of same-sex parents; that it would reflect national and international developments; that various law reform bodies are in support of adoption by same-sex couples; and that discrimination sends the wrong message to society.

Human rights

- 5.17** Several participants documented the human rights on which their arguments to remove discrimination against same-sex couples in relation to adoption were based. The Hon Penny Sharpe MLC, for example, quoted Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁰⁹

³⁰⁷ Submission 190, The Hon Penny Sharpe MLC, p 10

³⁰⁸ Submission 180, Barnardos, pp 4-5; Submission 228, Federation of Parents and Citizens Associations of NSW, p 2; Submission 225, Women's Legal Services NSW, p 4; Submission 190, p 7; Submission 178, Rainbow Labor, p 2; Submission 38, Parents and Friends of Lesbians and Gays, p 2; Submission 192, Association of Children's Welfare Agencies (ACWA), p 1. ACWA has noted that the views in its submission do not reflect the views of all ACWA members, particularly faith-based member organisations.

³⁰⁹ United Nations, International Covenant on Civil and Political Rights, Article 26, cited in Submission 190, p 10; see also Submission 183, p 18; Submission 192, p 1; Submission 178, p 2

- 5.18** Rainbow Labor also referred to the ICCPR, noting that Articles 2 and 26 call for citizens to be treated equally under the law and in judicial processes. They pointed out that in the case of adoption, same-sex couples do not enjoy such equality in relation to adoption by virtue of their sexuality.³¹⁰
- 5.19** Both Rainbow Labor and the GLRL contended that the failure to comply with this article places current adoption arrangements in respect of same-sex couples in breach of Australia's international obligations. On this basis they asserted that this serves as a barrier to fully realising object (f) of the *Adoption Act*, 'to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements.'³¹¹

Discrimination against children

- 5.20** Several participants further contended that the current exclusion of same-sex couples from adoption is also discriminatory against the children of same-sex parents.
- 5.21** For example, in its submission Barnardos argued that the provision that only one parent in a same-sex relationship can adopt is discriminatory against the child concerned:

The Act allows for a single gay or lesbian person to adopt a child. When this person is in a relationship, the Act allows for the adoption of the child only by one parent, thus clearly discriminating against the child, as it does not afford the same legal and psychological permanence and security as provided to children adopted by two people in a heterosexual relationship, whether married or not. While the child is parented by two people of the same-sex and considers both as his/her adoptive parents, the law allows for only one of those parents to be given this status. Adoption by both parents will ensure the child's rights to a relationship with each parent, providing emotional, financial and legal security, both in childhood and adult life.³¹²

- 5.22** Women's Legal Services NSW (WLS NSW) implied that when same-sex parents are subject to discrimination so too are their children, when it asserted, 'Firstly, it is never in a child's best interests to be subjected to discrimination.'³¹³
- 5.23** The GLRL quoted the UN Committee on the Rights of the Child, whose role is to monitor the implementation of the Convention on the Rights of the Child (CROC), and which made the following comments in relation to young children in socially marginalised families:

Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum-seekers. States parties have a responsibility to monitor and combat

³¹⁰ Submission 178, p 2

³¹¹ *Adoption Act 2000* (NSW), s 7, cited in Submission 183, pp 11-12; Submission 178, p 2

³¹² Submission 180, p 5

³¹³ Submission 225, p 3

discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions.³¹⁴

- 5.24** In addition, the National Children's and Youth Law Centre at the University of NSW argued that the *Adoption Act* stands in conflict with the CROC in that it discriminates against the child on the basis of the sexual orientation of his or her parents:

NSW adoption laws also contravene Article 2 of CROC - a child's right not to be discriminated against, irrespective of the child's or the parent's sex, social origin, or other status.³¹⁵

- 5.25** The National Children's and Youth Law Centre went on to contend that an effect of the current law is to exclude children raised in same-sex families from many of the legal certainties and rights that other children in NSW enjoy, for example in relation to the legal recognition of both their parents, as well as inheritance and succession in the event that the partner of the child's legal parent dies.³¹⁶ Both children's human rights and the issue of the recognition of existing parent child relationships are discussed in detail in a later section of this chapter.

Consistency with national and international developments

- 5.26** Several participants observed the general trend of law reform, both in NSW and nationally, to recognise same-sex couples and their children in law. Correspondingly, these participants argued that to recognise same-sex couples in adoption legislation would be to bring NSW legislation into line with this necessary and important trend.
- 5.27** For example, the GLRL, Inner City Legal Centre and Castan Centre for Human Rights Law all referred in detail to the legislative changes over recent years that have granted recognition to same-sex couples, both at the state and federal level.³¹⁷ The GLRL stated in its submission:

In just over one decade, every Australian legal jurisdiction has passed wide-reaching reforms to remove discrimination against same-sex couples. Beginning in 1999 in NSW with the first comprehensive recognition of same-sex de facto couples, all Australian states, territories and the Commonwealth now recognise same-sex de facto couples equally with heterosexual de facto couples. These reforms mirror developments internationally in numerous jurisdictions since the late 1980s.

Increasingly, attention has turned to the legal recognition and equal protection of children living in same-sex families. This has been evidenced in reforms to parentage presumptions, birth certificate regulations and adoption laws in Australia and overseas, to ensure the relationships between children and their lesbian and gay parents are legally recognised. The recognition of child-parent relationships confers onto children significant benefits, protections and entitlements.³¹⁸

³¹⁴ Committee on the Rights of the Child [2005] *General Comments No.7: Implementing Child Rights in Early Childhood* (41st Session) [para 12], quoted in Submission 183, p 16

³¹⁵ Submission 215, National Children's and Youth Law Centre, University of NSW, p 8

³¹⁶ Submission 215, p 8

³¹⁷ Submission 183, 6; Submission 175, p 4; Submission 221, p 10

³¹⁸ Submission 183, p 22

- 5.28** A detailed discussion of the recognition of parentage is provided in a later section of this chapter.
- 5.29** The recent Federal Government reforms to recognise same-sex relationships, which cascaded to effect changes to a raft of over 100 pieces of federal legislation,³¹⁹ are documented in Chapter 2. In relation to these reforms, the Inner City Legal Centre reported:
- In 2008, Federal Parliament passed laws that recognized same-sex couples as being in a de facto relationship, and provided equality in a range of areas, including Social Security, taxation, Medicare and Aged Care. As part of this law reform, Section 60H of the *Family Law Act 1975* (Cth) was amended to recognize same-sex couples as parents of children conceived by donor insemination. These amendments cured a vacuum in the law and conferred the status of legal parent on the co-mother of a child.³²⁰
- 5.30** The Castan Centre for Human Rights Law noted that these federal reforms were made in response to the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) report *Same-sex, Same Entitlements*, which recommended recognition of same-sex couples in relation to a range of financial and work-related entitlements and benefits.³²¹ That report also recommended that gay and lesbian people have equal rights to adoption.³²²
- 5.31** In addition, legal changes have occurred in Western Australia, the Australian Capital Territory and Tasmania to allow same-sex couples to adopt, and further reforms have taken place in Western Australia, the Australian Capital Territory, the Northern Territory, Victoria and NSW to grant legal recognition of parentage to the same-sex partner of a woman who has undergone a fertilisation procedure (see Chapter 2 for details of the NSW legislation).³²³ On this basis, the Castan Centre for Human Rights Law suggested:
- Thus, in Australia, all levels of government have recognised the same-sex family unit and made a determined effort to eradicate discrimination against same-sex couples and their children.³²⁴
- 5.32** The Inner City Legal Centre pointed out, like the GLRL, that the definition of de facto relationship in the *Adoption Act* is conspicuously inconsistent with all other NSW law, and indeed Commonwealth law:

³¹⁹ Ms Gray, Evidence, 24 February 2009, p 54

³²⁰ Human Rights and Equal Opportunity Commission, *Same-Sex, Same Entitlements: National Inquiry into Discrimination Against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, May 2007, cited in Submission 175, pp 6-7

³²¹ Submission 221, p 13

³²² Human Rights and Equal Opportunity Commission, *Same-Sex, Same Entitlements: National Inquiry into Discrimination Against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, May 2007, p 108

³²³ Submission 221, pp 12-13

³²⁴ Submission 221, pp 13-14

We note that the definition of ‘de facto relationship’ under the Act is now the only place in NSW law that does not include same-sex couples. It should be noted that these changes would bring the Act into line with the current definitions of ‘de facto relationship’ under NSW and Commonwealth law.³²⁵

5.33 The GLRL also documented the various international jurisdictions which have come to permit adoption by same-sex couples over the last decade and a half (as discussed briefly in Chapter 2).

5.34 On the basis of this broad national and international trend towards the recognition of same-sex relationships, the GLRL concluded:

Discrimination in adoption law also flies in the face of legal developments in NSW, other Australian states and territories, and internationally. Since 1999, NSW has removed all discrimination against same-sex couples from its statutes, with the exception of adoption.³²⁶

5.35 Both the GLRL and WLS NSW suggested that on the basis of this general trend it would be consistent with object (d) of the *Adoption Act* – to recognise the changing nature of practices of adoption – for legal change in respect of adoption by same-sex couples to occur.³²⁷ The latter organisation stated:

WLS NSW submits that the practices of adoption should change along with the recent legislative moves towards greater equality and legal recognition. One of the objects of the Act is to recognise the changing nature of practices of adoption, and given the significant law amendments to both state and federal legislation removing discrimination against people in same-sex relationships, WLS NSW submits that it is appropriate that the Act is also amended.³²⁸

Law reform bodies in support of adoption by same-sex couples

5.36 A number of submissions, including those of the GLRL and the Hon Penny Sharpe MLC, highlighted that several noteworthy law reform bodies supported amendment to adoption law in order to address discrimination against gay and lesbian people.³²⁹ The GLRL listed these bodies as follows:

- NSW Law Reform Commission – 1997 review of the *Adoption Act 1965* and 2006 review of the *Property (Relationships) Act 1984*
- Australian Human Rights Commission – 2007 *Same-sex, Same Entitlements* report
- Victorian Law Reform Commission – 2007 report on *Assisted Reproductive Technology and Adoption* and

³²⁵ Submission 175, p 8

³²⁶ Submission 183, p 20

³²⁷ Submission 183, p 11; Submission 225, p 4

³²⁸ Submission 225, p 4

³²⁹ Submission 183, p 6; Submission 190, p 13

- Tasmania Law Reform Institute – 2003 *Report on Adoption by Same-Sex Couples*.³³⁰

Discrimination sends the wrong message

5.37 The final core argument put forward by proponents for the removal of discrimination against same-sex couples in relation to adoption was that discrimination, codified in law, sends the wrong message to society. According to the GLRL, it particularly sends the wrong message to society about risks to children and devalues the contributions of gay and lesbian people:

Same-sex adoption involves removing prejudice from the lives of lesbians, gay men and their children. The GLRL affirms the social reality that 20 per cent of lesbians and up to 10 per cent of gay men are already parenting with potentially thousands more lesbians and gay men in positions of responsibility for children and/or young people. Discrimination in adoption laws sends the wrong message about risks to children, fuels prejudices and stereotypes against lesbians and gay men, and diminishes the significant contributions made by lesbian and gay people towards the development, care and education of children and young people in NSW.³³¹

5.38 Similarly, the Hon Penny Sharpe MLC contended that discrimination on the basis of sexuality may tacitly sanction homophobia:

Adoption laws that discriminate against same-sex couples imply that same-sex families are inferior and this may suggest that such homophobia is acceptable. Nondiscriminatory adoption legislation would send a clear signal to the children of same-sex parents, their peers and those responsible for their education and development that same-sex families are equal before the law and that homophobia is not socially sanctioned.³³²

5.39 WLS NSW reported that legal discrimination impacts upon the daily lives of many gay and lesbian people, and cited research indicating that ‘legislative discrimination is a major contributor to the high levels of social discrimination and stigmatisation that still exist toward same-sex couples.’³³³

5.40 Correspondingly, the GLRL argued that recognition of same-sex relationships promotes inclusiveness and respect, stating that, ‘Legal recognition promotes equality and will send a positive message to those who still hold prejudiced opinions.’³³⁴

³³⁰ NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81, NSW LRC, Sydney, 1997; NSW Law Reform Commission, *Relationships*, Report No 113, Sydney, 2006; Human Rights and Equal Opportunity Commission, *Same-Sex, Same Entitlements: National Inquiry into Discrimination Against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, May 2007; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption – Final Report*, VLRC, March 2007. All cited in Submission 183, p 21

³³¹ Submission 183, p 19

³³² Submission 190, p 7

³³³ Gay and Lesbian Rights Lobby, *All Love is Equal Isn't it?*, Consultation Report, quoted in Submission 225, p 5

³³⁴ Submission 225, p 5

Counter-arguments about anti-discrimination

5.41 Participants who argued against adoption by same-sex couples put forward a number of counter-arguments with respect to the claims of discrimination set out in the previous section. These counter-arguments focused on the absence of any right to adopt, an assertion of the primacy of the best interests of the child over issues of equality, and a child's perceived 'right' to a mother and father.

No right to adopt

5.42 Numerous participants expressed a strong concern that the claim to anti-discrimination in adoption law placed the rights of adults above those of children. These proponents pointed out that no one has the right to adopt a child.

5.43 For example, the NSW Council of Churches submission stated that, 'The Council respects the fundamental human rights of all individuals but recognises that these rights do not include adoption rights.'³³⁵ Anglicare Diocese of Sydney cautioned strongly against the focus of the debate becoming 'purely about the rights or desires of adults'.³³⁶

5.44 CatholicCare and the Life, Marriage and Family Centre, both on behalf of the Catholic Archdiocese of Sydney, highlighted the *Adoption Act's* stipulation that adoption is to be regarded as a service for the child and that no adult has a right to adopt the child, and underscored their support for the principles articulated in the *Adoption Act*:

Changing legislation and increasing this pool to include same-sex couples may meet a rights based agenda - exercising the right of all adults to be considered as adoptive parents. However, this shifts the focus from what adoption is really about. The assertion that no adult has the right to adopt a child is explicit in section 8(l)(c) of the *Adoption Act*. This assertion is specifically reinforced within the Principles of the current legislation in order to ensure the child stays as the paramount focus in all matters concerning adoption practice. We will remain strong advocates for the inclusion of these Principles.³³⁷

5.45 The Plunkett Centre for Ethics expressed a concern that to argue against discrimination in adoption was to place the wishes of same-sex couples above the welfare of the adopted child.³³⁸ The Children's Rights Council of Australia, Salt Shakers and the Australian Christian Lobby all expressed a similar concern that the rights of adults must not be prioritised above those of children.³³⁹ The Australian Family Association expanded on this point in its submission:

³³⁵ Submission 204, NSW Council of Churches, p 1

³³⁶ Submission 151, Anglicare Diocese of Sydney, p 7

³³⁷ Submission 213, Life, Marriage and Family Centre and CatholicCare, Catholic Archdiocese of Sydney, p 15. Hereafter this submission is referred to as that of the Catholic Archdiocese of Sydney.

³³⁸ Submission 226, Plunkett Centre for Ethics, p 2

³³⁹ Submission 217, Children's Rights Council of Australia, p 6; Submission 194, Salt Shakers, p 2; Mr Lyle Shelton, Chief of Staff, Australian Christian Lobby, Evidence, 25 February 2009, p 30

In recent decades, legislatures around the world have been working towards the elimination of all forms of discrimination against same-sex oriented persons. The AFA recognises that this objective is of paramount importance. However we submit that in seeking to eliminate discrimination against same-sex oriented persons, governments and judicatures must adjudicate between competing rights and interests. This is particularly so where the apparent advancement of same-sex rights competes with the protection and advancements of children's rights and interests.

The issue of adoption represents one such area of conflict. Calls to allow the adoption of children by same-sex couples often overlook the rights and best interests of the child in such circumstances.³⁴⁰

- 5.46** The Christian Democratic Party warned against claims based on 'some twisted form of equality':

The children are not to be regarded a right, nor regarded a commodity or possession to which all must be provided access in the interests of some twisted form of equality. Such distorted egalitarian concepts only serve the personal interests of the proponents, not those of the children. Children should not be used as a socio-political tool by special interest groups and minorities.³⁴¹

- 5.47** In a similar vein, Mr Lyle Shelton, Chief of Staff of the Australian Christian Lobby, argued that proponents for adoption by same-sex couples are unreasonably motivated by their own agenda:

We would very much see this as ideologically driven by homosexual activists who, not content with having discrimination removed [via the recent Federal Government reforms in recognition of same-sex relationships], are now pursuing symbolic aims and are holding up children as trophies for their own agenda. Children are not pets. They are not there to satisfy the whims of adult lifestyles. They should be given the proper care and attention where the state is needed to get involved in that. The state has an obligation to ensure that those children have a mother and a father figure in their lives.³⁴²

The primacy of the best interests of the child

- 5.48** Those arguing against adoption by same-sex couples strongly emphasised that the best interests of the child must always override the claims of adults, including claims of discrimination. The evidence gathered from participants about their views on what constitutes the best interests of the child, for example on parenting by a mother and father, are documented in detail in Chapter 3. In addition, the research literature about 'family form' versus 'family functioning' is considered in Chapter 4. In general, those who argued against adoption by same-sex couples interpreted the best interests of children to be served by the presence a mother and a father.

³⁴⁰ Submission 207, Australian Family Association, p 1

³⁴¹ Submission 186, Christian Democratic Party, p 8

³⁴² Mr Shelton, Evidence, 25 February 2009, p 33

5.49 A number of participants explained how they interpreted the best interests of the child specifically in the context of the suggestion by others that the current law is discriminatory. The Anglican Church, Diocese of Sydney explained that on the basis of its understanding of the best interests of the child, it does not see the present law as discriminatory:

We suggest that the law as it stands rightly focuses on the rights and best interests of the child rather than the rights of the parents. In a legal sense, the adoption of children is not about the legal entitlements of adults but what best meets the needs of children. This emphasis in the Act on the child's best interests and their need for a mother and a father reflects community standards about the optimum conditions in which children should be raised. For this reason we do not believe the current law is discriminatory, for its objective is appropriately to address the needs of the child.³⁴³

5.50 Asked to respond to the issue of discrimination and the best interests of the child, Anglicare emphasised again the child's right to optimal care (see Chapter 3). It then pointed out that the best interests principle is codified not only in the *Adoption Act*, but also the United Nations Declaration of the Rights of the Child, citing the following Articles:

- Article 3 – ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’
- Article 20 – ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State ... When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.’
- Article 21 – ‘States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration’.³⁴⁴

5.51 Anglicare went on to explain that in light of these Articles, the overriding question must be:

[W]ill the child's sense of personal and family identity be adversely affected by adoption into a family with same-sex parents; and given that same-sex adoptive parenting is outside the norm and adopted children already struggle with feelings of difference, will such children be adversely affected by having this additional adjustment imposed upon them.³⁴⁵

5.52 On this basis, Anglicare asserted that, ‘The *Adoption Act's* emphasis on the priority of the rights of the child here is correct and should not be overturned.’³⁴⁶

³⁴³ Anglican Church, Diocese of Sydney, Answers to questions on notice, p 1

³⁴⁴ United Nations Declaration on the Rights of the Child, quoted in Anglicare Diocese of Sydney, Answers to questions on notice, p 3

³⁴⁵ Anglicare Diocese of Sydney, Answers to questions on notice, pp 3-4

³⁴⁶ Anglicare Diocese of Sydney, Answers to questions on notice, p 4

- 5.53** The response of the Catholic Archdiocese of Sydney to the argument about discrimination also pointed back to the best interests of the child and the optimal environment in which to raise a child, stating that in this context discrimination between heterosexual and same-sex couples is not unjust:

The current law works to ensure that in any adoption decision “the best interests of the child in both childhood and later life must be paramount” ... To this end, it does not unjustly discriminate against same-sex couples. It justly discriminates between heterosexual couples and same-sex couples on the basis of their ability to provide the full range of emotional, psychological and behavioural supports necessary for the integral human development and well being of children.³⁴⁷

- 5.54** Similarly, the Australian Christian Lobby argued that the present law is not so much discriminatory as ‘an acknowledgement that the best interests of a child needing adoptive parents are best served with a mother and a father.’³⁴⁸ The Australian Christian Lobby contended that while the *Adoption Act* is discriminatory, such discrimination is necessary and right, just as it is with respect to other categories of potential applicants for adoption:

The *Adoption Act* is discriminatory against same-sex couples who wish to adopt, but this appropriate discrimination places the welfare of children above the lifestyle desires of adults. The Act also rightly discriminates against potential parents aged under 21 years, and couples who have not been living together continuously for a period of 2 years. By preventing such people from adopting children, the state is discriminating in favour of the child’s best interests. The principle applies equally to preventing same-sex couples from adopting children. If the child’s best interests really are paramount, then discriminating in favour of particular adoptive parents, and against other parents, is both necessary and right.³⁴⁹

The ‘right’ to a mother and a father

- 5.55** A number of participants argued against the right of same-sex couples to non-discrimination on the basis that children have a right to a mother and father. For example, the Fatherhood Foundation argued strongly that all children have a ‘birthright’ to a mother and a father relected in common law:

To legislate for homosexual adoption of children is to rob children of their biological birthright of a mother and a father. This natural birthright has been recognised in tribal law, ancient laws, Sharia Law, English common law and by nature of our heritage, Australian common law.³⁵⁰

- 5.56** Similarly, the Australian Family Association referred to a ‘fundamental’ right to a mother and father, which it argued the state has a responsibility to uphold:

³⁴⁷ Catholic Archdiocese of Sydney, Answers to questions on notice, p 5

³⁴⁸ Submission 185, Australian Christian Lobby, p 3; Catholic Archdiocese of Sydney, Answers to questions on notice, p 5

³⁴⁹ Australian Christian Lobby, Answers to questions on notice, p 2

³⁵⁰ Submission 199, Fatherhood Foundation, p 1

[D]o children have the right to be raised by a mother and a father? The AFA submits that children do have such a right, and that the state should uphold and protect that right. Since adoption by same-sex couples is inconsistent with this fundamental children's right, the state should not permit adoption by same-sex couples.³⁵¹

5.57 The Association went on to suggest that under Article 7.1 of the CROC, children enjoy the right to know and be raised by their biological mother and father. It suggested that, 'Appointing an adoptive mother and father in place of a child's biological parents would seem to best promote the child's right where there is no prospect of the child being raised by his or her biological parents.'³⁵²

5.58 Similarly, Mr Lyle Shelton of the Australian Christian Lobby indicated that his understanding of the CROC was that it affirmed the right to be raised by heterosexual parents:

Our reading of that convention is that it does not support [the concept of adoption by same-sex couples]. It makes reference to a child having the right to be raised by his or her parents, full stop, where you would understand that to mean parents in the traditional form of the word. I understand that convention was drafted some years ago, probably before homosexual activism came to the fore, and the word 'parents' used there would refer to heterosexual parents. That would be our understanding of the UN convention.³⁵³

5.59 Family Voice Australia referred to Principle 6 of the Declaration of the Rights of the Child which states that 'a child of tender years ... shall not, save in exceptional circumstances, be separated from his mother', arguing that on this basis placement of an infant with a male same-sex couple would be in breach of international law.³⁵⁴

5.60 The view that in the absence of biological parents, a family unit most resembling that model must rightfully be provided to the child was shared by the Children's Rights Council of Australia.³⁵⁵ The Plunkett Centre for Ethics also expressed this opinion, and went on to assert that while sometimes exceptional arrangements are required in adoptions, such exceptions should not come to legitimate a broader claim:

Children have rights. The most fundamental of these is the right to be born of natural biological origins, that is, to be born into, and raised within, a family made up of their natural biological parents (a mother and a father) and themselves. Laws which facilitate adoption by same-sex couples undermine this fundamental right ... Of course, in exceptional circumstances children are separated from their biological parents and adopted by other couples. It is the practice of adoption agencies to go to great lengths to place the to-be-adopted child in a family that comes close to the ideal circumstances: a mother and a father. Sometimes approximation of the ideal is not possible and exceptional arrangements are justified. But that exception should not be made the basis for a claim that, since non-ideal arrangements ie ones that do not meet the child's right to be born of

³⁵¹ Submission 207, p 1. See also Submission 186, p 9 and Submission 189, Australian Christian Values Institute, p 2

