

Submission  
No 183

## INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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# Gay & Lesbian Rights Lobby

## INQUIRY INTO ADOPTION BY SAME-SEX COUPLES

*SUBMISSION OF THE GAY & LESBIAN RIGHTS LOBBY (NSW)*

**JANUARY 2009**

*About the Gay & Lesbian Rights Lobby*

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales (NSW). Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative relationship reform. In NSW, we led the process for the recognition of same-sex de facto relationships, which led to the passage of the *Property (Relationships) Amendment Act 1999* (NSW) and subsequent amendments. The GLRL was also successful in campaigning for the equalisation of the age of consent in NSW for gay men in 2003 and the first recognition of same-sex partners in federal superannuation law in 2004. In 2006, we conducted one of the largest consultations on same-sex relationship recognition in Australia, with over 1,300 gay, lesbian, bisexual and transgender people in metropolitan, regional and rural NSW. The final report published in 2007, *All Love is Equal ...Isn't It?*, highlighted the broad community need and desire for same-sex relationship recognition and equality.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). We continue to work towards the outstanding recommendations largely in area of adoption.

## ABBREVIATIONS

AIHW	Australian Institute of Health and Welfare
ART	assisted reproductive technology
CRC	Convention on the Rights of the Child
FLA	<i>Family Law Act 1975 (Cth)</i>
HREOC	Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission)
GLRL	Gay & Lesbian Rights Lobby (NSW)
ICCPR	International Covenant on Civil and Political Rights
NSWLRC	New South Wales Law Reform Commission
VLRC	Victorian Law Reform Commission

## TERMINOLOGY

In this submission, we use a range of terminology to describe parental relationships and other significant adult-child relationships. We acknowledge these terms may be confusing at first, and may not be how adults or children actually describe their relationships with each other. We are not recommending these terms be used in legislation; we simply use them to provide clarity to our discussion.

For example, many birth mothers and co-mothers do not distinguish between their roles. Similarly, some gay fathers do not like the term 'donor-dad'. However, we need to use these terms as a way of clearly indicating the legal parental status of these people.

<b>Mother</b>	Birth or legal (e.g. adoptive) mothers
<b>Co-mothers</b>	Non-birth mothers who have jointly planned, conceived and raised a child with a female partner
<b>Fathers</b>	Biological and/or legal (e.g. adoptive) fathers
<b>Co-fathers</b>	Men who are equally parenting a child from the time of birth or adoption with a male partner
<b>Co-parents</b>	Co-mother and co-fathers
<b>Step-mothers, step-fathers</b>	New partners of a parent who has had a child in a previous relationship
<b>Known donors</b>	Biological fathers through donor insemination who know, but have little involvement with, a child they have helped create
<b>Donor-dads</b>	Biological fathers who have involvement, and regular contact, with their children

# CONTENTS

<b>Abbreviations</b> .....	<b>2</b>
<b>Terminology</b> .....	<b>2</b>
<b>Recommendations</b> .....	<b>4</b>
<b>Executive summary</b> .....	<b>5</b>
<b>1. Introduction</b> .....	<b>9</b>
1.1 Types of adoption: known, local and intercountry.....	9
1.2 The scope of this submission .....	10
<b>2. Why we support legal equality for same-sex couples in adoption law</b> .....	<b>11</b>
2.1 The legal recognition of parentage.....	12
2.1.1 The effects of granting legal parentage.....	12
2.1.2 Why adoption matters for same-sex families.....	14
2.1.3 Legal parentage, rights of the child and international human rights obligations..	16
2.2 Removing discrimination against same-sex couples.....	17
<b>3. Same-sex adoption in Australia and overseas</b> .....	<b>22</b>
3.1 Australian jurisdictions .....	22
3.2 International jurisdictions.....	27
<b>4. A review of the research on same-sex parenting</b> .....	<b>29</b>
4.1 <i>Meet the parents</i> .....	29
4.2 Other reviews and positions.....	30
<b>5. Our reform proposal</b> .....	<b>32</b>
5.1 The <i>Nappies</i> process: community-initiated reform.....	32
5.2 <i>Nappies</i> enacted .....	32
5.3 The outstanding recommendations: adoption reform.....	33
5.3.1 Adoption eligibility for same-sex couples.....	34
5.3.2 Second-parent adoption .....	35
5.3.3 Multi-parent families.....	38
<b>Appendix 1: Case study – The need for same-sex step-parent adoption</b> .....	<b>42</b>
<b>Appendix 2: Grandma “Linda” speaks...</b> .....	<b>45</b>

## RECOMMENDATIONS

### **Recommendation 1:**

Change the definitions of *couple*, *de facto relationship* and *spouse* in the Dictionary of the *Adoption Act 2000* (NSW) to reflect the non-discriminatory de facto definitions in the *Property (Relationships) Act 1984* (NSW).