³⁵² Submission 207, pp 2-3

³⁵³ Mr Shelton, Evidence, 25 February 2009, p 33

³⁵⁴ Submission 30, Family Voice Australia, p 5

³⁵⁵ Submission 217, p 3;

a (natural biological) father and a (natural biological mother) can be ethically and socially legitimate in a particular case, it is ethically and socially legitimate more generally.³⁵⁶

Legal recognition of existing parent-child relationships: known child adoption

- 5.61** Perhaps the most significant argument put forward in favour of adoption by same-sex couples was that it was in the best interests of children who are already parented by gay and lesbian people to have their existing parental relationships legally recognised. This assertion was put forward by many inquiry participants, including several who did not argue for reform on the basis of anti-discrimination. Again these arguments referred to the best interests and human rights of children.
- 5.62** As noted in Chapter 2, in 2006 there were an estimated 4,386 children living in same-sex couple families across Australia.³⁵⁷
- 5.63** In both Chapter 3 and earlier in this chapter it was noted that some participants highlighted that the impact of reform to allow same-sex couples to adopt will largely be felt in relation to known rather than unknown child adoptions. For example, Professor Jenni Millbank suggested that reform will especially impact upon step-parent adoptions.³⁵⁸
- 5.64** Ms Emily Gray of the GLRL stated that the removal of discrimination from the *Adoption Act* to enable recognition of existing families was a key concern for that organisation. She explained that, ‘The majority of ... cases that we are talking about here are where children already exist in families and where they want both of the parents to be recognised as legal parents.’³⁵⁹
- 5.65** The GLRL submission explained that known child adoptions involve children already living in same-sex parented families, upon whom adoption would confer significant benefits:
- In many cases adoption is not about unknown children but children who are already living in loving and stable homes with lesbian and gay carers, step-parents and co-parents. Known child adoption for same-sex couples would give same-sex parents the ability to legally formalise their relationships with their children. This legal recognition of parentage confers many benefits for children and their families.³⁶⁰
- 5.66** The GLRL also contended that such benefits would reflect the objects of the *Adoption Act*:
- These benefits strongly resonate with objects (a) and (b) from the *Adoption Act*, which emphasise the paramount consideration of the best interests of children (both in childhood and later life) and adoption as a child-centred service.³⁶¹

³⁵⁶ Submission 226, p 1

³⁵⁷ Gay and Lesbian Rights Lobby, Answers to questions on notice, p 1

³⁵⁸ Submission 222, p 4

³⁵⁹ Ms Gray, Evidence, 24 February 2009, p 45

³⁶⁰ Submission 183, p 11

³⁶¹ Submission 183, p 11

- 5.67** Participants noted that the recent changes to State and Commonwealth laws had achieved recognition for certain same-sex families, and acknowledged this as a significant achievement. As noted in Chapter 2 and earlier in this chapter, NSW and federal law now recognise via a ‘presumption of parentage’ the same-sex partner of a woman who has undergone a fertilisation procedure as the parent of her partner’s child, provided that the partner consented to the procedure. These reforms conferred the status of legal parent on the co-mother of children in these circumstances.
- 5.68** While underscoring the significance of these reforms, the GLRL pointed out that these parentage presumptions are limited in scope, only applying to children conceived via *assisted reproductive technology* to *lesbian* couples who consented *at the time of conception* to the fertilisation procedure.³⁶² It went on to state that for those same-sex couples not covered by these presumptions, ‘adoption reform is the only way in which both same-sex parents can be legally recognised as the parents of their children.’³⁶³
- 5.69** Similarly, the Australian Human Rights Commission commented in its submission that while certain same-sex parents are now recognised in law, ‘adoption laws remain an important tool by which same-sex couples can gain legal recognition as parents.’³⁶⁴
- 5.70** A number of participants identified a range of other family circumstances involving same-sex parents where the legal recognition of parentage via adoption was highly desirable but not possible under the current law, owing to the sexual orientation of the parents:
- children with a same-sex step-parent – where the child has no actual relationship with their biological parent who is recognised at law, nor any likelihood of a future one, as in the death of that parent.³⁶⁵
 - children of ‘single’ parents with a same-sex partner – where the child has only one parent at law, as in the situation of a single woman who has conceived via a fertilisation procedure or informal donation, where a legal relationship with the biological father never existed.
 - children with long-term foster carers – where permanency is considered desirable and appropriate (as discussed in detail in a later section)
 - children in families that have migrated – where same-sex couples who have borne or adopted children in other jurisdictions that do not recognise same-sex parentage have settled in NSW.³⁶⁶
- 5.71** The Council of Social Service of NSW (NCOSS) observed that the growing trend in same-sex parenting will mean that increasing numbers of same-sex parents will seek legal recognition for their parent-child relationship in the future:

³⁶² Submission 183, p 14 (emphasis in original)

³⁶³ Submission 183, p 14

³⁶⁴ Submission 227, Australian Human Rights Commission, p 2

³⁶⁵ Certain participants recognised that an important principle of adoption that the child’s relationship with biological parents not be severed without sound reason. See Submission 190, pp 2-3 and Submission 183, p 15

³⁶⁶ Submission 183, pp 14-15; Submission 190, pp 2-3; Submission 175, p 4; Submission 222, p 3

There are increasing numbers of same-sex couples who have children and who want to have children in the future. Gay couples are using surrogacy to enable them to have children and lesbian couples are seeking assisted or self insemination. This means that there will be an increasing number of families where the same-sex partner will want to be recognised as their child's parent through adoption. And, as with opposite-sex couples, there will be same-sex couples who are unable to have children and who will want to adopt a child as a couple.³⁶⁷

5.72 Ms Yasmin Hunter, Solicitor with the Inner City Legal Centre, confirmed that enquiries to the Centre for advice on recognition of parenting by same-sex parents were reasonably common, noting that:

Some of the people we have seen at the Centre have talked about situations similar, where the natural father has died or where the child was conceived through donor insemination and there is no natural father around. These children are being raised by couples in homes and are quite clearly expressing their wishes to be adopted by their other parent. Not necessarily for any legal reason but because they see this person as their parent and they feel less than in some way because they are not recognised.³⁶⁸

5.73 The GLRL argued that amending the definitions of 'couple', 'de facto relationship' and 'spouse' in the *Adoption Act* to reflect the non-discriminatory definition of de facto relationships of the *Property (Relationships) Act 1984* would address discrimination and enable same-sex partners to apply to adopt as a couple. It would also ensure that the step-parent adoption provisions in the *Adoption Act* apply equally to same-sex partners where they are actually in a step-parent relationship with the child.³⁶⁹

5.74 The GLRL went on to point out, however, that certain gay and lesbian parents would continue not to have access to legal recognition without further legal change, and offered the following examples:

- adoptive gay fathers where a child has been adopted in another country by only one father, as a result of the law in that country at the time, who then move to NSW
- a lesbian couple with a child conceived via a fertilisation procedure, where the child was born in a state that does not recognise a presumption of parentage in respect of these families, who then move to NSW
- a lesbian couple who conceived via sexual intercourse with a male donor.³⁷⁰

5.75 The GLRL explained that the existing step-parent adoption provision, even if it were available to same-sex couples, would not be appropriate for these families for three key reasons:

- The existing step-parent adoption provision requires that the child be at least five years of age before an application to adopt can be made, such that many children would lack that recognition until they were at least five.

³⁶⁷ Submission 163, Council of Social Services of NSW (NCOSS), p 3

³⁶⁸ Ms Yasmin Hunter, Solicitor, Inner City Legal Centre, Evidence, 25 February 2009, p 21

³⁶⁹ Submission 183, pp 33 and 35

³⁷⁰ Submission 183, pp 35-36

- It requires that the step-parent have lived continuously with the parent and child for at least three years before an application to adopt can be made. While this requirement may be appropriate for new step-parents, it cannot address situations where same-sex couples have made a decision to conceive or adopt jointly.
- It has a presumption against the making of an adoption order, on the basis that the child will have another legal parent with whom its relationship will be severed upon adoption by the step-parent. Thus it does not recognise the circumstance where a child has only one existing legal parent (as in the first two examples above), or where there is a second consenting legal parent (as in the case of the third example above).³⁷¹

5.76 The GLRL went on to report that for these reasons, the NSW Law Reform Commission (NSW LRC) concluded in its 2006 review of the *Property (Relationships) Act 1984* that the existing step-parent adoption mechanism was not suited to address such situations. As a result, the NSW LRC recommended the introduction of a new ‘co-mother adoption’ mechanism, stipulating that it should not include the age and length of relationship requirements of the step-parent adoption provision.³⁷² In its submission, the GLRL contended that co-fathers could also benefit from such a mechanism, and that there was no reason why it should be limited only to women same-sex partners.³⁷³

5.77 On this basis the GLRL recommended to the Committee that in addition to the definitional changes to the *Adoption Act* outlined above, a new ‘second-parent adoption’ provision, similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act*, be introduced. It held that this provision should allow for a child to be adopted by the spouse of their parent (based on an amended non-discriminatory definition of spouse), and that where the child has only one legal parent or a second consenting legal parent, there should be a presumption in favour of adoption, or at least no presumption against it.³⁷⁴

5.78 Professor Millbank concurred with the need to make additional provision for step-parent adoption and one which does not include the current onus against making the order, stating:

The existing provision on step-parent adoption is premised on the understanding that granting parental status to the ‘new’ social parent involves severing parental status from an existing biological parent, which current social policy opposes unless there are extreme circumstances. A separate provision for step-parent adoption should be inserted into the Act for situations where the child has only one legal parent. This new provision should not include the current onus which weighs against making the order.³⁷⁵

³⁷¹ Submission 183, pp 36-37

³⁷² NSW Law Reform Commission, *Relationships*, Report No 113, NSW LRC, Sydney, 2006, cited in Submission 183, p 37

³⁷³ Submission 183, p 37

³⁷⁴ Submission 183, p 38

³⁷⁵ Submission 222, p 8

- 5.79 The GLRL also recommended that further consideration be given to whether changes to the *Adoption Act* could be drafted to permit co-parent adoption granting legal access to more than two parents.³⁷⁶

Best interests and human rights

- 5.80 Several inquiry participants argued that the lack of legal recognition of same-sex parental relationships is contrary to children's best interests and in breach of their human rights.
- 5.81 For example, the National Children's and Youth Law Centre contended in its submission that, 'the current adoption laws in NSW fall short of viewing the child's best interests as paramount, and fail to accord the basic social and legal rights enshrined in CROC to children living in same-sex families.'³⁷⁷ It went on to assert that it is in a child's best interests to have their family recognised in law, and to suggest that the present law actually creates obstacles to the realisation of those interests:

The sexuality of a child's parents has no direct bearing on that child's best interests. It is in a child's best interests to have his or her family legally recognised and have his or her relationship of emotional and financial dependence reflected and protected by law. The current laws restrict a second parent's ability (in a same-sex partnership) to properly care for their child and also facilitate legal and social discrimination towards children living in same-sex families. The laws not only fail to promote the best interests of these children but in many circumstances also create direct obstacles to the realisation of such interests.³⁷⁸

- 5.82 Similarly, in its submission, the Australian Human Rights Commission referred to the requirement under Article 21 of the CROC that the best interests of the child be the paramount consideration in adoption, with the Commissioner going on to state:

I am concerned that adoption laws which arbitrarily exclude a couple on the grounds of sexuality may result in a breach these rights because they fail to consider the best interests of a particular child.³⁷⁹

- 5.83 The GLRL and the ACWA both referred to the Australian Human Rights Commission's conclusions in the *Same-sex, Same Entitlements* inquiry that the inability to legally recognise a child's parents may interfere with fully realising their rights under Article 21.³⁸⁰ The GLRL reported that the Commission found that the blanket exclusion of same-sex couples from

³⁷⁶ Submission 183, pp 38-39. See also Submission 225, p 6

³⁷⁷ Submission 215, p 3

³⁷⁸ Submission 215, p 9

³⁷⁹ Submission 227, p 3

³⁸⁰ Human Rights and Equal Opportunities Commission, *Same-Sex, Same Entitlements: National Inquiry into Discrimination Against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, May 2007, p 51, cited in Submission 192, p 1 and Submission 183, p 16

adoption ‘prevents an objective case-by-case assessment of what is in an individual child’s best interests.’³⁸¹

5.84 The GLRL went on to refer to Article 2(2) of the CROC, which sets out the child’s right not to be discriminated against, irrespective of his or her parent’s sex, social origin, or other status. It reported that the Australian Human Rights Commission is of the view that ‘status’ here includes the sexual orientation of the parents.³⁸²

5.85 Similarly, the Inner City Legal Centre quoted the Commission’s report as finding that same-sex parents should not have to face obstacles to the recognition of their relationships simply because of their sexual orientation:

[T]he reality is that same-sex families do exist. And the Inquiry does not accept that one set of parents should have to struggle harder than another set of parents to protect the best interests of their child, purely on the basis of sexuality. Laws that perpetuate such inequities are unjust and should be changed. They are also contrary to international human rights law.³⁸³

5.86 On the basis of the Commission’s conclusions, the GLRL asserted that denying legal recognition to children on the basis of their parents’ sexuality is discriminatory against the child:

Simply, by denying children the legal recognition of their parents only because their parents are in a same-sex relationship, you deny that child the advantages and protections conferred by legal parentage which are otherwise available to children with heterosexual parents. By discriminating against same-sex couples who are parents, the law discriminates against their children.³⁸⁴

5.87 Several other participants also referred to UN instruments and statements to argue for recognition of existing relationships. For example, the National Children’s and Youth Law Centre referred to Articles 5, 9, 18, and 27 of the CROC, suggesting for example that by failing ‘to legally recognise the rights of same-sex parents, NSW adoption laws may not secure the rights of children in these families to not be separated from their parents against their will’.³⁸⁵ It also quoted Article 8.1, that ‘States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.’³⁸⁶ On this basis, the Law Centre argued that:

The current state of the law does not recognise a child’s right to two legal parents of the same-sex. In so doing, a child already living with two parents of the same-sex, is

³⁸¹ Human Rights and Equal Opportunities Commission, *Same-Sex, Same Entitlements: National Inquiry into Discrimination Against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, p 51, quoted in Submission 183, p 16

³⁸² Submission 183, p 16

³⁸³ Submission 175, p 3

³⁸⁴ Submission 183, p 16

³⁸⁵ Submission 215, p 8

³⁸⁶ Article 8.1, United Nations Convention on the Rights of the Child, quoted in National Children’s and Youth Law Centre, Answers to questions on notice, p 1

denied the right to recognition of the family relations that form part of his or her identity.³⁸⁷

- 5.88** In addition, the Hon Penny Sharpe MLC referred to Articles 2, 5, 16 and 21 of the CROC, to the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and contended that where recognition of parentage would otherwise be in the best interests of a child, the state's failure to provide such recognition is a failure to provide the widest possible assistance to families:

[W]here a same-sex couple have the actual responsibility for the care and education of a child, and an adoption order in favour of one or both members of the couple would otherwise be in the child's best interests, prohibiting such an order from being granted constitutes a failure to accord the widest possible assistance and protection to families.³⁸⁸

- 5.89** Both the Castan Centre for Human Rights Law and the GLRL referred to other articles and instruments, noting that the UN has displayed a broad and flexible interpretation of 'the family' as reflecting diverse forms.³⁸⁹ The Castan Centre for Human Rights Law's submission explained this as follows:

Allowing same-sex couples to adopt is consistent with Australia's obligations under international law. No specific article of the Convention on the Rights of the Child ... deals directly with the issue of parentage ... Article 7(1) emphasises the right of the child to know and be cared for by his or her parents as far as possible. 'Parent' is not defined in CROC, 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. 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'. Discussions of the Committee on the Rights of the Child appear to 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'.³⁹⁰

- 5.90** On the basis of its analysis of the discussions of the Committee on the Rights of the Child, the Castan Centre for Human Rights Law concluded that there is no reason to suggest that some children should not have the rights and protections that others enjoy:

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 CROC, while others do not.³⁹¹

³⁸⁷ National Children's and Youth Law Centre, Answers to questions on notice, p 1

³⁸⁸ Submission 190, p 10

³⁸⁹ Submission 221, p 5; Submission 183, pp 16-17. See also Submission 163, p 5

³⁹⁰ Committee on the Rights of the Child, Reports of General Discussion Days CRC/C/DOD/1 [2.1], cited in Submission 221, pp 5-6

³⁹¹ Submission 221, pp 5-6

- 5.91** Further to the issue of whether children have a right to a mother and father, Mr McDougall of the National Children's and Youth Law Centre reported that this was not his understanding of the CROC:

As far as I am aware the Convention does not create a right to have a mother and a father. It tries to enshrine the right to a family and recognises that that too is contextual - not everyone, for a range of reasons, can actualise that right - and the very best we can do is try and find something which is going to best express those opportunities for that particular child.³⁹²

- 5.92** In addition, the Castan Centre for Human Rights Law reported that Australia's international obligations concerning the rights of the child to two heterosexual parents was examined by the Federal Court in *McBain's* case. Citing the CROC, ICESCR, ICCPR and the Universal Declaration of Human Rights (UDHR), the Catholic Church argued that marriage is a necessary precursor to founding a family. According to the Castan Centre, Justice Sundberg rejected this argument, concluding 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'.³⁹³

- 5.93** The Castan Centre went on to report that these ambiguities have been clarified to some extent by the UN Human Rights Committee. It suggested that the UN's recognition of diverse family forms means that adoption by same-sex couples would not contravene Australia's international obligations:

The General Comments issued by the Human Rights Committee in relation to Article 23 [of the UDHR] have gone some way to resolving some of these ambiguities. The Committee recognises 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 refers 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 with children within the concept of 'family.' Opening up adoption to same-sex couples in no way impairs Australia's compliance with its international obligations.³⁹⁴

The benefits of legal recognition for children

- 5.94** Numerous participants stressed a range of legal, material and social benefits for children that would flow from legal recognition of parental relationships via adoption.
- 5.95** According to the GLRL, the legal recognition of parent-child relationships is central to the operation of a range of laws regulating familial interactions. It suggested that, 'Legal recognition has profound consequences for the protection of a child's interests'³⁹⁵ in that it:

³⁹² Mr James McDougall, Director, National Children's and Youth Law Centre, Evidence, 25 February 2009, p 7

³⁹³ *McBain* [2000] 99 FCR 116, 120, cited in Submission 221, pp 6-7

³⁹⁴ Submission 221, pp 6-7

³⁹⁵ Submission 183, p 12

- empowers parents to make welfare, developmental, educative and caring decisions, and to take legal action, on behalf of the child
- underpins a child's entitlements to their parent's inheritance and superannuation death benefits, entitling the child to automatic inheritance if their parent dies without a will
- provides stability for the child if their parents separate by ensuring that both parents are responsible in respect of child support obligations and the sharing of time with the child
- provides certainty for the child if one of their parents dies such that the other legal parent automatically assumes sole parental responsibility for the child
- underpins many state and federal entitlements and protections for children (and parents), for example in relation to health care, social security, taxation, superannuation, criminal law, workers' compensation and workplace entitlements.³⁹⁶

5.96 Other stakeholders who identified such legal and material benefits as a result of the legal recognition of parentage included the National Children's and Youth Law Centre, the Inner City Legal Centre, WLS NSW, Professor Millbank, NCOSS, Ms Clover Moore MP, and Ms Silke Bader and Ms Tanya Sale.³⁹⁷

5.97 The Department of Community Services (DoCS) highlighted the absence of a child's right to inheritance in circumstances of intestacy where the parental relationship is not recognised:

The *Probate and Administration Act 1898* provides for the disposition of the property of a person who has died without making a will or whose will is invalid. Section 61B sets out the general scheme of what will happen under intestacy. Under that section the biological children of a same-sex partner would not receive automatic entitlement to a share of a deceased partner's estate. Application could be made under the *Family Provision Act 1982* which incorporates the definition of 'child of the relationship' as set out in the *Property Relationship Act 1984* and which would include the children of a lesbian relationship but may not include adult children of a lesbian relationship. Children of a gay couple would not be covered at all because the definition is based on the *Status of Children Act 1996* which does not deal with the status of children with respect to the same-sex partner of their biological father.³⁹⁸

5.98 Some participants also emphasised the social and emotional benefits for a child arising from the legal recognition of parentage. The Hon Penny Sharpe MLC contended that adoption expresses the highest level of commitment by a parent to a child, with profound implications for a child's sense of belonging and identity as well as their legal status:

Adoption is generally seen as expressing the highest possible level of parental commitment to the child. It offers the adopted child a sense of fully belonging to their

³⁹⁶ Submission 183, pp 12-13.

³⁹⁷ Submission 215, p 10; Inner City Legal Centre, Answers to questions on notice, pp 2-3; Submission 225, p 3; Submission 222, p 3; Submission 163, p 7; Submission 187, pp 1-2; Submission 69, Ms Silke Bader and Ms Tanya Sale, p 2

³⁹⁸ Department of Community Services, Answers to questions on notice, p 6

adopted family. Adoption can give a parent/child relationship a sense of permanency and security that other legal mechanisms for allocating parental responsibility may not. Where a child already views a prospective adoptive parent as their parent, adoption can bring the child's legal position into line with that view. In this sense, adoption can provide both legal recognition and social confirmation of the child's identity and family circumstances.³⁹⁹

5.99 Ms Sharpe also suggested that without legal recognition, children may have difficulty adjusting to the fact that one or both of their 'social' parents are not their legal parents. She further contended that without such recognition, increasing numbers of same-sex parents will be obliged to tell their children that the law sees their relationships as inferior to those in other families.⁴⁰⁰

5.100 Ms Jackie Braw, step-parent to Brenna Harding, emphasised the sense of security that recognition of their relationship would provide for Brenna, both at an emotional and material level:

She deserves the right to have her relationship with both her parents legally recognised. She deserves to feel secure emotionally, socially, legally and financially ... Most of the reason why I want to adopt Brenna is for her security, both now and in the longer term. I have made a verbal commitment to her and to Vicki and I have also made provision in my will. We have a relationship agreement that is in draft form at the moment and that we will amend and finalise in the near future. These are convoluted and complicated mechanisms that we should not need to put in place to ensure Brenna's security.⁴⁰¹

5.101 Ms Braw went on to suggest that legal recognition would also send a message of recognition to their extended family and community:

If the law recognised me as a legal parent I believe that behaviour would probably change. It would reinforce to people who perhaps are a little more conservative that I am Brenna's parent and that Brenna is their family too. I believe Brenna misses out on some really important family connections because of that.⁴⁰²

5.102 In evidence, Brenna stated her wish for Ms Braw to be recognised as her parent:

Of course. I mean, it would be great if she was legally recognised. I already recognise her as my mum, but legally it would be really good because there are so many things that could be changed like inheritance and some medical things and I really do want to have her legally as my mum.⁴⁰³

5.103 Mr McDougall of the National Children's and Youth Law Centre emphasised that from a child's perspective, the practical aspects of legal recognition can be very important, and also spoke to the issue of identity:

³⁹⁹ Submission 190, p 6

⁴⁰⁰ Submission 190, pp 6-7

⁴⁰¹ Ms Jackie Braw, Evidence, 24 February 2009, p 60

⁴⁰² Ms Braw, Evidence, 24 February 2009, p 61

⁴⁰³ Miss Brenna Harding, Evidence, 24 February 2009, p 65

[A]t a practical level, particularly looking at it from a child's perspective, there are decisions that are made in respect of gaining passports, gaining permission slips at school, which may not sound like an important feature but for kids is an incredibly important part of their lives, and having a recognised parent who can assume that role and be recognised in that role is something that does seem to be quite important to children. There is also I suppose the more amorphous issue of identity - who am I - and I want to be identified with those people who I consider to be members of my family.⁴⁰⁴

- 5.104** The Commissioner for Children and Young People, Ms Gillian Calvert, stated that, based on what the Commission's Young People Reference Group had told her, young people would consider that parental relationships should be recognised in law. She then drew her own conclusion about putting unnecessary barriers between parents and children:

[F]rom my discussion with the young people's reference group, from the child's point of view they see both those people as their parents and therefore they would argue - I imagine - that both of those parents should be recognised in law. I think you see that in a day-to-day way when you think about the way children live their lives. Children go to school and if the other parent in the child's life does not have any legal rights to make decisions on behalf of that child then it potentially disrupts the relationship between the child and the parent and somewhat restricts that adult's ability to fulfil what the child would see as the parental role. I think we are putting barriers between children and whom the children see as their parents in an unnecessary way.⁴⁰⁵

- 5.105** Ms Calvert went on to say that based on her consultation, the most important thing from the child's perspective is 'that children have families who love them and keep them safe.'⁴⁰⁶ She suggested that on this basis, 'they would be asking why the legal world is not keeping up with the child's emotional reality, if you like, and developmental reality.'⁴⁰⁷

The limitations of other forms of parental recognition

- 5.106** Several participants noted that alternative forms of legal recognition are available to address some of the practical issues associated with the absence of full legal recognition. They argued, however, that such orders are significantly inferior to the recognition granted via adoption, and therefore have less capacity to facilitate the best interests of the child.
- 5.107** As noted in Chapter 2, parenting orders can be obtained under the *Family Law Act 1975* (Cth) to confer parental responsibility on a couple or individual. The Inner City Legal Centre advised that these orders provide a legal document that can be shown to schools or hospitals to prove that a person has parental responsibility for a child.⁴⁰⁸ Mr Boers of the Inner City Legal Centre advised that for many years the Centre has advised lesbian couples where the co-mother is in a legal vacuum that in the absence of full recognition, such orders are the next

⁴⁰⁴ Mr McDougall, Evidence, 25 February 2009, pp 4-5

⁴⁰⁵ Ms Gillian Calvert, Commissioner for Children and Young People, Evidence, 25 February 2009, p 36

⁴⁰⁶ Ms Calvert, Evidence, 25 February 2009, p 37

⁴⁰⁷ Ms Calvert, Evidence, 25 February 2009, p 37

⁴⁰⁸ Submission 175, pp 6-7

best alternative.⁴⁰⁹ In addition, care orders from the Children's Court can confer parental responsibility in respect of children in foster care.⁴¹⁰

5.108 The Inner City Legal Centre noted, however, that parenting orders more limited in scope than full parenting rights, can be confined to specific purposes, and expire when the child turns 18. They can also be varied by a court upon application, thus allowing greater uncertainty for the child than would be the case were he or she adopted.⁴¹¹

5.109 Mr Kassisieh of the GLRL explained the differences between a parenting orders and full legal parentage granted via adoption, emphasising that parenting orders do not make the adult a legal parent:

[Parenting orders grant] parental responsibility, which is different from legal parentage. Legal parenting is a whole order of rights and responsibilities granted in common law and in statute to parents and children. Parental responsibility is a smaller area; it is akin to being a foster carer. You have responsibility for care and welfare, so you can make decisions on things like medical conditions, school permissions, and you need to be consulted, for example, on the child's religious beliefs and schooling requirements. Parenting orders do not change the definition of a parent and child for any other area, such as inheritance laws.⁴¹²

5.110 Mr Kassisieh went on to explain that parenting orders have traditionally been made in family law where parent relationships break down. In the absence of full legal recognition, same-sex families have come to utilise them for a purpose for which they were not designed.⁴¹³

5.111 Both Ms Gray of the GLRL and the Inner City Legal Centre also contended that the process of obtaining a parenting order is often long and arduous, and entails significant cost to the family concerned.⁴¹⁴

5.112 Professor Millbank also addressed the differences between adoption and other orders, concluding that parenting orders are less comprehensive and less permanent form of legal recognition:

Adoption is the most portable form of parental status in that an adoption in one state in Australia will be recognised in any other and will also flow through to all federal laws (compared to the recent NSW provisions for female partners with children born through assisted conception, which may not be recognised in states that have not yet made these changes.)