This will ensure same-sex couples will be eligible 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 (see **section 5.3.1**).

### **Recommendation 2:**

Introduce a new **second-parent adoption provision** similar in effect to the step-parent adoption provision under section 30 of *Adoption Act*.

The second-parent adoption provision should allow a child to be adopted by the *spouse* (as amended, see **recommendation 1**) of their parent. 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 (see **section 5.3.2**).

### **Recommendation 3:**

Consider whether changes to the *Adoption Act 2000* (NSW) could be drafted to permit co-parent adoption that granted legal status to more than two parents (see **section 5.3.3.1**).

### **Recommendation 4:**

Amend the *Births Deaths and Marriages Regulations 2006* (NSW) to allow parent(s) to name known donors of children born through assisted reproductive technology on the birth certificate. This would not raise any legal presumptions (see **section 5.3.3.4**).

# EXECUTIVE SUMMARY

## 1. INTRODUCTION

The Gay & Lesbian Rights Lobby (NSW) (“GLRL”) supports the removal of discrimination against same-sex couples in the *Adoption Act 2000* (NSW). At present, individual lesbians and gay men are permitted to apply for adoption but couple definitions in the *Adoption Act* preclude same-sex couples from being eligible to apply for adoption. The GLRL believes that, like other couples and individuals, same-sex couples should be assessed on their individual merits according to objective criteria in relation to their capacity to provide a loving and stable home to a child.

The GLRL strongly believes that the best interests of children are not furthered but in fact may be significantly hindered by discrimination against same-sex couples in the *Adoption Act*. Discrimination in adoption law denies children legal recognition of their families.

In this submission we refer to **known child adoption** (the adoption of children already in the care of their parents) and **unknown local and intercountry adoption** (the placement of a child born in Australia or overseas with a new family).

## 2. WHY WE SUPPORT ADOPTION EQUALITY FOR SAME-SEX COUPLES

Taking into account the objects of the *Adoption Act*, the GLRL strongly supports adoption equality for same-sex couples for these two primary reasons:

- The legal recognition of parentage (see **section 2.1**)
- Removing discrimination against same-sex couples (see **section 2.2**).

### 2.1 THE LEGAL RECOGNITION OF PARENTAGE

Known child adoption for same-sex couples would give same-sex parents the ability to legally formalise existing relationships with their children.

The legal recognition of parentage confers many benefits for children and their families, including automatic inheritance rights, child support obligations, and financial and emotional stability if a child’s parents separate or die (see **section 2.1.1**).

Despite significant reforms in 2008, some children with same-sex parents still do not have both of their parents legally recognised. Known child adoption is most relevant for some same-sex parents who are long-term foster carers, step-parents and co-parents (see **section 2.1.2**).

The GLRL believes that denying children the recognition of their families (and therefore denying them the benefits and protection of legal parentage), on the basis that their parents are of the same sex, may amount to a breach of Australia’s obligations under the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) (see **section 2.1.3**).

### 2.2 REMOVING DISCRIMINATION AGAINST SAME-SEX COUPLES

Adoption equality for same-sex couples would mean removing the legal anomaly which currently allows lesbian and gay *individuals* – but not same-sex *couples* – to apply for unknown

child adoption. The GLRL believes that same-sex couples should be assessed, like all couples and individuals, according to objective criteria on their ability to provide a loving and stable home to a child (see **section 2.2**).