Adoption and parenting orders traditionally have very different functions as well as different effects. When children have no parent who is willing or able to care for them (including if they are at risk of abuse or neglect and are removed from their families of origin), their placement is likely to be under NSW care and protection legislation,

⁴⁰⁹ Mr Paul Boers, Solicitor and Director, Inner City Legal Centre, Evidence, 25 February 2009, p 18

⁴¹⁰ Submission 190, p 5

⁴¹¹ Submission 175, pp 6-7

⁴¹² Mr Kassisieh, Evidence, 24 February 2009, p 48

⁴¹³ Mr Kassisieh, Evidence, 24 February 2009, p 49

⁴¹⁴ Ms Gray, Evidence, 24 February 2009, p 49; Submission 175, p 7

often entailing a long term care order in favour of foster parents, and sometimes ultimately adoption.

Family court orders are more likely to be sought when there is contest between competent family members as to where a child lives or spends time with. Family court orders can also be made on the basis of consent for parents and for parties who would otherwise have no form of legal relationship with a child. Parenting orders under the [*Family Law Act*] do not grant parental status – only certain responsibilities that cease when the child turns 18. This is a far less comprehensive and less permanent form of legal relationship.

Once adopted a child is a child of the parties under the [*Family Law Act*] and all other federal law.⁴¹⁵

5.113 Similarly, Ms Sharpe argued that adoption ‘has a number of legal consequences that other mechanisms for allocating parental responsibilities do not have’, including:

- The relinquishing parent(s) lose all rights concerning the child except those specifically preserved under adoption legislation or specifically granted by a Court order;
- The adoptive parent(s) have the same parental responsibilities for the child as its biological parent(s) would have had were it not for the adoption, including the duty to maintain the child;
- The adoptive parent(s) have the same parental rights in relation to the child as its biological parent(s) would have had were it not for the adoption, including the right to appoint a person to be a guardian of the child in the event of the adoptive parent’s death;
- The child has a new birth certificate in its adopted name, with the details of the adoptive parent(s) and their children (if any) shown on the certificate rather than those of their biological parent(s);
- The child’s right to inherit from its relinquishing parent(s) will cease and a right to inherit from the adoptive parent(s) will be created.⁴¹⁶

5.114 In relation to the issue of parenting orders expiring at age 18, DoCS explained how this can be problematic:

For many same-sex couples, this solution is only partially satisfactory because the orders are automatically discharged when the child turns 18. If, for example, an 18 year old is involved in a serious accident and requires his or her next of kin to consent to medical treatment, the non-legal parent would not be able to give that consent.⁴¹⁷

⁴¹⁵ Professor Jenni Millbank, Answers to questions on notice, p 2

⁴¹⁶ Submission 190, pp 5-6

⁴¹⁷ Department of Community Services, Answers to questions on notice, p 3

- 5.115** Mr Boers of the Inner City Legal Centre highlighted the inability, without full legal parentage, for a step-parent to be appointed guardian of the child, as well as the inability to claim child support in the event of the breakdown of the parents' relationship.⁴¹⁸
- 5.116** He cited an example of a lesbian couple, one of whom had a 13 year old daughter from a previous marriage, where the father had died. The couple sought legal advice as the biological mother was about to go overseas and wanted to make provision for her daughter in case anything happened to her. According to Mr Boers, if the birth mother had died, her partner would have been in a legal vacuum in terms of exercising parental responsibility.⁴¹⁹
- 5.117** In relation to whether the biological mother's will could appoint her same-sex partner to be the guardian of the child, Mr Boers explained that in the event of a dispute about the custody of the child following the death of the mother, the mother's (and child's) wishes may be taken into consideration by the Family Court, but could not override the provisions of the *Family Law Act*. He went on to suggest that while a will 'might be evidence of intention of the parent who passed away, but whether that is going to be given any weight by a court is another matter,' and contended that there might be much more compelling factors when determining the best interests of the child.⁴²⁰ By contrast, if the child were adopted, in the event of the mother's death, the step-parent's legal relationship with the child would continue.
- 5.118** The Department also indicated to the Committee that it would be desirable to address the issue of legal guardianship in the event of the death of the biological parent.⁴²¹
- 5.119** Mr Boers further advised that a child covered only by a parenting order would have no legal claim to child support in the event that the parents split up, and suggested that this had important implications for the best interests of the child:
- If the birth mother and her partner had separated, for instance, what provision would be made for the financial support of the child? I think that is a very significant issue relevant to the best interests principle. There would not have been any child support liability on the part of the partner because she does not have that status of legal parent and did not come within the definition of "parent" under the *Child Support Assessment Act*.⁴²²
- 5.120** In relation to child support, DoCS advised that this deficit will soon be addressed by Commonwealth legislation:

From 1 July 2009 the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws) Act 2008* will enable same-sex parents who separate to apply for child support. This amendment covers children whose parents are in a same-sex relationship and

⁴¹⁸ Mr Boers, Evidence, 25 February 2009, pp 18-19

⁴¹⁹ Mr Boers, Evidence, 25 February 2009, p 18

⁴²⁰ Mr Boers, Evidence, 25 February 2009, pp 18-19

⁴²¹ Department of Community Services, Answers to questions on notice, p 6

⁴²² Mr Boers, Evidence, 25 February 2009, p 18. See also Inner City Legal Centre, Answers to questions on notice, pp 2-3

separate after 1 July 2009 but does not apply to those children whose parents separated prior to that date.⁴²³

Counter-arguments about legal recognition of existing parent-child relationships

5.121 Several inquiry participants responded to the argument that the present adoption laws adversely affect children living in same-sex parent families by denying them legal and social recognition. While there were some differences in their views, these stakeholders generally maintained that current legal arrangements in respect of family law are largely sufficient, and that to amend the *Adoption Act* for the purposes of recognising such relationships would detract from the principles underpinning the *Adoption Act*, at the expense of other children and society at large. In arguing their case, these participants returned to their fundamental beliefs about the optimal environment in which children should be raised.

5.122 Both the Catholic Archdiocese of Sydney and Australian Christian Lobby maintained that existing law was sufficient to provide for the legal recognition of existing relationships between same-sex parents and children. The Catholic Archdiocese acknowledged the desirability of ‘protecting the interests of this small group of children’, but was firmly against ‘providing general legal sanction to adoptive arrangements which depart from best practice’.⁴²⁴ It further stated that it saw no reason to change the law:

There is no compelling reason why the law should be changed to allow the adoption of a small group of children whose needs can be properly addressed on a case-by-case basis. Limited forms of guardianship might be necessary and sufficient to deal with those select cases.

The risk involved in changing the law is that it would provide general endorsement and facilitation of adoption by same-sex couples, despite the lack of sufficient empirical sociological evidence to show equivalence between homosexual and heterosexual parenting. This would not be in the best interests of children.⁴²⁵

5.123 The Australian Christian Lobby insisted that the current legal provisions, particularly those facilitated by the changes to federal law in 2008, were sufficient. In this regard it stated:

Where a child is raised by one of its biological parents and the same-sex partner of that parent, ACL argues that discrimination against the couple and the child it is raising is no longer an issue of any legal significance. The Rudd Government last year amended numerous Commonwealth acts to remove discrimination against the parties to these alternative family arrangements. Amongst the significant changes were amendments to the *Family Law Act*, which gave same-sex couples access to the Family Court.

ACL was largely supportive of those legislative changes, recognising that unjustified discrimination against people who choose to live in alternative partnership arrangements should be removed, in the areas of government welfare and financial

⁴²³ Department of Community Services, Answers to questions on notice, p 3

⁴²⁴ Catholic Archdiocese of Sydney, Answers to questions on notice, p 2

⁴²⁵ Catholic Archdiocese of Sydney, Answers to questions on notice, p 2

benefits. It is especially important that children, who often do not have a say in the relationship choices of their carers, are not unfairly burdened in law.⁴²⁶

- 5.124** The Australian Christian Lobby went on to suggest that the argument that children continue to be adversely affected by the current law was ‘an emotive, wedge assertion used by minority groups to extract from governments full parenting ‘rights’ for same-sex couples.’⁴²⁷ Mr Lyle Shelton, Chief of Staff, warned:

This Committee ... should particularly not be allowing this very transparent tactic by homosexual activists of using the situation of children already caught in homosexual relations as the lever to achieve something already delivered by the Federal Government in response to the *Same-sex, Same Entitlements* report last year.⁴²⁸

- 5.125** Mr Ben Williams, Research Officer, expressed the view that ‘We should treat this exceptional family type in an exceptional way and not change the rule itself.’⁴²⁹ His colleague, Mr Shelton went on to argue that notwithstanding the additional recognition afforded via the 2008 changes to the *Family Law Act*, society should maintain its commitment to the heterosexual family:

I think it is important that we do not change the natural order to accommodate these circumstances. We have removed the discrimination. Why should we send a message to society and to future generations that we, as a contemporary group of people who have control over legislation, are saying that suddenly this form of social construct, which is against the natural order, is now somehow normal?⁴³⁰

- 5.126** Anglicare also suggested that existing laws should be sufficient to meet children’s needs. In the case of a child with a same-sex parent, Anglicare suggested that a parenting order or care order could be obtained. In the case of parents who wish to formalise a long term foster care arrangement, it suggested that in the interests of permanency where this is appropriate, additional provision could be achieved through ‘sole parental responsibility orders’ under section 149 of the *Children and Young Persons (Care and Protection) Act 1998*.⁴³¹ Asked about a scenario in which a child expresses a desire to be adopted by their (same-sex) parent, Anglicare urged particular caution:

Anglicare’s view is that a conservative, cautious approach is required where a decision is irreversible - such as adoption by a same-sex couple - as it would be putting the child in rare and uncertain family configurations where the adoption placement decision could be made prior to the child being of a developmental age where the implications of the decision are fully understood.⁴³²

⁴²⁶ Australian Christian Lobby, Answers to questions on notice, p 1

⁴²⁷ Australian Christian Lobby, Answers to questions on notice, p 2

⁴²⁸ Mr Shelton, Evidence, 25 February 2009, p 28

⁴²⁹ Mr Ben Williams, Research Officer, Australian Christian Lobby, Evidence, 25 February 2009, p 31

⁴³⁰ Mr Shelton, Evidence, 25 February 2009, p 32

⁴³¹ Anglicare Diocese of Sydney, Answers to questions on notice, pp 1-2

⁴³² Anglicare Diocese of Sydney, Answers to questions on notice, p 2

- 5.127 It went on to provide a real example of a child who entered permanent foster care at age 8, and was given a long term placement with a same-sex couple. A year later she expressed a desire for a mother and was subsequently found an alternative placement where she was eventually adopted. Anglicare stated:

It is important to note that in this instance she **had not been adopted** by the same-sex couple so there was an alternative arrangement that could be made for that child. However if this was a child at a younger age, less aware of her emotional needs or unable to express them clearly, a child in a similar situation could have been adopted by her same-sex caregivers but thereby precluded from the opportunity to receive care from both a mother and father figure.⁴³³

- 5.128 Revd Dr Andrew Ford, Lecturer and Member of Social Issues Executive of the Anglican Church, Diocese of Sydney, indicated that the Diocese had some sympathy with the arguments presented to the Committee about the desirability of legal recognition for the children already existing in families parented by same-sex couples. However, he expressed concern that reforming the *Adoption Act* was not the best way to do this, and that by changing the *Adoption Act* other problems might be created:

We also recognise ... society is a dynamic thing and legislation needs to be adapted to ensure that it achieves the purposes for which it was intended as society changes ... [S]ome legal means may need to be brought to bear to ensure legal security for those children within same-sex homes already, which we recognise. It is a complex matter that must be resolved again in the best interests of those children. But we want to contend that adoption may be the wrong category for you to address that matter. Maybe there are other ways within the law that exist already to address that problem and maybe by changing the *Adoption Act* you actually will open up a different [problem]. By solving one problem you may be inadvertently creating a whole series of problems down the track.⁴³⁴

- 5.129 In particular, Revd Dr Ford warned against undermining the principles which he saw as embedded in the *Adoption Act*, including that the optimal environment in which to raise a child is with a mother and father.⁴³⁵ Like the Catholic Archdiocese, Revd Dr Ford was wary of utilising the *Adoption Act* to legitimate existing parental relationships in the case of known children as he anticipated this would impact radically on unknown adoptions.⁴³⁶ In addition, Dr Ford reported anecdotal information from both Anglicare and other sources that there is a move away from known adoptions in heterosexual relationships. He stated that there have been reports of children who at one point in time expressed a desire to be adopted by a step-parent, and so relinquished their legal ties to the absent parent, but later came to regret their decision.⁴³⁷

- 5.130 Dr Ford went on to offer an alternative to, on the one hand, maintaining the legal status quo, and on the other enabling same-sex couples to adopt, suggesting that other legal means

⁴³³ Anglicare Diocese of Sydney, Answers to questions on notice, pp 1-2 (emphasis in original)

⁴³⁴ Revd Dr Andrew Ford, Lecturer and Member of Social Issues Executive, Anglican Church Diocese, Sydney, Evidence, 25 February 2009, pp 42-43

⁴³⁵ Revd Dr Ford, Evidence, 25 February 2009, p 43

⁴³⁶ Revd Dr Ford, Evidence, 25 February 2009, p 44

⁴³⁷ Revd Dr Ford, Evidence, 25 February 2009, p 45

beyond parenting orders could be established to confer greater parental recognition both prior to and beyond the child reaching adulthood. In doing so he reiterated the Diocese's fundamental beliefs about the best interests of the child:

[M]aybe there are other legal avenues by which legal parental rights and responsibilities can be bestowed on a parent without revoking completely those connections legally speaking with others. Then the child on majority - when they have reached 18 years of age - can say, "Yes, I want to formalise this process. Having now become an adult and responsible for my decisions I am able to make those decisions and know all of the consequences. I want to formalise that relationship with my parental carers." ... I do not think adoption is the right category in that situation because adoption really is a means by which the State can take protective control and provide a caring environment for someone who is unable to provide that for him or herself. Again, adoption is not the right category. We live in a society where people can choose to make their relationships as they see them, so I do not think it is my place to say they should not do that. But we would still want to say that does not take away from the fact that the optimal conditions are a mother and a father. Particularly with infants, that is what we should be aiming for.⁴³⁸

Inconsistencies in the legislation

5.131 A third key legal issue raised during the inquiry concerned the inconsistencies in the present law in relation to adoption by same-sex couples and other closely related provisions. Specifically, many participants highlighted inconsistency between the ability of same-sex couples to provide foster care but not to adopt and the ability of individuals in a same-sex relationship to adopt but not couples. In addition, numerous stakeholders pointed to the inconsistency between the recognition of certain same-sex parents under the presumptions of parenting legislation, but not other parents. Very few participants offered an alternative view on this issue. Each of the three areas is discussed below.

Foster care and adoption by same-sex couples

5.132 As noted in Chapter 2, at the present time in NSW same-sex couples are permitted to provide foster care. Several inquiry participants argued that it was inconsistent for the law to allow same-sex couples to provide foster care but to exclude them from adoption. They also argued that for various reasons this was not in the best interests of children concerned.

5.133 DoCS advised the Committee that this differential treatment arises from the non-gender-specific provisions for foster care under the *Children and Young Persons (Care and Protection) Act*.⁴³⁹ In evidence, Mr Best noted that foster care legislation has always only referred to individuals, and has since become subject to the *Anti-Discrimination Act* in a way that does not apply to the *Adoption Act*.

Looking back through the regulations foster care was first regulated for individuals under the 1969 regulations under the *Child Welfare Act* of 1939, and from 1969 onwards all of the legislation in foster care has only talked about a "foster carer". That

⁴³⁸ Revd Dr Ford, Evidence, 25 February 2009, p 46

⁴³⁹ Department of Community Services, Answers to questions on notice, p 9

was in the 1987 Act and it is still in the 1998 Act. So unlike the *Adoption Act* that talks about being able to adopt as an individual or as a couple, foster care legislation has always dealt with individuals. So the issue about couples has never arisen in relation to foster care.

The *Adoption Act* is, as I have said, specific that couples are a man and a woman. Because the foster care legislation only talks about an individual, when the antidiscrimination legislation changed, it of course, applied to foster care arrangements for those agencies that could not claim religious exemption. So from the time that came in, the law required the Department of Community Services to not consider issues of gender or same-sex in terms of people applying for foster care. That has now been going for over twenty years where the Department and some of the other agencies - those that do not claim religious exemption - have either been a private fostering agency under the old legislation or are currently designated agencies.⁴⁴⁰

- 5.134** The Department further explained that same-sex couples have emerged to help meet a particular demand for foster carers, and have provided care very effectively:

While there has always been a large number of people (couples and individuals) wanting to adopt infants or very young children, there has not been a corresponding supply of people willing and suitable to foster and provide care for older children. As a result, people in same-sex relationships have been included in foster care programs and have demonstrated themselves as being very capable of providing sound parental care for children in need.⁴⁴¹

- 5.135** Professor Millbank noted this inconsistency in her submission, as did a number of other participants.⁴⁴² Ms Clover Moore MP suggested it was a double standard that should not be allowed to remain.⁴⁴³ WLS NSW also implied a double standard when it observed, 'Same-sex couples are actively recruited as foster carers, however, unlike opposite-sex couples who are foster carers, adoption is not an option even where it may be in the child's best interests.'⁴⁴⁴

- 5.136** The Hon Penny Sharpe MLC questioned the policy rationale for this differential treatment, contending that it is nonsensical that the law would enable a child to be placed with foster parents whom it would later prevent from adopting the same child:

Where adoption is concerned, being gay or lesbian is not a bar, being in a de facto relationship is not a bar, but being in a same-sex de facto relationship is a bar. And yet, being a same-sex couple is not a bar to fostering. What possible policy justification could there be for this? It makes no sense to allow same-sex couples to foster children, all of whom come from difficult backgrounds and many of whom have a high level of special needs, and then to prevent those children from being

⁴⁴⁰ Mr Rod Best, Director, Department of Legal Services, Department of Community Services, Evidence, 24 February 2009, p 5

⁴⁴¹ Department of Community Services, Answers to questions on notice, p 9

⁴⁴² Submission 222, pp 2-3. See also Mr Boers, Evidence, 25 February 2009, p 19

⁴⁴³ Submission 187, p 3

⁴⁴⁴ Submission 225, p 4

adopted by those same-sex foster parents, even in circumstances where the Court would ordinarily determine that adoption is in the child's best interests.⁴⁴⁵

5.137 NCOSS made a similar point, stating:

Further preventing same-sex couples from being able to adopt children in general seems ridiculous in light of the widespread number of same-sex couples who are foster parents. If same-sex couples are able to provide short-term support and care, and a balanced family life, for foster children, then there is no reason to deny them this same right in regards to an adopted child. The only difference being that this will be for the whole of the child's life.⁴⁴⁶

5.138 The Inner City Legal Centre, Professor Millbank and WLS NSW all noted the potential benefits arising from enabling permanency for child in long-term foster care, as discussed in detail in Chapter 3.⁴⁴⁷

5.139 Noting other disadvantages that arise from this inconsistency, the GLRL contended that it serves to discourage same-sex couples from becoming foster carers:

[M]any same-sex couples are not aware that they are permitted to foster children in NSW because they assume that the bar on same-sex adoption also applies to same-sex fostering. As a result, inconsistency between child protection and adoption laws contribute to a situation where couples who would otherwise like to foster are discouraged from doing so - despite the critical shortage of foster carers.⁴⁴⁸

5.140 As noted earlier in this chapter, the lesbian couple, Ms Silke Bader and Ms Tanya Sale, have been foster carers to two children for seven years, and have been advised by DoCS that they are to be recommended for adoption. However, owing to the present law, they can only apply to adopt as two individuals. Ms Bader and Ms Sale's submission pointed to the confusion that this situation creates for the children in terms of their relationships with their parents, while also highlighting the perceived unfairness of the law as it stands:

[B]ut mostly, the question for our family that the children will regularly come up with, will be - why has Tanya adopted Mali - and why Silke adopted Jardin? What are we to respond to our two children - because we are not allowed to adopt both? How do you explain this to a child, who would put this down as one parent choosing their sibling over the other?

When you try and explain this to a nine and ten year old - their response is but Mum this is not right - it's not fair - and you know what ... they have hit the nail on the head. If two parents, no matter what sex they are, tick all the boxes correctly, what right does the government or for that matter anybody else in this world to decide just because the parents are of the same-sex they cannot adopt. Our children do not understand it and I can assure you we do not either.⁴⁴⁹

⁴⁴⁵ Submission 190, p 3

⁴⁴⁶ Submission 163, pp 3-4

⁴⁴⁷ Submission 175, p 7; Submission 222, p 3; Submission 225, p 4

⁴⁴⁸ Submission 183, p 19

⁴⁴⁹ Submission 69, p 2. See also Ms Tanya Sale, Evidence, 25 February 2009, p 64

Adoption by individuals but not couples

- 5.141** The fact that gay or lesbian people can adopt as individuals but not as couples was also identified as inconsistent by a number of inquiry participants. As in the case of Ms Bader and Ms Sale, the Committee was advised that people, foster carers in particular, can legally apply to adopt as an individual even while the relevant agency is aware that the person is in a same-sex relationship.⁴⁵⁰
- 5.142** Both the GLRL and Ms Sharpe observed that this situation was anomalous, with Ms Sharpe stating, ‘If the law does not distinguish between single people on the basis of their sexuality alone when it comes to adoption, why should it do so in relation to couples?’⁴⁵¹
- 5.143** Professor Millbank suggested this situation was hypocritical,⁴⁵² while Ms Gray of the GLRL suggested it was bizarre that a single person may adopt, but a couple who would arguably provide even more for a child should be automatically excluded:

At the moment we have this bizarre situation where a single gay or lesbian person can adopt an unknown child, but a couple who would perhaps provide even a more stable and loving environment are not able to adopt, simply because of the person they are going out with or the person they are having a relationship with. We believe that those restrictions should be lifted.⁴⁵³

- 5.144** Similarly, WLS NSW argued that allowing adoption by a same-sex couple ‘would mean that adopted children would benefit from the greater stability and security of having two legal parents rather than one.’⁴⁵⁴
- 5.145** In evidence, Mr Best of DoCS acknowledged that this situation was contradictory. When asked whether the situation where a gay or lesbian foster carer can apply to adopt even though the Department is aware that the person is living in a same-sex relationship undermined the law, Mr Best replied that it did not:

No ... it is not undermining the adoption law. The adoption law is quite clear that adoption is about changing the legal status of the child with the adult. It is not changing the legal relationship with the partner at all, so it is not an undermining of the law by any means because adoption is about the legal status of the child.⁴⁵⁵

- 5.146** Comparing the law in NSW in respect of adoption by individuals with that of other states, Mr Kassisieh of the GLRL pointed out that there is no legal impediment in this state to individuals adopting in these circumstances:

New South Wales is different from other states. Generally other states allow only individual adoption in special circumstances; for example, for a child with special

⁴⁵⁰ Mr Best, Evidence, 24 February 2009, p 6

⁴⁵¹ Submission 190, p 4

⁴⁵² Submission 222, p 3

⁴⁵³ Ms Gray, Evidence, 24 February 2009, p 46

⁴⁵⁴ Submission 225, pp 3-4

⁴⁵⁵ Mr Best, Evidence, 24 February 2009, p 6

needs. The Queensland legislation says that, as an example. New South Wales simply goes on objective criteria: Is this person fit and proper to care for a child, and have the resources and support required? There is no legal impediment, no difference for a couple or an individual under the law.⁴⁵⁶

- 5.147** Family Voice Australia, which argued against adoption by same-sex couples, was the only participant who offered a counter view on this issue. It recognised the contradiction in the current law and argued for it to be addressed by disallowing applications from individuals who are married or in a de facto relationship, whether same-sex or heterosexual:

For reasons given above [in relation to the presence of a mother and father being in the best interests of the child] it seems that children's best interests would normally be best served by limiting adoption to married couples. However, there may be particular circumstances where adoption by a single person who already has a relationship with a child is warranted. However, this provision should not be used to circumvent public policy by allowing de facto adoption by a same-sex couple by one party to the relationship applying to adopt a child.

This is a particular concern in relation to international adoptions. New South Wales law and practice should not connive in deceiving adoption authorities in countries which oppose same-sex adoption by facilitating adoption by one person who is a party to a same-sex relationship. As noted above no country which allows foreigners to adopt children currently allows same-sex couples to adopt ...

This section should be amended so that applications by one person to adopt cannot be made by any person who is married or in a de facto relationship, whether with a person of the opposite sex or of the same-sex.⁴⁵⁷

- 5.148** Intercountry adoptions are discussed in detail the following section of this chapter.

Presumptions of parentage in only certain same-sex relationship circumstances

- 5.149** The third area of inconsistency in the law highlighted by some participants was in the presumption of parentage in only certain circumstances involving same-sex relationships. As noted in Chapter 2 and in the previous section of this chapter on the legal recognition of existing parent-child relationships, in NSW the same-sex partner of a woman who has undergone a fertilisation procedure is legally recognised as the parent of her partner's child, provided that the partner consented to the procedure. That earlier section documented the concern among numerous inquiry participants that the absence of similar recognition for other same-sex families is contradictory and not in the best interests of children who are correspondingly denied the benefits of legal recognition for their parenting arrangements.

Potential impact on intercountry adoptions

- 5.150** A concern emerged during the hearings that reform to allow same-sex couples to adopt in NSW might threaten adoption agreements that Australia has with other countries. As noted in

⁴⁵⁶ Mr Kassisieh, Evidence, 24 February 2009, p 49

⁴⁵⁷ Submission 30, p 6

Chapter 2, over half of the 125 adoptions that occurred in NSW in 2007-2008 were intercountry adoptions. The Committee was, however, advised that such a threat was unlikely.

- 5.151** Information from DoCS provided after the hearings gave details on the legal underpinnings of intercountry adoption:

Section 111C of the *Family Law Act* also enacts the provisions of the *Convention on Protection of Children and Co-operation in respect of Inter-country Adoption*. The terms of the Convention are incorporated through the Family Law (Hague Convention on Inter-country Adoption) Regulations 1998. These regulations govern the relationship between the Commonwealth and the States in relation inter-country adoption.

Neither the Regulations nor the Convention take a position with respect to adoption by same-sex couples, however the Commonwealth has the lead role in negotiating particular arrangements with overseas countries. In intercountry adoption, the placement of children from overseas with an Australian couple is also dependent on the couple being able to meet any criteria that the overseas agency requires, including criteria relating to the couple's relationship. At the present time, none of the intercountry programmes which are active permit adoption by same-sex couples.⁴⁵⁸

- 5.152** Mr Shelton of the Australian Christian Lobby predicted that were the law amended to allow same-sex couples to adopt, those sending countries 'will not want to be a party to allowing their children to be released into Australia.'⁴⁵⁹

- 5.153** Mr Tudehope of Family Voice Australia suggested that such reform might create an inconsistency between Australia's obligations and the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.⁴⁶⁰

- 5.154** Mr Meney of the Catholic Archdiocese of Sydney asserted that as a general principle, Australia should avoid legislating for provisions that would stand in tension with international agreements:

Australia is always having tension between international covenants and the legislation we have in terms of our national obligations. Where you are deliberately aware that such tension would be created and you deliberately legislate along such lines it would seem to be highly imprudent to do so and it would show that we are being inconsistent in the way we are signing up to international treaties or operating within international law and what we are doing domestically.⁴⁶¹

- 5.155** Asked by Committee members to clarify the impact of reform on intercountry adoptions, Mr Best of DoCS reported that if the law were changed, same-sex couples would continue to be excluded from intercountry adoption:

If the law is changed, even if there is a change because of the requirements in international conventions and the requirements for those programs, our international

⁴⁵⁸ Department of Community Services, Answers to questions on notice, pp 3-4

⁴⁵⁹ Mr Shelton, Evidence, 25 February 2009, p 33

⁴⁶⁰ Mr Damien Tudehope, Solicitor, Family Voice Australia, Evidence, 24 February 2009, p 57

⁴⁶¹ Mr Chris Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 24 February 2009, p 39

programs would largely prohibit same-sex couples from adopting from overseas because of the requirements of those countries.⁴⁶²

- 5.156** He went on to explain that in international adoptions, one of the criteria taken into account is the wishes of the country from where the child originates.⁴⁶³ His colleague, Ms Mary Griffin, Director of Adoption and Permanent Care Services with the Department, further clarified:

Overseas countries are very strict. They have certain criteria, and you are either in or out, and it is not up to Australia to question those criteria. That is how intercountry works.⁴⁶⁴

- 5.157** The GLRL submission suggested that it accepted that reform in respect of adoption by same-sex couples in NSW would not enable those couples to adopt from overseas:

[E]ven if same-sex couples were permitted to apply for adoption in NSW, they would remain ineligible to participate in intercountry adoption programs ... Therefore, the issue of same-sex adoption eligibility is predominantly concerned with known child adoption and local unknown adoption only.⁴⁶⁵

- 5.158** One member of the Committee was particularly concerned about the possibility that advocates for adoption by same-sex couples might utilise the court system to test the continued exclusion of same-sex couples from overseas adoption on the basis of discrimination. He asked Mr Best how the Department would respond to the hypothetical situation where a court declared that such exclusion was discriminatory. Mr Best responded that it would depend on the specifics of the judgement, but that as the *Adoption Act* stands, as long as there were no pertinent changes to the *Anti-Discrimination Act 1977*, the continued exclusion of same-sex couples from intercountry adoptions would not be discriminatory:

It would depend upon the nature of the judgement. We have got similar laws in Canada and England, which currently permit same-sex couples adopting, and both England and Canada have similar overseas programs as we do and they have similar laws on discrimination and that has not as yet arisen there. It would depend upon what the nature of the laws was in terms of compliance with those programs. At the present time because of the structure of the *Adoption Act* if there were no changes to the *Anti-Discrimination Act* in NSW and there was just a change to the *Adoption Act* it would not be discriminatory under our *Anti-Discrimination Act*.⁴⁶⁶

- 5.159** Following the hearing, the Department further advised that case law suggests that Australian anti-discrimination law does not apply outside Australia, such that the initial concern was put to rest:

In the case of inter-country adoption there is support in the case law that the Commonwealth Antidiscrimination Act does not apply outside Australia [*Brannigan v*

⁴⁶² Mr Best, Evidence, 24 February 2009, p 2

⁴⁶³ Mr Best, Evidence, 24 February 2009, p 3

⁴⁶⁴ Ms Mary Griffin, Director, Adoption and Permanent Care Services, Department of Community Services, Evidence, 24 February 2009, p 9

⁴⁶⁵ Submission 183, p 9

⁴⁶⁶ Mr Best, Evidence, 24 February 2009, p 4

Commonwealth of Australia [2000] FCA 1591 (10 November 2000)] and a fortiori State anti discrimination legislation would also not apply extraterritorially.

The operative issue would appear to be the level of connection with the jurisdiction in which the Acts of discrimination occurred [*Clarke v Oceania Judo Union [2007] FMCA 292 (13 March 2007)*]. In the case of inter-country adoption there would be a high level of connectedness with the overseas jurisdiction as the decision would be made in relation to a national of that country by a organisation located in that country either by a government organisation or an organisation supported by the government. It is most likely therefore that there would be insufficient connectedness with NSW for the anti discrimination legislation to apply to decisions about inter-country adoption.⁴⁶⁷

Participants' recommendations for reform

5.160 Summarising many of the arguments put forward in this and other chapters, Professor Millbank argued that allowing same-sex couples to adopt would further the objectives of the *Adoption Act* by:

- broadening the pool of potential applicants eligible to be assessed on an individual basis about their capacity to meet the needs of the child in question
- enabling children currently in the care of foster parents who are a same-sex couple to enjoy the security of a permanent parent-child relationship
- providing children being raised by a same-sex couple where there is only one legal parent but two social parents the security of permanent legal recognition of their other parent
- avoiding the 'hypocrisy' of enabling 'individual' gay and lesbian applicants to adopt when they are members of a couple and will be parenting as such.⁴⁶⁸

5.161 In addition, the National Children's and Youth Law Centre contended that amending the *Adoption Act* to enable same-sex couples to adopt would 'help to ensure that the best interests of the child are met and their rights are protected.'⁴⁶⁹

5.162 Amongst those who argued for reform and who made specific recommendations in this respect, there was a high level of consistency in the content of those recommendations.

5.163 As noted in paragraph 5.73 above, the GLRL argued that amending the definitions of 'couple', 'de facto relationship' and 'spouse' in the *Adoption Act* to reflect the non-discriminatory definition of de facto relationship in the *Property (Relationships) Act 1984* would both address discrimination and enable same-sex partners to apply to adopt as a couple. It would also ensure that the step-parent adoption provisions in the *Adoption Act* apply equally to same-sex partners where they are actually in a step-parent relationship with the child.⁴⁷⁰

⁴⁶⁷ Department of Community Services, Answers to questions on notice, p 14

⁴⁶⁸ Submission 222, p 3

⁴⁶⁹ Submission 215, p 12

⁴⁷⁰ Submission 183, pp 33 and 35

- 5.164** Other participants who also specifically argued for definitional change within the *Adoption Act* to enable same-sex couples to adopt included the National Children's and Youth Law Centre, the Castan Centre for Human Rights Law, the Inner City Legal Centre, WLS NSW and NCOSS.⁴⁷¹
- 5.165** In addition, as noted in paragraphs 5.76 and 5.77, both the GLRL and Professor Millbank recommended that a new 'second-parent adoption' provision, similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act*, be introduced. The GLRL advocated that this provision would allow for a child to be adopted by the spouse of their parent (based on an amended non-discriminatory definition of spouse, as noted above - ie the same-sex de facto partner of the child's parent), and that where the child has only one legal parent or a second consenting legal parent, there should be a presumption in favour of adoption, or at least no presumption against it.⁴⁷²
- 5.166** The NSW Government submission to the inquiry concurred that if reform to allow same-sex couples to adopt is to occur, the definition of 'couple' and 'de facto' in the Dictionary to the *Adoption Act* would need to be amended. In terms of potential consequential amendments, it went on to state that:
- The [*Births, Deaths and Marriages Registration Act 1995, hereafter BDMR Act*] contains provisions regarding the registration of adoptions, and the issue of birth certificates to adopted persons. The initial view of the Attorney General's Department and the Registrar of Births Deaths and Marriages is that no changes to this Act would be required to register adoptions by same-sex couples, provided they occurred in the same way as adoptions by different sex couples.
- ... [T]he *Miscellaneous Acts Amendment (Same-sex Relationships) Act 2008* made amendments to the *BDMR Act* to enable both women in a same-sex relationship to be recognised on a child's birth certificate (in donor situations). Further changes to the *BDMR Act* may be needed to accommodate the inclusion of two male (adoptive) parents on a birth certificate.⁴⁷³
- 5.167** As noted elsewhere in this report, numerous inquiry participants argued against any reform to allow same-sex couples to adopt. These participants included Anglicare, the Catholic Archdiocese of Sydney, the Anglican Church, Diocese of Sydney, the Australian Christian Lobby, Family Voice Australia, the NSW Council of Churches, the Christian Democratic Party, the Plunkett Centre for Ethics, the Australian Family Association, Family Life International, the Australian Christian Values Institute, the Children's Rights Council of Australia, Salt Shakers, the Fatherhood Foundation, the Women's Action Alliance, the Non-Custodial Parents Party, St Philips Christian College and Redfield College.⁴⁷⁴

⁴⁷¹ Submission 222, p 8; Submission 215, p 12; Submission 221, pp 14-15; Submission 175, pp 7-8; Submission 225, pp 5-6; Submission 163, p 7

⁴⁷² Submission 183, p 38

⁴⁷³ Submission 223, p 5

⁴⁷⁴ Submission 151, p 4; Submission 213, pp 15-17; Submission 216, Anglican Church, Diocese of Sydney, p 1; Submission 204, p 1; Submission 185, pp 9-10; Submission 30, p 7; Submission 186, p 10; Submission 226, p 3; Submission 207, pp 1-2; Submission 193, Family Life International, p 1; Submission 189, p3; Submission 217, p 11; Submission 194, p 1; Submission 199, pp 1-2;

Conclusion

- 5.168** This chapter has examined the human rights and legal issues associated with the proposal to allow same-sex couples to adopt in NSW. It has documented the rights-based arguments in respect of anti-discrimination and the legal recognition of existing parental relationships, and has considered the evidence with regard to inconsistencies in the treatment of same-sex couples under the law in respect of adoption and other similar provisions. The Committee has also examined the potential impact that reform to enable same-sex couples to adopt may have on intercountry adoptions, as well as documenting participants' recommendations for reform.
- 5.169** In the previous two chapters, having considered participants' views, beliefs and reasoned arguments, along with the research evidence in relation to family structure, the majority of Committee members concluded that the best interests of the child in relation to adoption will be served by decisions based on the individual needs of the child and the individual capacities of the prospective parents, without regard to the sexual orientation of the parents. This conclusion was also informed by the evidence before the Committee about how the checks and balances built into the adoption system, most notably in assessment and court processes, will ensure that that only those who would make fit and proper parents will go on to adopt.
- 5.170** Having considered the evidence about anti-discrimination with respect to adoption by same-sex couples, some members of the Committee share the concern of a number of inquiry participants that the call for anti-discrimination in adoption law elevates the rights of adults above those of children, contrary to the objects of the *Adoption Act*. These members emphasise that the best interests of the child, as reflected in the presence of a mother and father in a permanent, preferably married relationship, must always override the claims of adults, even in relation to anti-discrimination.
- 5.171** The majority of Committee members, however, conclude that the best interests of children would be served by an end to discrimination against same-sex couples under adoption law. These members agree that sexual orientation is not a valid basis on which to determine whether a person should be a parent, and that all prospective parents are entitled to have their capacity to parent assessed on an equal basis. The members who form the majority are similarly concerned that the current exclusion of same-sex couples is also discriminatory against their children. The majority further note the human rights principles underpinning the imperative to address discrimination in respect of both groups. These members observe that the growing national and international trend in the legal recognition of same-sex relationships, as well as the support for reform among several noteworthy law reform bodies, lend further weight to this imperative. The majority of members also agree that removing discrimination from the *Adoption Act* would promote equality and send an important message to broader society about the positive contributions and capacities of gay and lesbian couples.
- 5.172** With respect to the arguments put forward in relation to the legal recognition of existing parent-child relationships, some members of the Committee do not support the argument that opening up adoption to same-sex couples is necessary to ensure that children in gay and lesbian parented families have legal recognition. These members maintain that to utilise adoption law to address these issues would be to undermine the principles underpinning the *Adoption Act*, to the detriment of other children and society in general. These members share

Submission 152, Women's Action Alliance, pp 1-2; Submission 196, Non-Custodial Parents Party, p 1; Submission 9, St Philips Christian College, p 1; Submission 162, Redfield College, p 2

the views of some participants that there may be alternative means, with less fundamentally negative consequences, to remedy some of the legal ramifications being faced by children currently parented by same-sex parents.

- 5.173** The majority of members, however, concur with the arguments presented by a number of inquiry participants that it is in the best interests of children already parented by gay and lesbian people to have their relationships legally recognised via amendment to the *Adoption Act*. These members have formed this conclusion in its own right, notwithstanding the previous arguments about the imperative of anti-discrimination. The members who form the majority also note that it is in this area of known adoptions that reform to allow same-sex couples to adopt will have its greatest impact. It is observed that a number of same-sex parent-child relationships are already recognised in law, while others remain excluded from recognition and thereby do not enjoy the significant legal, material, social and emotional benefits that accompany full legal recognition. The majority of members further note the human rights arguments in respect of children that underscore the call for legal recognition of both their same-sex parents.
- 5.174** The majority of members are also persuaded by the arguments put forward by several inquiry participants that alternative forms of legal recognition are significantly inferior to the recognition granted via adoption, and that reform to adoption law is the best mechanism to overcome these deficits. These members do not agree that to utilise the *Adoption Act* for this purpose will undermine the objects of the *Adoption Act*. On the contrary, they consider that it will further enhance these objects, especially with regard to ensuring that the best interests of the child are to be the paramount consideration in adoption law and practice, and that Australia complies with its obligations under international agreements.
- 5.175** The majority of members consider that the inconsistencies in the present law between adoption by same-sex couples and other closely related provisions are undesirable and not in the best interests of children. In relation to the differential treatment of same-sex couples in adoption and foster care, these members agree that it is nonsensical that the law enables a child to be placed with foster parents whom it would later preclude from adopting the same child. This is especially the case in light of the desirability of permanency for many children in out-of-home care. The members who form the majority also note the advice of the Department of Community Services that same-sex couples are helping meet a need for foster carers, and are providing care very effectively. The majority of members further consider it anomalous and misguided to allow same-sex couples to adopt as individuals but not as a couple. Similarly, these members conclude that it is undesirable that there is now a presumption of parentage in relation to same-sex couples only in the limited circumstances of the same-sex partner of a woman who has undergone a fertilisation procedure.
- 5.176** In relation to the potential impact that reform to allow same-sex couples to adopt might have for the intercountry adoption program, the majority of Committee members are satisfied that no negative effects can reasonably be anticipated, given that the criteria set by the country from where the child originates prevail. In each country with which Australia has an agreement, adoption by same-sex couples is precluded.
- 5.177** Other members of the Committee noted that no advice was sought from the Commonwealth Attorney General to establish what if any impact changes to NSW adoption laws to provide for adoption by same-sex couples would have on Australia's bilateral adoption agreements with a number of countries.

- 5.178** Having considered all of the evidence documented in this chapter, and in light of our conclusions in the previous two chapters, the majority of Committee members conclude, in summary, that reform to allow same-sex couples to adopt in NSW will protect children's rights and help to ensure children's best interests. It will do so by providing the security of legal recognition for existing parent-child relationships, by broadening the pool of potential applicants from which the most appropriate parents for any individual child are selected, and by enabling children currently fostered by same-sex couples to have that relationship permanently secured where appropriate. Such reform will also address discrimination against same-sex couples and their children, and address anomalous inconsistencies in their present treatment under the law.
- 5.179** Thus the majority of Committee members conclude that the NSW Government should amend the definitions of 'couple', 'de facto relationship' and 'spouse' in the Dictionary of the *Adoption Act* to reflect the non-discriminatory definition of de facto relationships in the *Property (Relationships) Act*. This will enable same-sex couples to apply to be assessed for adoption as a couple and provide same-sex step-parents with equal access to existing step-parent adoption provisions.
- 5.180** In addition, the majority of members conclude that the NSW Government should ensure that all same-sex couples are able to have their parent-child relationships legally recognised by introducing a new second-parent adoption provision similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act*. This new provision should not include the current onus in section 30(d) of the *Adoption Act* which weighs against making the order.

Recommendation 1

That the NSW Government seek to amend the definitions of 'couple', 'de facto relationship' and 'spouse' in the Dictionary of the *Adoption Act 2000* to reflect the non-discriminatory definition of de facto relationships in the *Property (Relationships) Act 1984*, thereby enabling same-sex couples to apply to be assessed for adoption as a couple and providing same-sex step-parents with equal access to existing step-parent adoption provisions.

Recommendation 2

That the NSW Government seek to introduce a new second-parent adoption provision similar in effect to the step-parent adoption provision in section 30 of the *Adoption Act 2000* to ensure that all same-sex couples are able to have their parent-child relationship legally recognised. This new provision should not include the current onus in section 30(d) of the *Adoption Act* which weighs against making the order.

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- 5.181** The final chapter of this report considers the issue of whether faith-based adoption agencies should be exempted from a requirement not to discriminate against same-sex couples resulting from reform to the *Adoption Act*.

Chapter 6 Exemptions

If the *Adoption Act 2000* were to be amended to allow same-sex couples to adopt, the two faith-based adoption agencies in NSW, who would wish to continue their policy of not providing services to same-sex couples, could be in breach of the *Anti-Discrimination Act 1977*. While the *Anti-Discrimination Act* includes an exemption for religious bodies in certain circumstances, there is uncertainty as to whether this exemption would apply in the case of adoption services provided by faith-based agencies. During the inquiry there was some debate as to whether these organisations would be exempt from the *Anti-Discrimination Act* as a matter of law and whether they should be exempt as a matter of policy. These issues are examined in this chapter.