- **Focus on the best interests of children.** The removal of discrimination against same-sex couples centres the adoption inquiry on the best interests of the child in a particular case without confusing that inquiry with irrelevant and prejudicial considerations.
- **Discrimination sends the wrong message.** Discrimination in adoption law sends the wrong message about lesbians and gay men and their risk to children. This discrimination stigmatises and offends the dignity of thousands of lesbian and gay parents, and lesbians and gay men who work with children and young people.
- **Inconsistency discourages same-sex couples from becoming foster carers.** The inconsistency between adoption law (which discriminates against same-sex couples) and child welfare laws (which allow same-sex couples to foster children) causes confusion about legal parenting rights. This acts as a barrier to potential same-sex carers who do not believe that same-sex couples are eligible to apply as foster carers.
- **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.
- **Law reform would reflect national and international developments.** Same-sex adoption reform is consistent with legal developments in Australia (in particular, the Australian Capital Territory, Western Australia and Tasmania) and overseas.
- **Same-sex adoption is not a barrier to opposite-sex couples wanting to adopt.** Allowing same-sex couple adoption will not make it harder for heterosexuals to adopt. Intercountry adoption (which accounts for over 75% of adoptions) will still not be open to same-sex couples; most sending countries with which Australia has intercountry adoption agreements only accept married couples or have otherwise very restrictive criteria. In any case, such an argument for denying same-sex couples the opportunity to apply for adoption puts the interests of potential parents before the interests of children. Children deserve to have the best parents from the widest pool of possible homes; couples should be judged on their individual merits according to objective criteria.
- **Support for same-sex adoption.** Same-sex adoption reform has the support of the NSW Law Reform Commission, Australian Human Rights Commission, Victorian Law Reform Commission and the Tasmanian Law Reform Institute.

### 3. SAME-SEX ADOPTION IN AUSTRALIA AND OVERSEAS

#### 3.1 AUSTRALIAN JURISDICTIONS

Most Australian jurisdictions have passed reforms recognising the parent-child relationships of children in same-sex families, including:

- **Western Australia (2002):** Recognition of lesbian co-mothers (who have children with their partners through assisted reproductive technology) and same-sex adoption.
- **Northern Territory (2003):** Recognition of lesbian co-mothers.
- **Tasmania (2003):** Second-parent adoption open to same-sex couples.
- **Australian Capital Territory (2004):** Recognition of lesbian co-mothers, same-sex adoption and a surrogacy parentage order scheme allowing the recognition of same-sex parents following a surrogacy arrangement.
- **New South Wales (2008):** Recognition of lesbian co-mothers.
- **Victoria (2008):** Incoming recognition of lesbian co-mothers and a surrogacy parentage order scheme allowing the recognition of same-sex parents.
- **Commonwealth (2008):** Comprehensive recognition of lesbian co-mothers, recognition of state-based surrogacy schemes and equal recognition of de facto same-sex step-parents.

In **Table 1**, we provide a summary of adoption and child welfare law in Australia in relation to same-sex couples:

- Same-sex couples are permitted to adopt in the ACT, Tasmania and Western Australia.
- Individual lesbians and gay men are permitted to apply for adoption in all Australian jurisdictions. However, some jurisdictions have general restrictions on individual adoption.
- Same-sex couples are permitted to foster children in all Australian jurisdictions (see **Table 1**).

#### 3.2 INTERNATIONAL JURISDICTIONS

International jurisdictions which permit same-sex adoption include: Belgium, Denmark, Iceland, Israel, The Netherlands, Norway, South Africa, Spain, Sweden, the United Kingdom, and several states/territories in Canada and the United States.

### 4. A REVIEW OF THE RESEARCH ON SAME-SEX PARENTING

Over the last 30 years, there has been a significant body of research into same-sex parenting and child welfare outcomes. This research clearly finds that the sexuality of a child's parents has no connection to the child's moral and cognitive development, wellbeing or happiness (see **section 4.1**).



The findings of the GLRL's research review is supported by the findings of other reviews and positions published by the Australian Psychological Society, Victorian Law Reform Commission, Canadian Department of Justice and the Australian Medical Association (see **section 4.2**).

What the research ultimately highlights is that it is not having lesbian and gay parents which is detrimental to children, it is legislation which fosters discriminatory attitudes and makes the already difficult job of parenting even harder for these families.