Overview

- 6.1 As discussed in previous chapters, the two faith-based adoption agencies that operate in NSW, Anglicare Diocese of Sydney and CatholicCare, do not support adoption by same-sex couples and do not wish to provide adoption services to such couples, even if the law was to change to allow them to adopt.
- 6.2 Both organisations argued that, if a change in the law meant their adoption policies based on their religious beliefs put them in breach of the *Anti-Discrimination Act*, they should be exempt from the application of the *Anti-Discrimination Act*. Several other inquiry participants supported this position while others objected to it.
- 6.3 While the *Anti-Discrimination Act* includes an exemption for religious bodies in certain circumstances, there is currently uncertainty as to whether this exemption would apply in the case of adoption services provided by faith-based agencies. This uncertainty has been generated by a 2008 decision of the NSW Administrative Decisions Tribunal.
- 6.4 It was argued during the inquiry that, as the scope of the existing exemption is unclear, a legislative amendment should be included in any law reform that allows same-sex couples to adopt to ensure that faith-based agencies can continue their policies of confining their services to heterosexual couples.
- 6.5 The Committee was informed that if such an exemption were not available, the ability of the faith-based agencies to continue to provide adoption services at all would become untenable. For example, in their joint submission on behalf of the Catholic Archdiocese of Sydney, CatholicCare and the Life, Marriage and Family Centre stated that it is possible that CatholicCare would stop providing adoption services altogether:

The current exemption for religious bodies, section 56, is not sufficiently wide enough to protect CatholicCare in these circumstances. In the absence of an appropriate amendment to section 56, it is possible that CatholicCare would be forced to cease providing adoption services as it could not do so without breaching the *Anti-Discrimination Act*.⁴⁷⁵

⁴⁷⁵ Submission 213, Life, Marriage and Family Centre and CatholicCare, Catholic Archdiocese of Sydney, pp 12-13. Hereafter this submission is referred to as that of the Catholic Archdiocese of Sydney.

- 6.6** Similarly, Revd Dr Andrew Ford, a Lecturer and Member of the Social Issues Executive of the Anglican Church, Diocese of Sydney, in response to a question from a Committee member concurred that, if no religious exemption was granted, rather than being required to countenance or facilitate the adoption of a child by a same-sex couple, the Anglican Church would prefer to withdraw from the provision of adoption services altogether.⁴⁷⁶
- 6.7** The Committee was informed that the issue of adoption by same-sex couples and exemption from anti-discrimination legislation for faith-based adoption agencies has arisen in some overseas jurisdictions where such adoption has recently been permitted. For example, the Catholic Archdiocese of Sydney advised that Catholic adoption agencies in the UK and in some parts of the US have withdrawn their services rather than contravene anti-discrimination legislation by not providing services to same-sex couples.⁴⁷⁷
- 6.8** Strong arguments were expressed during the inquiry to both support and reject the call for an exemption for faith-based adoption agencies. These arguments will be explored in detail later in this chapter. First, the existing exemption in section 56 of the *Anti-Discrimination Act* is examined, including the uncertainty surrounding its application in the case of the provision of services to same-sex couples by religious based adoption agencies.

Section 56 of the *Anti-Discrimination Act 1977*

- 6.9** As discussed in Chapter 5, discrimination on the grounds of homosexuality in the provision of goods and services is illegal in NSW (as well as in all other Australian jurisdictions).⁴⁷⁸
- 6.10** Anti-discrimination legislation commonly contains some exemptions for practices and actions where, for a reason consistent with the aims of the legislation, discrimination should be allowed to occur. Common exemptions relate to, for example, sport, residential accommodation and religious bodies.
- 6.11** Section 56 of *Anti-Discrimination Act* sets out an exemption for certain acts of religious bodies. Most relevant to the provision of adoption services is subsection (d):

56 Religious bodies

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,

⁴⁷⁶ Revd Dr Andrew Ford, Lecturer and Member of Social Issues Executive, Anglican Church, Diocese of Sydney, Evidence, 25 February 2009, p43

⁴⁷⁷ Mr Chris Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Evidence, 24 February 2009, p 39 and Submission 213, pp 12-13. See also Mr Damien Tudehope, Legal Representative and Spokesperson, Family Voice Australia, Evidence, 24 February 2009, p 57

⁴⁷⁸ *Anti-Discrimination Act 1977* (NSW), s 49ZP

- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

6.12 It is not necessary for a religious body to ‘apply’ for the exemption contained in section 56. Rather, it can be invoked in the event that a discrimination claim is made. A similar exemption exists in anti-discrimination legislation in most Australian states and territories and at the federal level.⁴⁷⁹

6.13 In addition, applications can be made under sections 126 and 126A of the *Anti-Discrimination Act* for an exemption for a specific activity or program in certain circumstances. As noted by the Department of Community Services (DoCS):

Exemptions are only likely to be granted where the principles of anti-discrimination and promoting equal opportunity are being upheld. They are usually granted where the purpose is for helping redress past discrimination through positive discrimination.⁴⁸⁰

6.14 As discussed in Chapter 2, there are three Australian jurisdictions that currently permit adoption by same-sex couples: the Australian Capital Territory, Western Australia and (to a more limited extent) Tasmania. As far as the Committee is aware, only in Western Australia are faith-based adoption agencies effectively exempt from the application of anti-discrimination legislation.

6.15 In relation to Western Australia, the *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA) implemented a number of measures to equalise the status of gay and lesbian people including amending the *Adoption Act 1994* (WA) to allow same-sex couples to adopt. Following debate on the Bill, changes were made to include a specific amendment to the definition of ‘services’ under Section 4 of the *Equal Opportunity Act 1984*. This amendment effectively excluded the Equal Opportunity Commission from reviewing any allegation of discrimination relating to the adoption of a child.⁴⁸¹

Section 56 and the provision of services by faith-based adoption agencies

6.16 There was uncertainty among inquiry participants about the potential application of the exemption in section 56 to the provision of adoption services by the two faith-based agencies in NSW.

⁴⁷⁹ *Anti-Discrimination Act 1991* (Qld), s 109; *Equal Opportunity Act 1984* (SA), s 50; *Equal Opportunity Act 1995* (Vic), s 75; *Equal Opportunity Act 1984* (WA), s 72; *Discrimination Act 1991* (ACT), s 32; *Anti-Discrimination Act* (NT), s 51; *Sex Discrimination Act 1984* (Cth), s 37

⁴⁸⁰ Department of Community Services, Answers to questions on notice, p 14

⁴⁸¹ WAPD (*Legislative Assembly*), 2 August 2001, p 1983 and WAPD (*Legislative Assembly*), 11 December 2001, pp 6851-6852

- 6.17** Mr Rod Best, the Director of Legal Services with DoCS, expressed the view that religious-based organisations would fall within the exemption:

At the present time in NSW I am not aware of any proposal to change the *Anti-Discrimination Act* in terms of the religious discrimination exemption. Because there are broad general criteria in the *Adoption Act* there would be no difficulty in a faith-based organisation being able to apply the adoption criteria and not work with same-sex couples. So they can fall within the exemption of the *Anti-Discrimination Act*.⁴⁸²

- 6.18** Other inquiry participants, however, informed the Committee that a recent 2008 decision of the NSW Administrative Decisions Tribunal put the matter into doubt.
- 6.19** In *OV and anor v QZ and anor* (No.2)⁴⁸³ the Tribunal found that an organisation run by Wesley Mission had discriminated against a same-sex couple on the grounds of homosexuality when it refused to provide them with services relating to making an application to become foster carers. The Tribunal awarded damages of \$5000 each to the couple and ordered Wesley Mission to review its policy on foster care services and make it non-discriminatory.
- 6.20** The Tribunal rejected the argument put by Wesley Mission that the exemption in section 56 of the *Anti-Discrimination Act* applied to this situation. In making its determination, the Tribunal considered (among other matters) the meaning of the terms ‘religion’ and ‘doctrine’ and concluded that the belief that ‘monogamous heterosexual partnership within marriage is both the norm and ideal’ was not a ‘doctrine’ of Christianity so as to attract the exemption in section 56(d).⁴⁸⁴
- 6.21** Wesley Mission has appealed the decision to the Tribunal’s Appeal Panel. On 27 January 2009, Wesley Mission was unsuccessful before the Appeal Panel in its application to have a number of questions of law referred to the NSW Supreme Court (rather than the matter being heard by the Appeal Panel).⁴⁸⁵ The Appeal Panel heard the appeal in late April but had not handed down its decision by the time this report was finalised.⁴⁸⁶
- 6.22** As the facts of the case are similar to the adoption situation, the Tribunal’s decision has created uncertainty as to the position of faith-based adoption agencies with regard to adoption by same-sex couples. This uncertainty was highlighted by several inquiry participants. For

⁴⁸² Mr Rod Best, Director, Department of Legal Services, Department of Community Services, Evidence, 24 February 2009, p 7

⁴⁸³ [2008] NSWADT 115 (1 April 2008)

⁴⁸⁴ The Tribunal also held the act of authorising a person to be a foster carer does not constitute an appointment within the meaning of s56(c).

⁴⁸⁵ *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5. The Attorney General intervened in these proceedings pursuant to section 69 of the *Administrative Decisions Tribunal Act 1997*. Both the Wesley Mission and the Attorney General requested that the Appeal Panel refer certain questions, which they regarded as questions of law, to the Supreme Court pursuant to section 118(1) of the *Administrative Decisions Tribunal Act 1997*. It is noted that the NSW Attorney General has sought and gained the right to intervene in the appeal. The NSW Attorney General has supported the applications and operation of the exemption provision in the *Anti-Discrimination Act*.

⁴⁸⁶ The Committee notes also that the decision of the Appeal Panel can be the subject of a further appeal to the Supreme Court.

example, Revd Dr Andrew Ford of the Anglican Church acknowledged that as a result of the case there is some doubt surrounding the application of the exemption:

I think that there is some doubt. We do not have legal opinion on how strong—we have not sought legal opinion on that point, but there is at least some potential there for it ... Yes, [we have] some reservations that the changes to the Act may leave the Anglicare organisation in an invidious, maybe untenable, position.⁴⁸⁷

6.23 Family Voice Australia noted that the case raised ‘grave concerns’ about the interpretation of the exemption:

The decision by the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) against Wesley Mission in a case dealing with the application of two homosexual men to act as foster parents raises grave concerns about the interpretation of the religious based exception in the NSW *Anti-Discrimination Act 1977*.

The Tribunal’s findings that (a) the “religion” of Wesley Mission was “Christianity” and (b) that “Christianity” has no doctrine that “monogamous heterosexual partnership within marriage” is both the “norm and ideal” are extraordinary ...

This case has implications for religious-based adoption service providers if the law on adoption is changed to permit same-sex couples to apply to adopt. It is clear that the existing exemptions in the *Anti-Discrimination Act 1997* would be inadequate.⁴⁸⁸

6.24 The Department also noted that [t]he case demonstrates that the exemption set out in section 56 ... will not apply to matters about which a particular faith does not have an established doctrine and conversely where such a doctrine can be established the protection will apply.⁴⁸⁹

Arguments in support of an exemption

6.25 The arguments presented in support of the availability of an exemption from anti-discrimination legislation for faith-based adoption agencies were essentially two fold. First, that such agencies should be permitted the religious freedom to provide services in accordance with the tenets of their religious beliefs. Second, that the potential withdrawal of Anglicare and CatholicCare from the provision of adoption services in NSW would leave a large gap in the provision of this important service.

6.26 Mr Chris Meney of the Catholic Archdiocese of Sydney argued for the right to provide adoption services in keeping with the beliefs of the Catholic Church:

I think it is very important for bodies of a whole range of persuasions to be able to contribute to the public good in a flourishing democracy and that is what we would like to see ourselves doing. We do not claim that every other agency has to do business the way that we do it, but we do claim a right as a part of a flourishing community which represents a sizeable proportion of the population to be able to

⁴⁸⁷ Revd Dr Ford, Evidence, 25 February 2009, pp 47-48

⁴⁸⁸ Submission 30a, Family Voice Australia, p 3

⁴⁸⁹ Department of Community Services, Answers to questions on notice, p16

provide our contribution in a way that is in keeping with our beliefs and what we believe is in the best interests of children in the circumstances.⁴⁹⁰

6.27 The Australian Christian Lobby referred to the need to properly respect freedom of religion:

The case has serious implications for faith-based service providers should the Adoption Act be amended to allow same-sex couples to adopt. If the Government is to properly respect the right of all citizens to freedom of religion, conscience and belief, as established in international instruments, it must not force religious individuals and bodies to act against their strongly-held convictions in the provision of adoption services.⁴⁹¹

6.28 Anglicare referred to its ability to provide services within the framework of a Christian ethos:

We are concerned whether changes to this or to other definitions could affect adoption services within the framework of a Christian ethos. We would be concerned about changes to the legislation that may compel Anglicare to act against its ethos or which may adversely affect future funding or regulatory arrangements. Anglicare Sydney does not want to be forced to decide between obeying the laws of Australia and obeying its religious principles in deciding what is in the best interests of a child in its care.⁴⁹²

6.29 Anglicare and the Anglican Church, Diocese of Sydney, both recommended that an exemption be created:

Should the Act be amended to permit adoptions by same-sex couples that legislation also be enacted to make clear that a decision made in good faith by a religious institution providing adoption services to reject such applicants be protected from a claim of unlawful discrimination.⁴⁹³

6.30 Revd Dr Ford of the Anglican Church, Diocese of Sydney called for an exemption to enable Anglicare to continue to operate 'in good faith':

... The reason we have called for a specific change to the *Adoption Act* is that in the future ... it would be good to be assured as a church organisation that they could continue to operate in good faith and do what they have always done with regard to the best interests of the child and therefore fulfil the requirements and principles of the Act, which is to place children with heterosexual couples.⁴⁹⁴

6.31 The Plunkett Centre for Ethics referred to the moral nature of the divergence of views on the issue of adoption by same-sex couples and argued that agencies should not be compelled to conform to a particular moral view:

⁴⁹⁰ Mr Meney, Evidence, 24 February 2009, p 41

⁴⁹¹ Australian Christian Lobby, Answers to questions on notice, p 3

⁴⁹² Submission 151, Anglicare Diocese of Sydney, p14. Similar comments were made by the Anglican Church, Archdiocese of Sydney in Submission 216, p5.

⁴⁹³ Submission 151, p4 and Submission 216, p1

⁴⁹⁴ Revd Dr Ford, Evidence, 25 February 2009, pp 47-48

In circumstances of such moral disagreement, the Parliament should not legislate to compel conformity with a particular moral view on this controversial matter by building into any legislative change which permits adoption by same-sex couples the right of agencies not to facilitate adoption by same-sex couples.⁴⁹⁵

6.32 The Plunkett Centre argued for an exemption to secure respect for conscientious objection:

I therefore submit that if legislation is passed which legalizes adoption by same-sex couples, parliament should enact robust provisions which secure respect for conscientious objection, without disadvantage, for individuals and institutions who do not find themselves able to facilitate adoption by same-sex couples.⁴⁹⁶

6.33 With regard to the impact of faith-based agencies withdrawing their adoption services entirely, the Catholic Archdiocese of Sydney pointed out in its submission that CatholicCare was the only non-government provider of *state-wide* adoption services:

CatholicCare is the only provider of state-wide adoption services, apart from the Department of Community Services. As such it plays a vital role in giving choice to parent/s considering adoption for their child. It is therefore submitted that in the event that same-sex adoption is introduced in NSW the *Anti-Discrimination Act* must be amended in a way that protects the right of religious agencies like CatholicCare to continue to provide adoption services.⁴⁹⁷

6.34 Witness M, the parent of two adopted children, expressed support for a religious exemption rather than losing the expertise of the religious based agencies:

... the agencies that currently do adoption do it with a great deal of expertise. To lose those organisations would be to throw the baby out with the bathwater. If they applied for a religious exemption to the legislation, I think that would be a more acceptable situation rather than lose that expertise.⁴⁹⁸

Arguments against an exemption

6.35 Those opposed to the proposal that faith-based adoption agencies should be exempt from the application of the *Anti-discrimination Act* rejected the idea that public funded bodies that provide a secular service should be permitted to discriminate against homosexual couples.

6.36 For example, Mr Ghassan Kassisieh, the Policy and Development Co-ordinator for the Gay and Lesbian Rights Lobby (GLRL) stated that GLRL does not support a public funded service provider discriminating against lesbians and gay men and argued that they should not be given a specific exemption to do so:

I suggest that if it is a service provider that is being commissioned by the Government to provide a service that is public taxpayer funded, to not play by the eligibility criteria

⁴⁹⁵ Submission 226, Plunkett Centre for Ethics, pp 3-4

⁴⁹⁶ Submission 226, pp 3-4

⁴⁹⁷ Submission 213, pp12-13

⁴⁹⁸ Witness M, Evidence, 19 March, p 26

that any other service provider would have to do, is to give a special exemption to a service provider that essentially provides a secular service.⁴⁹⁹

6.37 Professor Jenni Millbank of the Faculty of Law, University of Technology, Sydney, similarly argued that an exemption is not appropriate for a religious entity that is performing a social service on behalf of the government or, in other words, undertaking a secular as opposed to religious function:

I think it is a completely appropriate exemption for religious entities who are performing religious functions. I do not think it is an appropriate exemption for religious entities who are providing social services on behalf of government, who have been contracted out, who are paid for those services and who are performing a secular function. I think, just to be absolutely crystal clear, the placement of children for fostering and adoption is a secular social function, it is not a religious function ... my very strong submission to you is that religious entities providing adoption services should not be exempted.⁵⁰⁰

6.38 Professor Millbank provided the following analogy to illustrate her argument:

Adoption placement is not a religious function even if the bodies undertaking this social service happen to have a religious feeling about how they undertake it. The best analogy would be the provision of services to families through the federal government's Family Relationship Centres (FRC). All FRCs are provided by non-government organisations under tender and contract arrangements. Although around half of FRCs are operated by religious bodies they are not at liberty to exclude same-sex couples and families from such a vital family dispute resolution service.⁵⁰¹

6.39 The GLRL also argued that this is not a 'freedom of religion' issue:

We do not believe the provision of secular government-funded services is an issue relating to the freedom of religion, which the International Covenant on Civil and Political Rights (ICCPR) clearly says must be balanced with the fundamental rights and freedoms of others (art 18(3)). The right to equality before the law (art 26) and to be treated without discrimination (art 2) are two fundamental human rights that clearly fall within this built-in balancing mechanism.⁵⁰²

Conclusion

6.40 As the preceding discussion shows, strong arguments have been presented for and against an exemption from the application of the *Anti-Discrimination Act* for faith-based adoption agencies in relation to the refusal to provide services to same-sex couples.

⁴⁹⁹ Mr Ghassan Kassisieh, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, Evidence, 24 February 2009, p 51

⁵⁰⁰ Professor Jenni Millbank, Faculty of Law, University of Technology, Sydney, Evidence, 25 February 2009, p 60

⁵⁰¹ Professor Jenni Millbank, Answers to questions on notice, p 3

⁵⁰² Gay and Lesbian Rights Lobby, Answers to questions on notice, p 7

- 6.41** After concluding that adoption by same-sex couples does further the objects of the *Adoption Act*, the most significant factor in the majority of the Committee's reasoning to recommend that the law be changed to allow same-sex couples to adopt has been the right of gay and lesbian people to be free from discrimination in this area of life as they should be in all areas of life. In this regard, the argument against an exemption presented by the Gay and Lesbian Rights Lobby and Professor Millbank, that agencies offering public funded services should not be permitted to discriminate, is very compelling.
- 6.42** The Committee notes the arguments expressed by several inquiry participants in support of an exemption for faith-based agencies. While the Committee respects the right to religious freedom, it is not clear to some Committee members that the ability to provide adoption services to heterosexual couples while denying them to other couples based on their homosexuality alone is a matter of religious freedom. Other Committee members believe that faith-based adoption agencies should be able to provide adoption services in accordance with the tenets of their religious beliefs, and that this is sufficient reason alone to justify an exemption. The majority of the Committee is not persuaded that these reasons alone justify the application of an exemption to this aspect of their work.
- 6.43** The Committee has, however, noted the statements made in oral and written evidence that these agencies would be placed in an untenable position if they were required to provide adoption services to same-sex couples, given the religious tenets upon which their operations are based, and that this might lead them to withdraw their services altogether. It is the Committee's view that this would be an undesirable consequence of law reform to allow same-sex couples to adopt and one that would not be in the best interests of children in general. It is important that the faith-based adoption agencies are able to continue their valuable work in facilitating adoptions in NSW.
- 6.44** The Committee has therefore concluded that, as a matter of policy, faith-based adoption agencies should be exempt from discrimination law in relation to providing same-sex couples with adoption services.
- 6.45** One member of the Committee, however, is of the view that it is wrong to endorse practices that are inherently discriminatory and that no exemption should be available to any organisation, faith-based or otherwise.
- 6.46** It is also the Committee's view that, due to the uncertainty concerning the scope of the exemption in section 56 of the *Anti-Discrimination Act* arising from the decision of the Administrative Decisions Tribunal in *OV and anor v QZ and anor*, a legislative amendment is required to ensure that faith-based adoption agencies can continue their policies of not providing services to same-sex couples.
- 6.47** The Committee is aware that the outcome of the appeal of this decision may be that the exemption is given a wider interpretation by the Administrative Decisions Tribunal's Appeal Panel or the Supreme Court than that given by the Tribunal, however, this outcome in itself would not necessarily put the matter to rest, as any future case would be determined on its merits. It is our view that, in order for all those involved in the adoption field to be certain about the application of the law to them, an exemption should be unequivocally spelt out.
- 6.48** The majority of the Committee has not drawn conclusions as to the precise form that this amendment should take, except to express the firm view that, as this inquiry relates specifically

to the issue of adoption by same-sex couples, the exemption should be confined to the provision of adoption services. The exemption should not extend, directly or indirectly, to matters outside the Committee's terms of reference, such as foster care services. Other Committee members believe that formal legal advice should be sought to establish precisely what actions should be taken to provide certainty with respect to exemption provision protection for faith-based adoption agencies, as originally intended by the NSW Parliament. These members believe that the issue of exemption provisions for faith-based foster care services is a matter that falls outside the terms of reference for this inquiry.

Recommendation 3

That included in any legislative amendment to allow same-sex couples to adopt should be an exemption for faith-based adoption agencies from the application of the *Anti-Discrimination Act 1977* in relation to providing same-sex couples with adoption services.

- 6.49** The majority of the Committee is also of the view that an exemption from the application of the *Anti-Discrimination Act* for faith-based adoption agencies in the provision of services to same-sex couples should be linked to a requirement that these agencies refer any same-sex couples who seek their services to another accredited adoption agency that will assist them. At present, this would entail a referral to either DoCS or Barnardos, although in the future it would include any other agencies that may become accredited.
- 6.50** Other Committee members do not support this position. Requiring faith-based agencies to refer same-sex couples who seek their services to another accredited adoption agency that will assist them totally compromises the position upon which they relied upon the exemption in the first place.
-

Recommendation 4

That, if an exemption from the application of the *Anti-Discrimination Act 1977* is created for faith-based accredited adoption agencies in the provision of services to same-sex couples, the exemption should be linked to a statutory requirement that the agencies refer any same-sex couples who seek their services to another accredited adoption agency that will assist them.

- 6.51** The majority of the Committee is also of the view that if an exemption is created, the Department should ensure that the role of the various accredited adoption agencies is such that all applicants for adoption have equal access to the different groups of children that are currently the focus of each agency's work. For example, at present, Barnardos only deals with older children with complex needs, while Anglicare and CatholicCare focus on adoptions of unknown infants. DoCS facilitates both known and unknown adoptions. Unless DoCS and/or a secular non-government adoption agency continues to facilitate unknown adoptions, gay and lesbian couples would effectively be restricted to utilising Barnardos, and their equity of access to unknown adoptions would be significantly restricted. It will be important to ensure that gay and lesbian people are not inadvertently precluded from applying to adopt unknown infants, that their access is not restricted by geography, or that they may, in effect, only adopt children with complex needs.
-

- 6.52** Other Committee members believe that DoCS should not alter in any way its practices and procedures to inhibit faith-based adoption agencies from offering their services in NSW in accordance with the tenets of their religious beliefs.

Recommendation 5

That, if an exemption from the application of the *Anti-Discrimination Act 1977* is created for faith-based accredited adoption agencies in the provision of services to same-sex couples, the Department of Community Services ensure that in practice all applicants for adoption have equitable access to the full range of children subject to local adoption.

Appendix 1 Submissions

No	Author
1	Mr Peter Mitchell
2	Mr Jim Peters
3	Mr John Goldbaum
4	Mr Dennis & Mrs Ann Outred
5	Mr Stephen Peterson
6	Mr Peter Dolan
7	Mr Craig Scott
8	Mr Brian McGregor
9	St Philips Christian College
10	Mr Luke Reed
11	Mr Chris Brittain
12	Dr Brian Sidel
13	Mr Bruce York
14	Mr Ben Blackburn
15	Belrose Concerned Citizens Christian Group
16	Mr Benjamin Radkovic
17	Mrs Rhonda Palmer
18	Mr Nathan Johnston
19	Mr Wayne Tedeschi
20	Mr Luke Portelli
21	Mrs Heather Longfield
22	Name Suppressed
23	Mr John McEwen
24	Mr Denis & Mrs Rosalie Padgett
25	Mr Jason & Mrs Natasha Crestani
26	Mrs Helen McKelleher
27	Ms Inge Micheelsen
28	Ms Lyn Towells
29	Ms Rhonda Avasalu
30	Family Voice Australia
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31	Mrs Jennifer Hunt

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36	Mrs Nola Drum
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38	Parents and Friends of Lesbians and Gays (NSW)
39	Ms Joanne Moggs
40	Revd George Drew
41	Ms Wendy White
42	Ms Jennifer Miller
43	Ms Robyn Maxwell
44	Mr David Henderson
45	Mr Grafton Van Veelen
46	Mr Kenneth Rae
47	Mr Allan Rae
48	Ms Joyce Rae
49	Mr James Stedman
50	Mr Chris Harding
51	Mrs Leslie Berry
52	Mr Ian King-Brown
53	Mr Stephen Estherby
54	Ms Jo Haylen
55	Ms Nissa Siano
56	Ms Karin Richter
57	Mr Archie Lea
58	Lithgow Bible Church
59	Ms Juanita Cox
60	Confidential
61	Mr James Gregory
62	Mrs Jill Stirling
63	Confidential
64	Ms Vicki Harding, Ms Jackie Braw & Miss Brenna Harding
65	Mr Paul Myers
66	Dr David Van Gend

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68	Mr Robert Stephens
69	Ms Silke Bader & Ms Tanya Sale
70	Hannah & Roslyn
71	Mr Denis Colbourn
72	Mr Eric Jones
73	Mr Robert & Vicki Joyner
74	Mr Doug Dixon-Hughes
75	Ms Petra McNeilly Ruthledge
76	J Marsham
77	Mr David de Bomford
78	Dr Kathy Sant
79	Dr Wayne Glass
80	Mr Mark Sewalt
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82	Ms Stephanie Hasouros
83	Mr John Higgins
84	Mr James Rose
85	Ms Meaghan Arundell
86	Ms Madeleine Hunt
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88	Mr Cameron Higgins
89	Mr Mark Wood
90	Ms Harriet Harding
91	Mr Henry Collier
92	Ms Ashley Symons
93	A E Sloane
94	Mr Joel Clements
95	Ms Kelly Marr
96	Ms James Adams
97	Mr Trafford Judd & Mr Michael Griffin
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100	Ms Joycelyn Kerlin
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104	Ms Benjamin Bartley
105	Ms Michelle Barrett
106	Ms James Goss
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108	Ms Loveday Key
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145	Ms Margaret Laundry
146	Ms Jemma Tribe
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148	Mr Matthew Kalitowski
149	Mr Walter Morrison
150	Mr David Falconer
151	Anglicare Diocese of Sydney
152	Women's Action Alliance (NSW)
153	Mr Tay Plain
154	Mr Raymond Moran
155	Mr Michael & Mrs Lorraine Casanova
156	Ms Diane Broadway
157	Mrs Judith Bond
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159	Mr John Abbott
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180	Barnardos Australia
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182	Mr Russell Shakespear
183	Gay and Lesbian Rights Lobby NSW
184	Mrs Engelein van der Velden
185	Australian Christian Lobby
186	Christian Democratic Party
187	Ms Clover Moore MP
188	Orange Christian Assembly
189	Australian Christian Values Institute
190	Hon Penny Sharpe MLC
191	Mr Roland Foster
192	Association of Children's Welfare Agencies
193	Family Life International
194	Salt Shakers
195	Mr Daniel Treacy
196	Non-Custodial Parents Party (Equal Parenting)
197	Confidential
198	Mr William Swire
199	Fatherhood Foundation
200	Confidential
201	Mrs Alison Marsh
202	Confidential
203	Mr Ray & Mrs Trish Barbero
204	NSW Council of Churches
205	Mr Peter & Mrs Diane Newland
206	Name Suppressed

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209	Mr Brett Eyles & Mr Kyrra Lee
210	Mr Benjamin Easton
211	Mr Dean & Mrs Tempe Harvey
212	Mrs Julie Jordan
213	CatholicCare & Life, Marriage and Family Centre, Catholic Archdiocese of Sydney
214	Mr Gerard Calilhanna
215	National Children's & Youth Law Centre
216	Anglican Church, Diocese of Sydney
217	The Children's Rights Council Australia
218	Mr Bruce & Mrs Alison Amos
219	Mr Tony Evans
220	Confidential
221	Castan Centre for Human Rights Law
222	Professor Jenni Millbank
223	NSW Premiers Department
224	Dr Damien W Riggs
225	Women's Legal Service NSW
226	Plunkett Centre for Ethics
227	Australian Human Rights Commission
228	Federation of Parents and Citizens' Association NSW
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230	Mr Edward Lloyd
231	Dr Cindy Kok
232	Ms Regan Smith and Ms Annemarie Volpe
233	Mr Richard Jardine
234	Ms Nicky Glover
235	Ms Larna Warren
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256	Ms Amelia Toohey
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258	Mr Jeff Butler
259	Mr Asaf Fisher
260	Ms Madeleine Motion
261	Mr Baden Rushworth
262	Ms Elizabeth Kean
263	Ms Evelyn Gray
264	Ms June Lam
265	Mr Aaron Wallis
266	Mr Jamie Hodgson
267	Ms Marion Paul
268	Ms Leonore Glansbeek
269	Ms Belinda Carden
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284	Ms Sharon Anderson-Waite
285	Ms Laura Christenson
286	Ms Joanna Williams
287	Ms Skye McGuffie
288	Ms Sharyn Hall
289	Ms Michelle Barratt
290	Ms Julia Barratt
291	Mrs Lesley Barratt
292	Ms Harita Sridhar
293	Mr Anthony Robison
294	Ms Kim Wilson
295	Ms Isobel Connell
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298	Ms Jolyn Hersch
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320	Ms Penelope Walker
321	Ms Lauren Smee
322	Ms Amy Adair
323	Mr Jorge Baron
324	Mr David Skidmore
325	Ms Jennie Dang
326	Mr Ray Goodlass
327	Ms Brenda Hayman
328	Ms Rachel Beaney
329	Mr Richard Baldry
330	Mr Stuart Baanstra
331	Mr Tim Wardell
332	Ms Susan Bilton
333	Ms Rebekah Hitchenson
334	Mr Paden Hunter
335	Mr Brendan Lloyd
336	Ms Honora Jenkins
337	Mr Rohan Morris
338	Mr Craig McAlpine
339	Mr Lachlan Sutherland
340	Ms Nian Ci Liong
341	Ms Robyn Degenhardt

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
24 February 2009 Jubilee Room, Parliament House	Mr Rod Best	Director, Legal Services, Department of Community Services
	Ms Mary Griffin	Director, Adoption and Permanent Care Services, Department of Community Services
	Ms Louise Voigt	Chief Executive Officer, Barnardos Australia
	Ms Lynn Moggach	Deputy Senior Manager, Find-A-Family, Barnardos Australia
	Ms Jane West	Principal Officer, Adoptions, Anglicare Diocese of Sydney
	Ms Sue Madden	Principal Officer, Out-of-Home Care, Anglicare Diocese of Sydney
	Ms Jackie Palmer	Senior Manager, Child Youth and Family Services Department, Community Care Division, Anglicare Diocese of Sydney
	Dr John Bellamy	Research Officer, Policy and Research Unit, Anglicare Diocese of Sydney
	Mr Christopher Meney	Director, Life Marriage and Family Centre, Catholic Archdiocese of Sydney
	Ms Emily Gray	Co-Convenor, Gay and Lesbian Rights Lobby
	Mr Ghassan Kassisieh	Policy and Development Coordinator, Gay and Lesbian Rights Lobby
	In camera witness A	
	In camera witness B	
	In camera witness C	
In camera witness D		
25 February 2009 Jubilee Room, Parliament House	Mr Damien Tudehope	Legal Representative and Spokesperson, Family Voice Australia
	Ms Vicki Harding	
	Ms Jackie Braw	
	Miss Brenna Harding	
	Mr James McDougall	Director, National Children' and Youth Law Centre
	Dr Damien W Riggs	Visiting Research Fellow, School of Psychology, University of Adelaide National Convenor, Gay and Lesbian Issues in Psychology Interest Group, Australian Psychological Society
	Ms Yasmin Hunter	Solicitor, Inner City Legal Centre

Date	Name	Position and Organisation
	Mr Paul Boers	Board Member and Family Law Solicitor, Inner City Legal Centre
	Mr Lyle Shelton	Chief of Staff, Australian Christian Lobby
	Mr Benjamin Williams	Research Officer, Australian Christian Lobby
	Ms Gillian Calvert	Commissioner, Commission for Children and Young People
	In camera witness E	
	Revd Dr Andrew Ford	Member, Social Issues Executive, Anglican Church, Diocese of Sydney
	Professor Jenni Millbank	Professor, Faculty of Law, University of Technology, Sydney
	Ms Silke Bader	
	Ms Tanya Sale	
19 March 2009	In camera witness F	
Jubilee Room,	In camera witness G	
Parliament House	In camera witness H	
	In camera witness I	
	In camera witness J	
	In camera witness K	
	In camera witness L	
	In camera witness M	

Appendix 3 Tabled documents

Wednesday 25 February 2009

Public hearing, Parliament House, Sydney

1. Document titled '*Ask the Children: Overview of Children's Understanding of Well-Being*', tabled by Ms Gillian Calvert, Commissioner, Commission for Children and Young People
2. Document titled 'Children in three contexts: Family, education and social development', Children Australia, by Sarantakos, S, tabled by Professor Jenni Millbank, Faculty of Law, University of Technology, Sydney

Appendix 4 Answers to questions on notice

The Committee received answers to questions on notice from:

1. Department of Community Services
2. Barnardos Australia
3. Anglicare Diocese of Sydney
4. CatholicCare & Life, Marriage and Family Centre, Catholic Archdiocese of Sydney
5. Gay and Lesbian Rights Lobby
6. Family Voice Australia
7. Ms Vicki Harding, Ms Jackie Braw & Miss Brenna Harding
8. National Children's and Youth Law Centre
9. Dr Damien W Riggs
10. Inner City Legal Centre
11. Australian Christian Lobby
12. Commission for Children and Young People
13. Anglican Church, Diocese of Sydney
14. Professor Jenni Millbank

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Appendix 6 Minutes

Minutes No. 23

Thursday 27 November 2008

Members' Lounge, Parliament House, Sydney at 2.25 pm

1. Members present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Correspondence

The Committee noted the following item of correspondence received:

- 27 November 2008 – From the Hon Linda Burney MP, Minister for Community Services, to the Chair, proposing terms of reference in regard to adoption by same sex couples.

3. Receipt of terms of reference for an inquiry into adoption by same sex couples

Debate ensued on the reference received from the Minister for Community Services.

4. Adjournment

The meeting was interrupted by the sitting of the House at 2.30pm. Committee adjourned until 1 December 2008.

Merrin Thompson

Clerk to the Committee

Minutes No. 24

Monday 1 December 2008

Room 1102, Parliament House, Sydney at 9.00am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Ms Hale
Ms Fazio

2. Apologies

Mr Donnelly

3. Minutes

Resolved, on the motion of Ms Hale: That Draft Minutes No. 22 and 23 be confirmed.

4. Receipt of terms of reference for an inquiry into adoption by same sex couples

4.1 Briefing from Steven Reynolds, Clerk Assistant–Procedural Support, on the powers of Committees in relation to ministerial references

The Clerk Assistant-Procedural Support briefed the Committee.

Resolved, on the motion of Mr Clarke: That the Committee write to the Minister for Community Services and the Attorney-General to confirm whether the terms of reference include the implications of any changes for non-government organisations and agencies involved in adoption.

4.2 Adoption of terms of reference

Resolved, on the motion of Ms Fazio: That the Committee adopt the terms of reference received from the Minister for Community Services on 27 November 2008 for an inquiry into law reform issues regarding whether NSW adoption laws should be amended to allow same sex couples to adopt.

4.3 Reporting terms of reference to the House

Resolved, on the motion of Mr Ajaka: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House that it has adopted terms of reference received from the Minister for Community Services for an inquiry into law reform issues regarding whether NSW adoption laws should be amended to allow same sex couples to adopt.

4.4 Consideration of proposed time line

Resolved, on the motion of Mr Ajaka: That the Committee adopt the following time line for the Inquiry, subject to any changes necessary and determined by the Chair in consultation with the Committee:

- 13 February 2009 Closing date for submissions
- Late February Hearings
- Late March Chair's draft
- Mid April Report deliberative and tabling.

4.5 Advertising inquiry and call for submissions

Resolved, on the motion of Ms Fazio: That the Inquiry and the call for submissions be advertised at the earliest opportunity, with a closing date of 13 February 2008, in the Sydney Morning Herald and Daily Telegraph and any other appropriate publications as determined by the Secretariat.

4.6 Press release

Resolved, on the motion of Ms Fazio: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW to coincide with the Chair informing the House that the Committee has adopted the terms of reference received from the Minister for Community Services and again to coincide with the publication of advertisements in the Sydney Morning Herald and the Daily Telegraph.

4.7 Invitations to stakeholders to make a submission

Resolved, on the motion of Ms Fazio: That the Committee write to the following stakeholders identified by the Secretariat, as well as any additional stakeholders identified by Committee members and notified to the Secretariat by COB Friday 5 December 2008, along with any further stakeholders identified by the Secretariat, informing them of the Inquiry and inviting them to make a submission:

Government organisations

- NSW Department of Premier and Cabinet
- Anti-Discrimination Board of NSW
- Human Rights and Equal Opportunity Commission
- NSW Attorney General's Department
- NSW Department of Community Services
- NSW Commission for Children and Young People
- Queensland Commission for Children and Young People

Legal organisations

- NSW Law Reform Commission
- Women's Legal Resources Centre
- Inner City Legal Centre (includes Lesbian and Gay Legal Advice Service)
- The Law Society of NSW
- Women's Forum Australia
- Australian Lawyers for Human Rights

Gay and lesbian organisations

- Gay & Lesbian Rights Lobby
- Australian Coalition for Equality
- Mr Rodney Croome, Gay advocate

Non-government child welfare organisations

- NSW Foster Care Association
- Barnados
- Uniting Care Burnside

Adoption organisations

- Adoption Australia
- Australian InterCountry Adoption Network
- VANISH

Academics

- Professor Jenni Millbank, University of Technology Sydney
- Professor Anita Stuhmcke, University of Technology Sydney
- Ms Eve Tauber, Family Court of Australia
- Dr Ruth McNair, part time senior lecturer and GP specialising in lesbian health and parenting

Religious organisations

- St Mark's National Theological Centre
- Family Voice Australia
- Life, Marriage and Family Centre, Catholic Diocese of Sydney
- Australian Family Association (NSW)
- Australian Christian Lobby
- Family Life International

- Anglican Church Diocese of Sydney
- Plunkett Centre for Ethics
- John Paul II Institute for Marriage and Family
- Uniting Church Board of Social Responsibility
- Anglican Church of Australia

Other

- St James Ethics Centre
- NCOSS
- Any additional identified by the Committee or the Secretariat.

4.8 Other matters

Mr Clarke moved: That the Committee write to the Minister for Community Services to request her to provide the Committee with any correspondence from organisations or individuals her office has received in the last 12 months regarding the matters contained in the terms of reference.

Question put.

The Committee divided.

Ayes: Mr Ajaka and Mr Clarke

Noes: Ms Fazio, Ms Hale and Ms Robertson.

Question resolved in the negative.

5. ***

6. ***

7. Adjournment

The Committee adjourned at 9.55 am until the first hearing for the Inquiry into adoption by same sex couples on a date in February to be confirmed by the Secretariat in consultation with the Committee.

Rachel Callinan

Clerk to the Committee

Minutes No. 26

Tuesday 24 February 2009

Jubilee Room, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio

Revd Nile (as a participating Member from 3:00 pm)

2. Minutes

Resolved, on the motion of Ms Hale: That Minutes No. 24 and 25 be confirmed.

3. ***

4. ***

5. Inquiry into adoption by same sex couples**5.1 Correspondence**

The Committee noted the following items of correspondence received:

- 16 December 2008 – From Hon Linda Burney MP, Minister for Community Services advising that the Department undertook a review of the *Adoption Act 2000* in 2006/07 and identifying key stakeholders to contact for the inquiry.
- 16 January 2009 – From Hon Linda Burney MP, Minister for Community Services, confirming that terms of reference include consideration of impact of law reform on non-government organisations and agencies involved in adoption.
- 16 January 2009 – From John Picot, CEO NSW State Council, St Vincent de Paul Society NSW, advising that the Society will not be making a submission.
- 16 January 2009 – From Commissioner for Children and Young People, advising the Commission will not make a submission to the inquiry.
- 29 January 2009 – From Mr J Vreeling, Family Voice Australia, providing a list of signatures from individuals in support of Family Voice Australia's submission.
- 9 February 2009 – From Katrina Wong, Convenor, Youth Justice Coalition, advising that Coalition will not be making a submission to the inquiry.

The Committee noted the following items of correspondence sent:

- 2 December 2008 – From Chair to Hon Linda Burney, Minister for Community Services, asking whether the terms of reference include examination of the impact of law reform on non-government organisations and agencies involved in adoption.

5.2 Publication of submissions

Resolved, on the motion of Ms Fazio: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(2), the Committee authorise the publication of the following submissions:

- in full: 1-21, 23-33, 35-51, 53-59, 61-62, 65-69, 71-100, 102-111, 113-115, 117-120, 122-123, 126-139, 141-168, 170-178, 180-196, 198-199, 201, 203-205, 207, 209-225
- with author's name suppressed at author's request: 22, 34, 64, 112, 116, 206
- with children's names suppressed at author's request: 52, 101, 179
- with photos of child and surname suppressed at author's request: 70
- with name of child's school suppressed at author's request: 121.

Resolved, on the motion of Ms Fazio: That the following submissions be kept confidential at author's request: 60, 63, 124, 125, 140, 169, 197, 200, 202, 208.

Resolved, on the motion of Ms Fazio: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(2), the names of all those who sent in a form letter submission be published together with a copy of the form letter.

5.3 Correspondence from the Hon Greg Donnelly MLC

The Hon Greg Donnelly MLC tabled a letter to the Chair, dated 23 February 2009, requesting that heterosexual couples who have adopted or intend to adopt and who believe that raising a child requires the input of both a mother and father be invited to appear to give evidence to the Inquiry.

Debate ensued.

Resolved, on the motion of Ms Fazio: That the Committee Secretariat write to the three non-government adoption agencies operating in NSW to request their assistance in identifying heterosexual couples who have adopted or intend to adopt and who believe that raising a child requires the input of both a mother and father, and facilitate their appearance before the Committee.

5.4 Public hearing – Inquiry into adoption by same sex couples

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the Department of Community Services were sworn and examined:

- Mr Rod Best, Director, Legal Services
- Ms Mary Griffin, Director, Adoption and Permanent Care Services.

The evidence concluded and the witnesses withdrew.

The following witnesses from Barnardos were sworn and examined:

- Ms Louise Voigt, Chief Executive Officer
- Ms Lynn Moggach, Deputy Senior Manager, Find a Family.

The evidence concluded and the witnesses withdrew.

The following witnesses from Anglicare Sydney were sworn and examined:

- Ms Jane West, Principal Officer, Adoptions
- Ms Sue Madden, Principal Officer, Out of Home Care
- Ms Jackie Palmer, Senior Manager, Child Youth and Family Services Department, Community Care Division
- Dr John Bellamy, Research Officer, Policy and Research Unit.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney.

The evidence concluded and the witness withdrew.

The following witnesses from the Gay and Lesbian Rights Lobby were sworn and examined:

- Ms Emily Gray, Convenor
- Mr Ghassan Kassisieh, Policy and Development Coordinator.

The evidence concluded and the witnesses withdrew.

5.5 *In camera* hearing

Resolved, on the motion of Ms Fazio: That the Committee proceed to take evidence from Witness A, B, C and D in camera.

The media and the public withdrew.

The Committee proceeded to take in camera evidence.

The following witnesses were sworn and examined:

- Witness A
- Witness B
- Witness C
- Witness D

Persons present other than the Committee:

- Committee secretariat staff: Ms Rachel Callinan, Ms Merrin Thompson, Ms Natalie Udovic, Ms Christine Nguyen, Ms Claire Allen and Ms Kate Harris
- Mr Steven Reynolds, Clerk Assistant-Committees
- Hansard reporters.

The evidence concluded and the witnesses withdrew.

5.6 **Public hearing**

Resolved, on the motion of Ms Fazio: That the hearing resume in public.

The public and the media were readmitted.

The following witness was sworn and examined:

- Mr Damien Tudehope, Legal Representative, Family Voice Australia.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Vicki Harding
- Ms Jackie Braw
- Miss Brenna Harding.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.18 pm. The public and the media withdrew.

6. Adjournment

The Committee adjourned at 5.18 pm until 9:00 am Wednesday 25 February 2009.

Rachel Callinan

Clerk to the Committee

Minutes No. 27

Wednesday 25 February 2009

Room 814/815, Parliament House, Sydney at 9.06am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio (12:10 pm)

2. Public hearing – Inquiry into adoption by same sex couples

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined via teleconference:

- Mr James McDougall, Director, National Children's and Youth Law Centre.

The evidence concluded and the witness withdrew.

The Chair cleared the room. The media and the public withdrew.

3. Deliberative meeting

The Committee deliberated.

4. Public hearing – Inquiry into adoption by same sex couples

Witnesses, the public and the media were readmitted.

The following witness was sworn and examined via teleconference:

- Dr Damien Riggs, Visiting Research Fellow and National Convenor, School of Psychology, University of Adelaide and National Convenor, Gay and Lesbian Issues in Psychology Interest Group, Australian Psychological Society.

The evidence concluded and the witness withdrew.

The following witnesses from the Inner City Legal Centre were sworn and examined:

- Ms Yasmin Hunter, Solicitor
- Mr Paul Boers, Director, Board Member and Family Law Solicitor.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Christian Lobby were sworn and examined:

- Mr Lyle Shelton, Chief of Staff
- Mr Benjamin Williams, Research Officer.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Gillian Calvert, Commissioner for Children and Young People.

Ms Calvert tendered the document, *Ask the Children: Overview of Children's Understandings of Well-Being*, NSW Commission for Children and Young People.

The evidence concluded and the witness withdrew.

5. *In camera* hearing – Inquiry into adoption by same sex couples

Resolved, on the motion of Ms Fazio: That the Committee proceed to take evidence from Witness E in camera.

The media and the public withdrew.

The Committee proceeded to take in camera evidence.

The following witness was sworn and examined via teleconference:

- Witness E.

Persons present other than the Committee:

- Committee secretariat staff: Ms Merrin Thompson, Ms Natalie Udovicic, Ms Christine Nguyen
- Hansard Reporters.

The evidence concluded and the witness withdrew.

6. Public hearing – Inquiry into adoption by same sex couples

Resolved, on the motion of Ms Fazio: That the hearing resume in public.

Witnesses, the public and media were readmitted.

The following witness was sworn and examined:

- Dr Andrew Ford, Member, Social Issues Executive, Anglican Church Diocese of Sydney.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor Jenni Millbank, Faculty of Law, University of Technology, Sydney.

Professor Millbank tendered the document, Sarantakos, S., 'Children in three contexts: Family, education and social development', *Children Australia*, Vol 21, No 3, 1996, pp 23-31.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Silke Bader
- Ms Tanya Sale.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.15 pm. The public and the media withdrew.

7. Deliberative meeting - Inquiry into adoption by same sex couples

7.1 Publication of transcript

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and Standing Order 223(1), the Committee authorise the publication of the transcript of evidence on 24 February 2009 with certain identifying information suppressed.

7.2 Publication of in camera transcript

Resolved, on the motion of Mr Donnelly: That, in the public interest and according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 223(2), the Committee authorise the publication of the in camera transcript of evidence of Witnesses A, B C and D on 24 February 2009, with all identifying information suppressed.

7.3 Additional questions on notice

Resolved, on the motion of Mr Donnelly: That any additional questions from Members be provided to the Secretariat by 9.00 am, 2 March 2009 for forwarding to witnesses.

7.4 Additional hearing

Resolved, on the motion of Ms Fazio: That an additional hearing for the Inquiry be held at a time and date yet to be determined to take evidence from up to three families identified by non-government adoption agencies in response to the letter of request from the Committee.