## 5. OUR REFORM PROPOSAL

Our reform proposal is built upon our extensive 3-year community consultation with lesbian and gay parents and experts in the field (see **section 5.1**). Our major law reform proposals have had the endorsement of the NSW Law Reform Commission and several of our previous parenting law reform recommendations have already been enacted in prior state and federal reforms (see **section 5.2**). Our proposal has three major parts:

- **Remove discrimination against same-sex couples in adoption eligibility.** Change the definitions of *couple*, *de facto relationship* and *spouse* in the Dictionary of the *Adoption Act 2000* (NSW) to reflect the non-discriminatory de facto definitions in the *Property (Relationships) Act 1984* (NSW). This will remove discrimination against same-sex couples and give same-sex partners the eligibility to apply for adoption as a couple. This will also ensure that step-parent provisions in the *Adoption Act* will apply equally to same-sex partners where they are actually in the position of a step-parent (see **section 5.3.1**).
- **Introduce a new second-parent adoption mechanism.** Whilst the 2008 reforms to parentage presumptions were an important and significant step, there are some scenarios where the presumptions cannot apply or cannot provide a remedy for previous discrimination. For same-sex parents in this position, a second-parent adoption mechanism is required which allows a child to be adopted by the spouse or de facto partner of their parent (where the existing parent(s) consent). As the NSW Law Reform Commission notes, the existing step-parent adoption provision is not appropriate or suited to this situation. Furthermore, to reduce administrative and legal costs of applying for adoption orders, the GLRL believes that there should be a presumption in favour of (or at least, no presumption against) making the adoption order where there is only one legal parent or a second parent who is consenting (see **section 5.3.2**).
- **Give further consideration to the necessity and/or desirability of legally recognising children living in multi-parent families.** Some same-sex families have complex co-parenting arrangements involving more than two parents. In some cases, these families may be poorly protected or reflected in the law, leading to financial and economic uncertainty for these children and their parents. The GLRL offers some potential future solutions for further discussion, including the possibility of multi-parent adoption, extending the role of parenting orders, auditing the adequacy of existing child-parent legal definitions, and/or introducing a new symbolic, non-legal category on birth certificates allowing a known donor to be named with the consent of the parent(s). These options are raised for further discussion and consideration (see **section 5.3.3**).

# 1. INTRODUCTION

The Gay & Lesbian Rights Lobby (NSW) ('GLRL') welcomes the opportunity to provide a submission to the *Inquiry into Adoption by Same-Sex Couples*.

This submission outlines the GLRL's position in relation to the terms of reference. Namely:

- The GLRL supports the removal of discrimination against same-sex couples in the *Adoption Act 2000* (NSW). At present, individual lesbians and gay men are permitted to apply for adoption but couple definitions in the *Adoption Act* preclude same-sex couples from being eligible to apply for adoption. The GLRL believes this legal position simply cannot be justified on any rational basis.
- The GLRL strongly believes that the best interests of children are not furthered but in fact may be significantly hindered by discrimination against same-sex couples in the *Adoption Act*. Discrimination in adoption law denies children legal recognition of their families. The GLRL supports non-discriminatory adoption mechanisms to ensure that children have their parents recognised under the law.

## 1.1 TYPES OF ADOPTION: KNOWN, LOCAL AND INTERCOUNTRY

In this submission, we speak about a few different types of adoption. Discrimination against same-sex couples in the *Adoption Act* impacts on all these types of adoption:

- **Known child adoption.** Known child adoption involves the adoption of a child who is related to, or already in the care, of their parent(s). This includes the adoption of a child by their foster carers, step-parents or co-parents. Known child adoption legally formalises an *existing* parent-child relationship.
- **Unknown child adoption (or 'stranger' adoption).** Stranger adoption involves the placement of an unrelated child with a new family. The child may be originally resident in Australia (**local adoption**) or come from overseas (**intercountry adoption**).

The most recent data on adoptions shows 125 adoptions took place in NSW in 2007-08.<sup>1</sup> Of these adoptions, 37 (30%) involved known children and 88 (70%) were stranger adoptions. Of the stranger adoptions, 15 (17%) were local adoptions and 73 (83%) were intercountry adoptions.

As will be explained in **section 2.2**, even if same-sex couples were permitted to apply for adoption in NSW, they would remain ineligible to participate in intercountry adoption programs. This is because the sending countries with which Australia has agreements generally do not allow unmarried couples to apply to adopt a child. Therefore, the issue of same-sex adoption eligibility is predominantly concerned with known child adoption and local unknown adoption only.