7.5 Correspondence

Resolved, on the motion of Mr Donnelly: That the Committee write to the Attorney General to request independent legal advice concerning whether section 56 of the *Anti-Discrimination Act 1977* would provide sufficient grounds for exemption for religious-based adoption agencies, were the *Adoption Act 2000* amended to allow adoption by same sex couples.

Resolved, on the motion of Mr Donnelly: That the Committee write to the Department of Community Services seeking clarification concerning whether section 56 of the *Anti-Discrimination Act 1977* would provide sufficient grounds for exemption for religious-based adoption agencies, were the *Adoption Act 2000* amended to allow adoption by same sex couples.

Resolved, on the motion of Mr Donnelly: That the Committee write to the Attorney General seeking a de-identified copy of the recent *Administrative Decisions Tribunal* ruling in respect of Wesley Mission.

8. ***

9. Adjournment

The Committee adjourned at 5.25pm until 18 March 2009.

Merrin Thompson
Clerk to the Committee

Minutes No. 29

Thursday 19 March 2009

Jubilee Room, Parliament House, Sydney at 9.00 am

1. Members present

Ms Robertson (Chair)
 Mr Clarke (Deputy Chair)
 Mr Donnelly
 Mr Ajaka
 Ms Hale
 Ms Fazio (9:30 am)

2. *****3. Deliberative meeting****3.1 Minutes**

Resolved, on the motion of Mr Ajaka: That Minutes No. 26 and 27 be confirmed.

3.2 Correspondence

The Committee noted the following items of correspondence received:

- 25 February 2009 – From Mr Paul Boers, Solicitor, Inner City Legal Centre, to Secretariat, responding to a matter raised during the hearing on 25 February 2009.
- 3 March 2009 – From Ms Voigt, CEO and Director Welfare, Barnardos, to Chair, in response to Committees' request to identify an appropriate couple to appear as witness.
- 6 March 2009 – From Ms Gillian Calvert, Commissioner for Children and Young People, to Chair, providing additional information to the Committee.

The Committee noted the following items of correspondence sent:

- 25 February 2009 – From Chair to Mr Boerma, CEO, CatholicCare Sydney, requesting assistance in identifying an appropriate couple to appear as witness.
- 25 February 2009 – From Chair to Ms Voigt, Chief Executive Officer, Barnardos, requesting assistance in identifying an appropriate couple to appear as witness.
- 25 February 2009 – From Chair to Mr Kell, CEO, Anglicare Sydney, requesting assistance in identifying an appropriate couple to appear as witness.
- 5 March 2009 – From Chair to Hon John Hatzistergos MLC, requesting advice in relation to the exemption under section 56 of the Anti-Discrimination Act 1977.

3.3 Publication of documents

Resolved, on the motion of Ms Fazio: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of:

- Submissions 226-228 and Supplementary Submission 185a to the Inquiry into adoption by same sex couples.
- Submissions 135 and 177 to the Inquiry into adoption by same sex couples, with the names of the authors suppressed, at the author's request.
- ***
- ***
- The following answers to questions on notice arising from the hearings for the Inquiry into adoption by same sex couples on 24 and 25 February:
 - 10 March 2009 - from Mr Damien Tudehope, Family Voice Australia.
 - 10 March 2009 - from Ms Vicki Harding and Ms Jackie Braw
 - 11 March 2009 - from Professor Jenni Millbank, Faculty of Law, UTS
 - 11 March 2009 - from Dr Riggs, School of Psychology, University of Adelaide
 - 12 March 2009 – from Catholic Archdiocese of Sydney
 - 13 March 2009 – from Mr Lyle Shelton, Australian Christian Lobby
 - 16 March 2009 – from Ms Louise Voigt, Barnardos Australia:
 - 17 March 2009 – from Anglicare, Sydney
 - 17 March 2009 – from the Gay and Lesbian Rights Lobby
 - 18 March 2009 – from Anglican Archdiocese of Sydney
 - 18 March 2009 – from the National Children's and Youth Law Centre
 - 19 March 2009 – from Australian Christian Lobby
 - 19 March 2009 – from the Inner City Legal Centre.

3.4 ***

3.5 ***

4. ***In camera* hearing – Inquiry into adoption by same sex couples**

Resolved, on the motion of Ms Fazio: That the Committee proceed to take evidence from Witnesses F, G, H, I, J, K, L and M *in camera*.

The media and the public withdrew.

Persons present other than the Committee:

- Committee secretariat staff: Ms Rachel Callinan, Ms Merrin Thompson, Ms Natalie Udovicic, Ms Christine Nguyen
- Hansard Reporters.

The Committee proceeded to take in camera evidence.

The following witnesses were sworn and examined:

- Witness F
- Witness G.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Witness H
- Witness I.
- Witness J
- Witness K.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Witness L
- Witness M.

The evidence concluded and the witnesses withdrew.

The in camera hearing concluded at 5:55 pm.

5. Deliberative meeting

5.1 Publication of in camera transcript

Resolved, on the motion of Mr Donnelly: That, in the public interest and according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975, and Standing Order 223(2), the Committee authorise the publication of the in camera transcript of evidence of Witnesses F, G, H, I, J, K, L and M on 19 March 2009, with all identifying information suppressed.

6. Adjournment

The Committee adjourned at 6.00 pm until 23 April 2009.

Rachel Callinan

Clerk to the Committee

Minutes No. 30

Thursday 23 April 2009

Room 1102, Parliament House, Sydney at 9.25 am

1. Members present

Ms Robertson (*Chair*)
 Mr Clarke (*Deputy Chair*)
 Mr Donnelly
 Mr Ajaka
 Ms Hale
 Ms Fazio

2. Minutes

Resolved, on the motion of Ms Hale: That draft Minutes No. 28 and 29 be confirmed.

3. ***

4. ***

5. Inquiry into adoption by same-sex couples

Resolved, on the motion of Ms Fazio: That the following items of correspondence be noted:

3.1 Correspondence received

- 20 March 2009 – Answers to QON from Commissioner Calvert, CCYP, with additional information
- 26 March 2009 – Email from Hon Greg Donnelly MLC to Committee secretariat forwarding detailed references for publications referred to during hearings
- 1 April 2009 - Answers to QON from the CCYP's reference group
- 6 April 2009 – From Hon Greg Donnelly MLC to Chair expressing concern regarding information and material the Committee is waiting to receive in relation to the religious exemption under the *Anti-Discrimination Act 1977*
- 8 April 2009 – Answers to QON from Mr Best, Department of Community Services, with additional attachments
- 9 April 2009 – Further answers to QON from Department of Community Services
- 9 April 2009 – From Hon Greg Donnelly MLC to Chair requesting the finalisation of the report be deferred to a date following handing down of the Wesley Mission appeal
- 9 April 2009 – Email from Hon Greg Donnelly MLC to Committee Director, providing copy of Professor Alvare's draft paper titled, Parenting and Gender
- 15 April 2009 – From Witness A to Chair regarding his experience as a witness before the Committee on 24 February 2009
- 15 April 2009 – Email from Hon Greg Donnelly MLC to Committee Director providing copy of Dr Byrd's paper titled, Parenting Gender Complementarity
- 22 April 2009 – Letter from Hon John Hatzistergos MLC, Attorney General, responding to the Committee's request for advice on exemptions for religious organisations under s56 of the *Anti-Discrimination Act 1977*.

With regard to the correspondence of 15 April 2009 from Witness A to the Chair, the Committee deliberated.

Resolved, on the motion of Mr Ajaka: That the Chair, in consultation with the Clerk of the Parliaments, prepare a response to the letter from Witness A, to express the Committee's regret that the witnesses found their appearance before the Committee to be a distressing experience, and that the Committee be consulted on the wording of the response through an open email process with the aim of reaching consensus, and that if agreement cannot be reached a further meeting of the Committee be held in the next sitting week to discuss the matter further.

Resolved, on the motion of Ms Hale: That the letter of 15 April 2009 from Witness A to the Chair, and the Committee's response to the letter be kept confidential.

With regard to the correspondence of 6 April and 9 April from the Hon Greg Donnelly to the Chair and the correspondence of 22 April 2009 from the Attorney General to the Chair, all concerning the issue of religious exemption to anti-discrimination law, the Committee deliberated.

Resolved, on the motion of Mr Donnelly: That consideration of the Chair's draft report for the Inquiry into adoption by same-sex couples be deferred to a date to be determined by the Chair in consultation with the Committee following the publication of the decision of the Administrative Decisions Tribunal Appeal Panel in relation to the appeal of the Tribunal's decision in *OV and anor v QZ and anor (No.2) [2008] NSWADT 115 (1 April 2008)*, and that no further evidence be taken for the purposes of the Inquiry.

Ms Fazio asked for her vote against this motion to be recorded in the Minutes.

3.2 Publication of answers to questions on notice

Resolved, on the motion of Ms Fazio: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of the answers to questions on notice taken during the Committee's hearings on 24 and 25 February 2009, with the exception of Attachment 1 received from the Department of Community Services which remains confidential.

3.3 Publication of submission

Resolved, on the motion of Ms Fazio: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of Submission 341 to the Inquiry into adoption by same sex couples.

6. Adjournment

The Committee adjourned at 11.00am until 9.00am 18 May 2009.

Rachel Callinan
Clerk to the Committee

Minutes No. 31

Monday 18 May 2009

Room 1102, Parliament House, Sydney at 9.25 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Minutes

Resolved, on the motion of Mr Ajaka: That, on the advice of the Clerk to the Committee, Ms Robertson's name be removed from the last paragraph under the heading '5.1 Correspondence received'.

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 30, as amended, be confirmed.

3. Inquiry into adoption by same sex couples

3.1 Correspondence

Resolved, on the motion of Mr Ajaka: That the following items of correspondence be noted:

Received

- 17 April 2009 – From Ms Gray, Co-Convenor, Gay and Lesbian Rights Lobby, to secretariat, responding to question regarding second parent adoption definitions.
- 27 April 2009 – From Ms Voigt, Chief Executive Officer, Barnardos Australia, to the Committee, providing results from searches into the American Society of Paediatricians.

- 13 May 2009 – From the Hon Amanda Fazio MLC to the Chair, stating her intent to move a motion to rescind the Committee’s decision to defer consideration of its report on the inquiry into Adoption by same-sex couples.

Sent

- 28 April 2009 – From Chair to Witness A, in response to letter received, 15 April 2009.

4. ***

5. ***

6. **General business**

The Committee noted correspondence dated 13 May 2009 from the Hon Amanda Fazio MLC to the Chair, stating her intent to move a motion to rescind the Committee’s decision to defer consideration of its report on the inquiry into Adoption by same-sex couples.

Notice having been given, Ms Fazio moved: That the decision of the Committee of 23 April 2009 (Minutes No. 30) to defer further consideration of its report on the inquiry into Adoption by same-sex couples be rescinded.

Question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale, Ms Robertson
Noes: Mr Ajaka, Mr Clarke, Mr Donnelly.

Question resolved in the affirmative on casting vote of the Chair.

Resolved on the motion of Ms Fazio: That the Committee meet to consider the Chair’s Draft Report on the inquiry into Adoption by same-sex couples on a date to be determined by the Secretariat in consultation with the Chair and Committee members.

7. **Next meeting**

The Committee adjourned at 5:15 PM sine die.

Rachel Callinan

Clerk to the Committee

Draft Minutes No. 33

Monday 29 June 2009

Room 1102, Parliament House, Sydney at 9.20 am

1. **Members present**

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Inquiry into adoption by same-sex couples

2.1 Answers to questions on notice

The Committee noted the following item of correspondence received:

- 12 March 2009 - Email from Witness E forwarding answers to questions on notice arising from the hearing on 25 February 2009

Resolved, on the motion of Mr Donnelly: That the answers to questions on notice received from Witness E be kept partially confidential (name suppressed) at the request of the author.

Resolved, on the motion of Ms Hale: That the following attachments to answers to questions on notice previously made public by the Committee be kept confidential at the request of the author:

- Attachment 1 to the answers received from the Commission for Children and Young People on 6 March 2009
- Attachment 1 to the answers received from Professor Jenni Millbank on 11 March 2009.

2.2 Consideration of the Chair's draft report

The Chair tabled her draft report entitled *Adoption by same-sex couples*, Report 38, which, having been previously circulated, was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Donnelly: That paragraph 1.2 be amended by omitting the words 'belief-based' in the second sentence, and inserting instead the words 'diverse views, beliefs and reasoned arguments'.

Resolved, on the motion of Mr Donnelly: That paragraph 1.3 be amended by inserting at the end of the sentence, 'subject to those agencies meeting a statutory requirement that they refer any same-sex couples who seek their services to another accredited adoption agency that will assist them'.

Resolved, on the motion of Mr Donnelly: That paragraph 1.13 be amended by deleting the third and fourth sentences and inserting the following:

The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.

Resolved, on the motion of Mr Donnelly: That paragraph 1.14 be amended by deleting the last sentence and inserting instead the words 'The Committee did not undertake its own extensive review of the research literature.'

Resolved, on the motion of Mr Donnelly: That paragraph 1.15 be amended by omitting the words 'belief-based' in the first sentence, and inserting instead the words 'diverse views, beliefs and reasoned arguments'.

Resolved, on the motion of Ms Fazio: That Chapter 1, as amended, be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Donnelly: That after the final sentence in the first introductory paragraph the following sentence be inserted as follows:

For a detailed account of the adoption system in NSW prior to 2000, see the report of the Standing Committee on Social Issues, *Releasing the Past: Adoption Practices 1950-1998 – Final Report*.

Resolved, on the motion of Mr Donnelly: That paragraph 2.13 be amended by inserting the word ‘currently’ after the word ‘three’ in the first sentence.

Resolved on the motion of Ms Fazio: That paragraph 2.16 be amended by omitting the second sentence and inserting instead the words, ‘CatholicCare specialises in finding suitable adoption placements for infants and also facilitates adoption of older children through their out-of-home care program.’

Resolved on the motion of Mr Ajaka: That the second sentence of paragraph 2.18 be amended by omitting the words ‘generally ... that is,’ and inserting instead the words “referred to as either ‘known’ or ‘unknown’. In ‘unknown’ adoptions,”.

Resolved on the motion of Mr Donnelly: That paragraph 2.20 be amended by omitting the word ‘effectively’ before ‘prevented’ and inserting the words, ‘either an explicit prohibition against same-sex adoption or through’ before ‘the requirement that joint applicants be married.’

Resolved, on the motion of Mr Donnelly: That following paragraph 2.36 a new paragraph be inserted as follows:

As at April 2009, 239 expressions of interest to adopt a child through the local adoption program were lodged with DoCS, 229 of which were from couples, and 10 from single persons. There were also 378 expressions of interest lodged for the intercountry adoption program. Of these, 347 were from couples and 31 from single persons. Also at that time, 31 couples had been approved to adopt within the local adoption program. In addition, 402 applicants, comprising 349 couples and 53 single persons, had been approved to adopt from an overseas program.

Resolved, on the motion of Mr Donnelly that following paragraph 2.70 a new paragraph be inserted as follows:

After extensive community consultation the Queensland Government introduced into Parliament on 10 February 2009 the Adoption Bill 2009. The bill, in its eligibility criteria, explicitly excluded same-sex couples from adopting children. It is noted that the bill did not pass into law as the Queensland Parliament prorogued on 23 February 2009.

Resolved, on the motion of Mr Donnelly that following paragraph 2.77 a new paragraph be inserted as follows:

Adoption by the same-sex couples is not permitted in the majority of countries around the world.

Resolved on the motion of Ms Fazio: That chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Donnelly: That the first introductory paragraph be amended by omitting the fourth and fifth sentences and inserting instead the following:

The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.

Resolved, on the motion of Mr Donnelly: That the second introductory paragraph be amended by omitting the words 'values and beliefs' in the first sentence and inserting instead the words 'views, beliefs and reasoning'.

Resolved, on the motion of Mr Donnelly: That paragraph 3.3 be amended by ending the first sentence after the words 'Adoption Act', moving the footnote to the end of that sentence, omitting the words 'significant weight' in the new second sentence and inserting instead the word, 'consideration'.

Resolved, on the motion of Mr Donnelly that paragraph 3.6 be amended by omitting the two dot points and inserting instead the following:

The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.

Resolved, on the motion of Mr Donnelly: That paragraph 3.8 be amended by omitting the words 'religious and otherwise,' and inserting instead the words 'beliefs and reasoning'.

Resolved, on the motion of Ms Fazio: That paragraph 3.9 be amended by omitting the word 'both' in the first sentence and inserting instead 'all'.

Resolved, on the motion of Mr Donnelly: That the heading after paragraph 3.9 be amended by omitting the words 'Family form:'.

Resolved, on the motion of Ms Hale: That paragraph 3.10 be amended by omitting the words 'family form' from the second sentence, inserting instead the words 'the presence of both a mother and a father, preferably in a married relationship,', and omitting the third sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 3.13 be amended by inserting at the end of the sentence 'along with a number of individual authors of submissions.'

Resolved on the motion of Ms Fazio: That the heading after paragraph 3.16 be amended by placing inverted commas around the words 'fundamental complementarity'.

Resolved on the motion of Mr Donnelly: That paragraph 3.17 be amended by inserting the words 'in the short and long term' after the word 'children', and the words, 'in a permanent, preferably married relationship,' after the word 'father' in the first sentence.

Resolved on the motion of Mr Donnelly: That after paragraph 3.17 a new paragraph be inserted as follows:

A number of inquiry participants, including those who made submissions, spoke about the unique nature of both mothering and fathering and the contributions each makes to the nurturing and development of children. Many of those making a contribution to the inquiry emphasised that mothering and fathering was much more than providing role models for children.

Resolved on the motion of Mr Donnelly: That the heading after paragraph 3.42 be amended by deleting the words 'Family functioning: adoption decisions based on the individual needs of the child and the capacity of the prospective parents' and inserting instead the words 'Adoption decisions regardless of parental gender and sexuality'.

Resolved on the motion of Mr Donnelly: That paragraph 3.43 be amended by inserting the words ', regardless of their gender and sexuality' at the end of the first sentence.

Resolved on the motion of Mr Donnelly: That paragraph 3.106 be amended by inserting a new sentence at the end as follows:

The Committee acknowledges the limited evidence available to the inquiry about the views of children and believes that this is an important area where more empirical research should be undertaken.

Resolved on the motion of Mr Donnelly: That paragraph 3.115 be amended by omitting the words 'whether they believed those interests were primarily served by family form or family functioning' in the first sentence and inserting instead the words 'whatever their views'.

Resolved on the motion of Mr Donnelly: That paragraph 3.116 be amended by omitting the words 'belief-based' in the second sentence and inserting instead the words 'views, beliefs and reasoned'.

Resolved on the motion of Mr Donnelly: That paragraph 3.117 be amended by omitting the words 'headed by a married man and woman' and inserting instead the words 'comprised of a mother and father in a permanent, preferably married relationship'.

Resolved on the motion of Mr Donnelly: That paragraph 3.121 be amended by omitting the word 'indicate', inserting instead the word 'suggest', and inserting a new sentence at the end as follows:

Other Committee members believe that the evidence from children to the inquiry was limited and should not be used to assert a generalised position by children in NSW towards adoption by same-sex couples.

Resolved on the motion of Mr Clarke: That paragraph 3.122 be amended by omitting the word 'We' in the second sentence, inserting instead the word 'They', omitting the word 'our' in the third sentence and inserting instead the word 'their'.

Resolved on the motion of Mr Donnelly: That paragraph 3.122 be amended by inserting two new sentences at the end as follows:

Other Committee members reject the argument that the debate about adoption by same-sex couples is a religious versus secular contest. Many of the participants in the inquiry who expressed belief-based views also articulated reason-based arguments as to why they opposed adoption by same-sex couples. For many of these participants the key issue is the importance of a child having the opportunity to be raised by a mother and a father in a permanent, preferably married relationship, a view to which a number of people subscribe, not just theists or those of religious persuasion.

Resolved on the motion of Mr Donnelly: That paragraph 3.123 be amended by omitting the word 'we' from the last sentence and inserting instead the words 'the majority of the Committee'.

Resolved, on the motion of Ms Fazio: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Donnelly: That the title of the chapter be amended by omitting the words ‘family form and family functioning’ and inserting instead the word ‘families’.

Resolved on the motion of Mr Donnelly: That the first introductory paragraph be amended by omitting the words ‘family form or family functioning’ and inserting instead the words ‘family types are’.

Resolved on the motion of Mr Donnelly: That the second introductory paragraph be amended by omitting the final sentence and inserting instead the sentence ‘The Committee did not undertake its own review of the research literature.’

Resolved, on the motion of Mr Donnelly: That the heading above paragraph 4.1 be amended by omitting the word ‘versus’ and inserting instead the word ‘and’.

Resolved, on the motion of Mr Ajaka: That paragraph 4.1 be amended by omitting the words ‘whether ... greatest impact on’ in the first sentence and inserting instead the words ‘the extent to which family form and/or family functioning impacts upon’.

Resolved, on the motion of Mr Donnelly: That paragraph 4.2 be amended by omitting the word ‘committed’ in the first sentence and inserting instead the words ‘permanent, preferably married’.

Resolved, on the motion of Mr Ajaka: That paragraph 4.3 be amended by omitting the words ‘as it is in a’ from the second sentence, inserting instead the word ‘or’, and inserting at the end of the sentence the words ‘, or other family structures’.

Resolved, on the motion of Ms Hale: That paragraph 4.4 be amended by inserting after ‘some participants’ the words ‘who held widely divergent views’.

Resolved, on the motion of Mr Donnelly: That the heading after paragraph 4.4 be amended by omitting the words ‘Family form’ and inserting instead the words ‘Parenting by a mother and a father’.

Resolved, on the motion of Mr Donnelly: That the heading after paragraph 4.18 be amended by omitting the words ‘Family functioning’ and inserting instead the words ‘Parenting by same-sex couples’.

Resolved, on the motion of Mr Donnelly: That paragraph 4.19 be amended by omitting the words ‘family functioning ... family form,’ and inserting instead the words ‘same-sex parenting’.

Resolved, on the motion of Mr Donnelly: That paragraph 4.38 be amended by omitting the words ‘arguing for family form over family functioning and who’, inserting instead the words ‘who supported parenting by a mother and a father’, and inserting the word ‘and’ after ‘same-sex couples’.

Resolved, on the motion of Mr Donnelly: That after paragraph 4.43 a new paragraph be inserted as follows:

An inquiry participant raised particular concerns about certain research methods used to advance the case in support of adoption by same-sex couples.

Resolved, on the motion of Mr Donnelly, that after paragraph 4.43 a second new paragraph and quotation be inserted as follows:

The Women’s Action Alliance (NSW) noted the comments of the American College of Pediatricians:

Heterosexual parenting is the normative model upon which most comprehensive longitudinal research on childrearing has been based. Data on long-term outcomes for children placed in homosexual households are very limited and the available evidence reveals grave concerns. Those

current studies that appear to indicate neutral to favourable results from homosexual parenting have critical flaws such as non-longitudinal design, inadequate sample size, biased sample selection, lack of proper controls, and failure to account for confounding variables ... Therefore the burden is on the proponents of homosexual parenting to prove that moving further away from the heterosexual parenting model is appropriate and safe for children.

Resolved, on the motion of Mr Donnelly: That paragraph 4.44 be amended by omitting the first sentence and inserting instead the sentence as follows:

In turn, those participants who support same-sex parenting criticised the methodologies of studies emphasising family structure.

Resolved, on the motion of Mr Donnelly: That after paragraph 4.65 a new paragraph be inserted as follows:

Another inquiry participant emphasised the importance of applying the 'scientific method' in quantitative studies to minimise the influence of the researcher's perspective, thus mitigating against subconscious bias. This participant described the scientific method as involving random assignment to an experimental group (which has something done to it) and a control group (which has nothing done to it). Any differences that appear are statistically assessed and are rejected unless they reach the 0.05 level of significance. This means that there is less than 5 percent probability that the differences have appeared by chance.

Resolved, on the motion of Mr Donnelly: That certain information in the in camera transcript of 25 February 2009, previously kept confidential at the request of the witness, and Submission 220, previously kept confidential at the request of the author, be made public with the author's permission.

Resolved, on the motion of Mr Donnelly: That paragraph 4.80 be amended by omitting the words 'form or family functioning is' and inserting instead the words 'types are'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.81 be amended by omitting the sentence and inserting instead a new sentence as follows:

As mentioned previously, the Committee did not undertake its own review of the research literature.

Resolved, on the motion of Mr Donnelly: That paragraph 4.82 be amended by inserting at the end of the first sentence the words 'in a permanent, preferably married relationship'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.82 be amended by deleting all words after 'parenting' in the second sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.82 be amended by inserting after the word 'harmed' in the last sentence the words 'or disadvantaged'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.83 be amended by inserting after the word 'harmed' in the last sentence the words 'or disadvantaged'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.84 be amended by omitting the word 'form' at the end of the third sentence and inserting instead the word 'structure'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.85 be amended by omitting the word 'respective', then omitting the words 'form and family' and inserting instead the words 'structure and'.

Resolved, on the motion of Ms Fazio: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Mr Donnelly moved: That after paragraph 5.47 a new paragraph be inserted as follows:

As previously noted in Chapter 2, adoption by same-sex couples is not permitted in the majority of countries around the world.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Ajaka, Mr Clarke

Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Mr Donnelly moved: That paragraph 5.41 be amended by omitting the word 'perceived' before 'right' in the second sentence.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Ajaka, Mr Clarke

Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That the first sentence of paragraph 5.169 be amended by omitting the words 'belief-based' and inserting instead the words 'views, beliefs and reasoned'.

Resolved, on the motion of Mr Donnelly: That paragraph 5.169 be amended by omitting the words 'form and functioning' from the first sentence and inserting instead the word 'structure'.

Resolved, on the motion of Mr Donnelly: That paragraph 5.170 be amended by inserting after the word 'father' in the second sentence the words 'in a permanent, preferably married relationship'.

Resolved, on the motion of Mr Donnelly: That paragraph 5.172 be amended by omitting from the second sentence all words before the word 'these', then omitting the word 'deficits' and inserting instead the word 'issues'.

Resolved, on the motion of Mr Donnelly: That paragraph 5.172 be amended by omitting from the final sentence the words 'disadvantages experienced' and inserting instead the words 'ramifications being faced'.

Resolved, on the motion of Mr Donnelly: That after paragraph 5.175 a new paragraph be inserted as follows:

Some members of the Committee believe that foster care is not the central focus of the inquiry and that issues relating to it should be examined separately and in their own right.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Ajaka, Mr Clarke

Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That after paragraph 5.176 a new paragraph be inserted as follows:

Other members of the Committee noted that no advice was sought from the Commonwealth Attorney General to establish what if any impact changes to NSW adoption laws to provide for adoption by same-sex couples would have on Australia's bilateral adoption agreements with a number of countries.

Ms Fazio moved: That Recommendations 1 and 2 be adopted.

Mr Donnelly moved: That the motion of Ms Fazio be amended by omitting the word 'adopted' and inserting instead the words 'deleted and replaced with the following recommendation:

That the NSW Government does not amend the eligibility criteria of the *Adoption Act 2000* to permit same-sex couples to adopt.'

Mr Ajaka moved: That the amendment of Mr Donnelly to the motion of Ms Fazio be amended by inserting after the words 'permit same-sex couples to adopt' the words 'unknown children'.

Question put: That the amendment of Mr Ajaka to the amendment of Mr Donnelly be agreed to.

The Committee divided.

Ayes: Mr Ajaka

Noes: Ms Fazio, Ms Hale, Ms Robertson, Mr Donnelly, Mr Clarke

Question resolved in the negative.

Question put: That the amendment of Mr Donnelly to the motion of Ms Fazio be agreed to.

The Committee divided.

Ayes: Mr Donnelly, Mr Clarke, Mr Ajaka

Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Mr Ajaka moved: That the motion of Ms Fazio be amended 'so that Recommendation 1 applies only to known adoptions'.

Question put: That the amendment of Mr Ajaka to the motion of Ms Fazio be agreed to.

The Committee divided.

Ayes: Mr Ajaka

Noes: Mr Donnelly, Mr Clarke, Ms Fazio, Ms Robertson, Ms Hale.

Question resolved in the negative.

Original question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale, Ms Robertson
Noes: Mr Donnelly, Mr Clarke, Mr Ajaka

Question resolved in the affirmative on the casting vote of the Chair.

Resolved, on the motion of Mr Ajaka: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Ms Fazio: That paragraph 6.21 be amended by omitting the final sentence and inserting instead the sentence as follows:

The Appeal Panel heard the appeal in late April but had not handed down its decision by the time this report was finalised.

Resolved, on the motion of Mr Donnelly: That the footnote at the end of paragraph 6.21 be amended by inserting at the end the following:

It is noted that the NSW Attorney General has sought and gained the right to intervene in the appeal. The NSW Attorney General has supported the applications and operation of the exemption provision in the Anti-Discrimination Act.

Resolved on the motion of Mr Donnelly: That paragraph 6.41 be amended by inserting before the word 'Committee' in the first sentence the words 'the majority of the'.

Resolved on the motion of Mr Donnelly: That paragraph 6.42 be amended by inserting before the word 'that' in the second sentence the words 'to some Committee members'.

Resolved on the motion of Mr Donnelly: That paragraph 6.42 be amended by inserting after the second sentence a new sentence as follows:

Other Committee members believe that faith-based adoption agencies should be able to provide adoption services in accordance with the tenets of their religious beliefs, and that this is sufficient reason alone to justify an exemption.

Resolved on the motion of Ms Hale: That paragraph 6.42 be amended by inserting before the word 'Committee' in the third sentence the words 'majority of the'.

Ms Hale moved: That paragraph 6.43 be amended by omitting from the first sentence the words 'accepted as genuine' and inserting instead the word 'noted'.

Question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale, Ms Robertson
Noes: Mr Ajaka, Mr Donnelly, Mr Clarke

Question resolved in the affirmative on the casting vote of the Chair.

Resolved on the motion of Ms Hale: That after paragraph 6.44 a new paragraph be inserted as follows:

One member of the Committee, however, is of the view that it is wrong to endorse practices that are inherently discriminatory and that no exemption should be available to any organisation, faith-based or otherwise.

Resolved on the motion of Mr Donnelly: That paragraph 6.47 be amended by inserting before the word 'Committee' in the first sentence the words 'majority of the'.

Resolved on the motion of Mr Donnelly: That paragraph 6.47 be amended by inserting at the end the sentences as follows:

Other Committee members believe that formal legal advice should be sought to establish precisely what actions should be taken to provide certainty with respect to exemption provision protection for faith-based adoption agencies, as originally intended by the NSW Parliament. These members believe that the issue of exemption provisions for faith-based foster care services is a matter that falls outside the terms of reference for this inquiry.

Ms Fazio moved: That Recommendation 3 be adopted.

Mr Donnelly moved: That the motion of Ms Fazio be amended by omitting the words 'be adopted' and inserting instead 'be amended by omitting the following:

That, included in any legislative amendment to allow same-sex couples to adopt, should be an exemption for faith-based adoption agencies from the application of the Anti-Discrimination Act 1977 in relation to providing same-sex couples with adoption services.

and inserting instead:

That the NSW Government obtain legal advice to establish what action should be taken to provide certainty with respect to exemption provision protection for faith-based adoption agencies, as originally intended by the NSW Parliament.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Clark

Noes: Mr Ajaka, Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative.

Original question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Clark, Mr Ajaka, Ms Fazio, Ms Robertson

Noes: Ms Hale

Question resolved in the affirmative.

Resolved on the motion of Mr Donnelly: That paragraph 6.48 be amended by inserting before the word 'Committee' in the first sentence the words 'majority of the', then deleting the word 'firmly'.

Resolved on the motion of Mr Donnelly: That after paragraph 6.48 a new paragraph be inserted as follows:

Other Committee members do not support this position. Requiring faith-based agencies to refer same-sex couples who seek their services to another accredited adoption agency that will assist them totally compromises the position upon which they relied upon the exemption in the first place.

Ms Fazio moved: That Recommendation 4 be adopted.

Mr Donnelly moved: That the motion of Ms Fazio be amended by omitting Recommendation 4 in its entirety.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Clark, Mr Ajaka
Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Original question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale, Ms Robertson
Noes: Mr Donnelly, Mr Clark, Mr Ajaka

Question resolved in the affirmative on the casting vote of the Chair.

Resolved on the motion of Mr Donnelly: That paragraph 6.49 be amended by inserting before the word 'Committee' in the first sentence the words 'majority of the'.

Resolved, on the motion of Ms Fazio: That paragraph 6.49 be amended by omitting from the first sentence the words 'consider ... ensure' and inserting instead the words 'ensure that the role of the various accredited adoption agencies is such' and inserting in the second sentence after the words 'For example' the following:

, at present, Barnardos only deals with older children with complex needs, while Anglicare and CatholicCare focus on adoptions of unknown infants. DoCS facilitates both known and unknown adoptions. Unless DoCS and/or a secular non-government adoption agency continues to facilitate unknown adoptions, gay and lesbian couples would effectively be restricted to utilising Barnardos, and their equity of access to unknown adoptions would be significantly restricted.

and omitting from the remainder of the second sentence the word 'it' and inserting instead 'It'.

Resolved, on the motion of Ms Fazio: That Recommendation 5 be amended by omitting the words 'consider ... to', inserting after the words 'ensure that' the words 'in practice', and inserting after the word 'have' the word 'equitable'.

Resolved on the motion of Mr Donnelly: That after paragraph 6.49 a new paragraph be inserted as follows:

Other Committee members believe that DoCS should not alter in any way its practices and procedures to inhibit faith-based adoption agencies from offering their services in NSW in accordance with the tenets of their religious beliefs.

Ms Fazio moved: That Recommendation 5 be adopted.

Question put.

The Committee divided.

Ayes: Ms Fazio, Ms Hale, Ms Robertson

Noes: Mr Donnelly, Mr Ajaka, Mr Clarke

Question resolved in the affirmative on the casting vote of the Chair.

Resolved, on the motion of Ms Fazio: That Chapter 6, as amended, be adopted.

Executive summary read.

Resolved on the motion of Mr Donnelly: That the second paragraph on page xi be amended by omitting the words 'belief-based' from the second sentence and inserting instead the words 'views, beliefs and reasoned'.

Resolved on the motion of Mr Donnelly: That the third paragraph on page xi be amended by inserting after the word 'beliefs' in the first sentence the words 'and arguments based on reason'.

Resolved on the motion of Mr Donnelly: That the fourth paragraph on page xi be amended by inserting at the end the following:

, subject to those agencies meeting a statutory requirement that they refer any same-sex couples who seek their services to another accredited adoption agency that will assist them

Resolved on the motion of Mr Donnelly: That the sixth paragraph on page xii be amended by omitting the third and fourth sentences as follows:

The first stream emphasised 'family form', arguing that adopted children's best interests are served by the presence of a mother and a father. The second stream underscored 'family functioning', contending that a child's best interests will be served by decisions based on the individual needs of the child and the particular capacities of the prospective parents, regardless of their sexuality.

and inserting instead the following:

The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children's best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children's best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.

Resolved on the motion of Mr Donnelly: That the seventh paragraph on page xii be amended by inserting before the word 'Committee' in the second sentence the words 'majority of the', then omitting the words 'belief based' from the second sentence and inserting instead the words 'views, beliefs and reasoned'.

Resolved on the motion of Mr Donnelly: That the second paragraph on page xiii be amended by omitting the words 'headed by a married man and woman' and inserting instead the words 'comprised of a mother and father in a permanent, preferably married relationship'.

Resolved on the motion of Mr Donnelly: That the third paragraph on page xiii be amended by inserting at the start of the last sentence the words 'The majority of Committee members believe that'.

Resolved on the motion of Mr Donnelly: That the sixth paragraph on page xiii be amended by omitting the final sentence and inserting instead the sentence 'The Committee did not undertake its own review of the research literature.'

Resolved, on the motion of Mr Donnelly: That the second paragraph on page xiv be amended by inserting after the word 'father' in the first sentence the words 'in a permanent, preferably married relationship'.

Resolved, on the motion of Mr Donnelly: That the second paragraph on page xiv be amended by omitting from the end of the second sentence the words 'and are convinced that at best, the research on same-sex parenting is equivocal'.

Resolved, on the motion of Mr Donnelly: That the second paragraph on page xiv be amended by inserting after the word 'harmed' in the third sentence the words 'or disadvantaged'.

Resolved, on the motion of Mr Donnelly: That the second paragraph on page xiv be amended by omitting from the last sentence the words 'consider that a cautious approach which', inserting instead the words 'support the policy position that', and omitting the words 'is essential'.

Resolved, on the motion of Mr Donnelly: That the third paragraph on page xiv be amended by inserting after the word 'harmed' in the final sentence the words 'or disadvantaged'.

Resolved, on the motion of Mr Donnelly: That the seventh paragraph on page xiv be amended by inserting after the word 'father' in the second sentence the words 'in a permanent, preferably married relationship'.

Resolved, on the motion of Mr Donnelly: That the second paragraph on page xv be amended by omitting from the second sentence all words before the word 'these'.

Resolved, on the motion of Mr Donnelly: That the fourth paragraph on page xv be amended by omitting from before the word 'inferior' in the first sentence the word 'significantly'.

Mr Donnelly moved: That after the second paragraph on page xvi a new paragraph be inserted as follows:

Other members of the Committee noted that no advice was sought from the Commonwealth Attorney General to establish what if any impact changes to NSW adoption laws to provide for adoption by same-sex couples would have on Australia's bilateral adoption agreements with a number of countries.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mr Ajaka, Mr Clarke

Noes: Ms Fazio, Ms Hale, Ms Robertson

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Donnelly: That the third paragraph on page xvi be amended by inserting as the final sentence ‘Other members of the Committee do not support this proposal.’

Resolved, on the motion of Mr Donnelly: That the fourth paragraph on page xvi be amended by inserting as the final sentence ‘Other members of the Committee do not support this proposal.’

Resolved, on the motion of Mr Donnelly: That the sixth paragraph on page xvi be amended by inserting before the word ‘Committee’s’ in the first sentence the words ‘majority of the’.

Resolved, on the motion of Mr Donnelly: That the sixth paragraph on page xvi be amended by inserting at the start of the second sentence the words ‘The majority of the Committee believe that,’.

Resolved, on the motion of Mr Donnelly: That the sixth paragraph on page xvi be amended by inserting as the final sentence ‘Other members of the Committee do not support this position.’

Resolved, on the motion of motion of Mr Donnelly: That the seventh paragraph on page xvi be amended by omitting the second, third and fourth sentences as follows:

While the Committee respects the right to religious freedom, it is not clear that the ability to provide adoption services to heterosexual couples while denying them to other couples based on their homosexuality alone is a matter of religious freedom. The Committee is not persuaded that these reasons alone justify the application of an exemption to this aspect of their work.

and inserting instead:

While the Committee respects the right to religious freedom, it is not clear to some Committee members that the ability to provide adoption services to heterosexual couples while denying them to other couples based on their homosexuality alone is a matter of religious freedom. Other Committee members believe that faith-based adoption agencies should be able to provide adoption services in accordance with the tenets of their religious beliefs, and that this is sufficient reason alone to justify an exemption. The majority of the Committee is not persuaded that these reasons alone justify the application of an exemption to this aspect of their work.

Resolved, on the motion of Mr Donnelly: That the seventh paragraph on page xvi be amended by inserting as the final sentence ‘Other members of the Committee do not support this proposal.’

Resolved, on the motion of Ms Hale: That the eighth paragraph on page xvi be amended by omitting from the first sentence the words ‘accepted as genuine’ and inserting instead the word ‘noted’.

Resolved, on the motion of Mr Donnelly: That the third paragraph on page xvii be amended by inserting before the word ‘Committee’ in the first sentence the words ‘majority of the’.

Resolved, on the motion of Mr Donnelly: That the third paragraph on page xvii be amended by inserting as the final sentence ‘Other Committee members believe that formal legal advice should be sought on this issue.’

Resolved, on the motion of Mr Donnelly: That the fourth paragraph on page xvii be amended by inserting before the word ‘Committee’ in the first sentence the words ‘majority of the’.

Resolved, on the motion of Mr Donnelly: That the fourth paragraph on page xvii be amended by omitting the word ‘firmly’ before the words ‘of the view’ in the first sentence.

Resolved, on the motion of Mr Donnelly: That the fourth paragraph on page xvii be amended by inserting as the final sentence ‘Other members of the Committee do not support this position.’

Resolved, on the motion of Ms Fazio: That after the fourth paragraph on page xvii a new final paragraph be inserted as follows:

The majority of the Committee is also of the view that if an exemption is created, the Department should ensure that the role of the various accredited adoption agencies is such that all applicants for adoption have equal access to the different groups of children that are currently the focus of each agency's work. For example, at present, Barnardos only deals with older children with complex needs, while Anglicare and CatholicCare focus on adoptions of unknown infants. DoCS facilitates both known and unknown adoptions. Unless DoCS and/or a secular non-government adoption agency continues to facilitate unknown adoptions, gay and lesbian couples would effectively be restricted to utilising Barnardos, and their equity of access to unknown adoptions would be significantly restricted. It will be important to ensure that gay and lesbian people are not inadvertently precluded from applying to adopt unknown infants, that their access is not restricted by geography, or that they may, in effect, only adopt children with complex needs.

Resolved, on the motion of Mr Donnelly: That the new final paragraph on page xvii be amended by inserting as the final sentence 'Other members of the Committee do not support this view.'

Resolved, on the motion of Ms Fazio: That the executive summary, as amended, be adopted.

Resolved, on the motion of Ms Fazio: That the Committee Secretariat correct any typographical and grammatical errors in the report prior to tabling.

Resolved, on the motion of Ms Fazio: That the draft report, as amended, be the report of the Committee and presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice, and correspondence relating to the inquiry, in accordance with Standing Order 231.

Resolved, on the motion of Ms Fazio: That dissenting statements be submitted to the secretariat by 5pm close of business on the day after members are provided with a copy of Draft Minutes No. 33.

3. ***

4. **Adjournment**

The Committee adjourned at 6.10 pm sine die.

Rachel Callinan
Clerk to the Committee

Appendix 7 Dissenting statements

DISSENTING STATEMENT – HON JOHN AJAKA MLC

I. The scope of the extension of adoption eligibility criteria

If amendment to the *Adoption Act* is to proceed, in accordance with Recommendation 1, then it is my view that the extension of adoption eligibility criteria to permit same-sex couples to apply for adoption should *only* apply in respect of ‘known children’. Accordingly, I moved an amendment to Recommendation 1, to the effect that it only apply in respect of ‘known children’.

The rationale for this amendment, from the evidence before the Committee, is threefold:-

1. As stated in the Executive Summary of the Committee’s Report, ‘it is in [the] area of known adoptions that reform to allow same-sex couples to adopt will have its greatest impact’.
2. The importance of affording legal recognition to existing relationships between same-sex couples and children by way of amendment to the *Adoption Act* was cited as one of the ‘best mechanisms to overcome...deficits’ in the current law, such as the inconsistencies which currently allow for foster care by same-sex couples and adoption by gay and lesbian individuals.
3. The overriding consideration of ‘the best interests of the child’ will be given clearer expression in cases of known adoption, where the child is familiar with the prospective adoptive parents and can express an opinion in respect of an Adoption Order.

II. The conditional exemption for ‘faith-based’ adoption agencies

Whilst I support the position taken by the majority of Committee members in favour of the exemption for faith-based adoption agencies from the application of the *Anti-Discrimination Act 1977* in relation to providing same-sex couples with adoption services, I dissent in relation to the imposition of conditions of the type outlined in Recommendation 4.

It is my view that to require faith-based adoption agencies to refer any same-sex couples that seek their services to another accredited adoption agency is essentially to force them to indirectly assist in the achievement of an outcome contrary to their underlying beliefs.

John Ajaka MLC

DISSENTING STATEMENT – THE HON GREG DONNELLY MLC

Does a child have a right to expect to be raised by a mother and a father? Should New South Wales law recognise such a right and facilitate, wherever possible, children being raised by a mother and a father?

It is my view that the answer to both these questions is yes. Moreover, I believe that the overwhelming view of the citizens of New South Wales to both these questions is also yes, notwithstanding the fact that for a range of reasons beyond their control, there are children in this state who do not have the opportunity to grow up with a mother and a father.

New South Wales has had responsible government since 1856 - over 150 years. Over that period, governments of all persuasions have acknowledged and supported the general proposition that a child's best interest is served when that child is raised by a mother and a father. This has been seen, correctly in my view, as a valid principle that has guided our collective decision-making with respect to protecting the wellbeing of children. The principle is underpinned by that profoundly human bond that exists between a child and a mother and a father. A bond that is intrinsically known and understood by all cultures, down the ages for as long as anybody can remember.

This report is significant because it seeks to turn on its head, this conventional wisdom that has guided lawmakers in this state for generations with respect to legislating for the welfare and best interests of children. The recommendations in this report if implemented, would deny some children the right to be raised by a mother and a father. For a government to propose such legislation would, in my view, be unconscionable. To be sure, it would amount to a statement by the government that for a child both "mothering" and "fathering" are not important.

Adoption is a definitive legal process which permanently transfers all the legal rights and responsibilities of being a parent from a child's birth parent(s) to the adoptive parents(s). Adoption laws in this state have always operated to serve the best interests of children, not adults. This "paramountcy principle" remains at the heart of adoption legislation and practice in New South Wales today.

Current legislation restricts adoption by couples to heterosexual couples. Underpinning this is the widely held community view that it is in the best interests of a child to be raised by a mother and a father. The arguments made in favour of the heterosexual parenting model were presented in detail by a number of participants to the inquiry both through submissions and oral evidence. I find the arguments and the evidence supporting the heterosexual parenting model of a man and a woman in a permanent, preferably married relationship persuasive and worthy of ongoing legislative support.

Decisions of adults do often impact on children. For example, there are children in New South Wales living with two adults of the same-sex, one of whom is biologically connected to the child. Indeed there may be instances of children living with two adults of the same-sex, where neither of the adults is biologically connected to the child. Furthermore, there may also be cases where a child is living with more than two adults.

If there are genuine questions of uncertainty with respect to rights and responsibilities between same-sex couples and children who are living with them, then there is an argument that these matters should be looked at and clarified. However, I do not believe that the appropriate way to proceed is to amend the *Adoption Act 2000*. That Act, as it was designed to do, covers the field with respect to adoption in this state. If there are certain specific issues that need to be addressed involving same-sex couples and

children living with them, let the specific issues be considered and dealt with on their merits. Amending the *Adoption Act 2000* is not the only way to deal with such issues. Other legislative or regulatory mechanisms could be developed to address them.

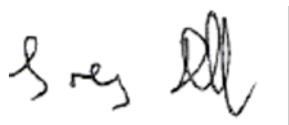
Other issues in the report deserving comment include:

- adoption by same-sex couples is not permitted in the majority of countries around the world; and
- laws permitting adoption by same-sex couples in Australia are the exception, not the rule.

Faith-based adoption agencies have a long history of providing adoption services in this state. An exemption provision in the *Anti-Discrimination Act 1977* enables such agencies to, according to their religious tenets, only offer adoption services to heterosexual couples. This arrangement has operated without difficulty or problems for a number of years. It is therefore extraordinary that one of the recommendations of this report would seek to qualify and compromise the exemption entitlement currently utilised by these agencies. The proposed requirement of faith-based agencies to refer same-sex couples who seek their services to another accredited adoption agency that will assist them totally compromises the position they relied upon under the exemption in the first place. Forcing a faith-based agency to act in a way that did not accord with the tenets of their beliefs would undermine the exercise of legitimate religious freedom.

On the issue of the exemption provision, one final point should be made. Subject to the Appeal Panel's decision in the Wesley Mission case referred to in chapter 6 of the report, the New South Wales Government should obtain legal advice to establish what actions should be taken to provide certainty with respect to exemption provision protection for faith-based adoption agencies, as originally intended by the Parliament.

I conclude by noting that it was only with the exercise of the casting vote by the Committee Chair that the proposed recommendations were endorsed. Throughout this report, reference to "the majority of the Committee" means three Committee members out of six with the casting vote of the Chair required to carry the day. This inquiry report does not provide a mandate for change of adoption laws. What it does do is highlight the need for further study, debate and reflection on this most important area of social policy.



Greg Donnelly MLC
Government Whip