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<sup>1</sup> Australian Institute of Health and Welfare (AIHW) (2009) *Adoptions Australia 2007-2008*, Child welfare series no. 44, Cat no. CWS 32, Canberra: AIHW, p. 9. Available at: <[www.aihw.gov.au/publications/cws/aa07-08/aa07-08.pdf](http://www.aihw.gov.au/publications/cws/aa07-08/aa07-08.pdf)> [Accessed 6 February 2008].

## 1.2 THE SCOPE OF THIS SUBMISSION

In this submission, we address the terms of reference in the following sections:

- **Section 2** outlines our reasons for supporting equality for same-sex couples in adoption law. This section addresses Parts A, C and D of the terms of reference.
- **Section 3** provides a comparative analysis of adoption and parenting laws in Australia and overseas. This section addresses Part B of the terms of reference.
- **Section 4** summarises the current social science and psychological research literature on same-sex parenting and welfare outcomes for children. This section addresses Parts A and D of the terms of reference.
- **Section 5** outlines our recommendations for reform. This section addresses Part E of the terms of reference.

The GLRL would be pleased to provide further information or appear at a public hearing at the request of the Committee.

## 2. WHY WE SUPPORT LEGAL EQUALITY FOR SAME-SEX COUPLES IN ADOPTION LAW

This section addresses Parts A, C and D of the terms of reference.

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.

Part A of the terms of reference invites comment on whether adoption eligibility for same-sex couples would further the objects of the *Adoption Act*. We believe the objects of the *Adoption Act* which are directly relevant to this inquiry are 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) ...
- (d) to recognise the changing nature of practices of adoption,
- (e) ...
- (f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,
- (g) ...
- (h) ...
- (i) ...<sup>2</sup>

We do not believe that the issue of same-sex couple eligibility poses any new or additional considerations for the other objects which apply to adoptions more generally.

Taking into account the objects of the *Adoption Act*, the GLRL strongly supports adoption equality for same-sex couples for these two primary reasons:

- **The legal recognition of parentage.** 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 (see **section 2.1**). 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.
- **Removing discrimination against same-sex couples.** Adoption equality for same-sex couples would mean removing the legal anomaly which currently allows lesbian and gay *individuals* – but not same-sex *couples* – to apply for unknown child adoption. The GLRL believes that same-sex couples should be assessed, like all couples and individuals, according to objective criteria on their ability to provide a loving and stable home to a

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<sup>2</sup> *Adoption Act 2000* (NSW), s 7.

child (see **section 2.2**). The removal of discrimination against same-sex couples centres the adoption inquiry on the best interests of the child in a particular case without confusing that inquiry with irrelevant and prejudicial considerations. Removing discrimination against same-sex couples furthers objects (d) and (f) of the *Adoption Act*, by reflecting evolving adoption practices with respect to same-sex families (both in Australia and internationally; see **section 3**) and ensures NSW complies with international child welfare and human rights obligations, as set out in the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) (see **section 2.1.3**).

## 2.1 THE LEGAL RECOGNITION OF PARENTAGE

Apart from the common law<sup>3</sup> and statutory parentage presumptions<sup>4</sup> (or schemes<sup>5</sup>), adoption is one of the few mechanisms by which the law formalises and recognises a parent-child relationship (i.e. grants **legal parentage**). The recognition of legal parentage confers many benefits, protections and entitlements to children, their parents and other family members. The GLRL strongly believes it is the best interests of children to have the reality of their parenting circumstances legally recognised.

### 2.1.1 THE EFFECTS OF GRANTING LEGAL PARENTAGE

The legal recognition of child-parent relationships is central to the operation of many laws which regulate familial interactions. Legal recognition has profound consequences for the protection of a child's interests.

For example:

- **Legal parentage empowers parents to make welfare, developmental, educative and caring decisions on behalf of a child.** Legally-recognised parents can authorise medical treatment for a child, sign permission notes, appoint a guardian and enrol children at schools and child care centres. Legally-recognised parents are also entitled to take legal action on behalf of a child.
- **The recognition of child-parent relationships underpins a child's entitlements to their parent's inheritance and superannuation death benefits.** The legal recognition

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<sup>3</sup> Where a child is born through sexual intercourse, the legal parents are the biological mother and biological father: *ND and BM* [2003] FamCA 469.

<sup>4</sup> Where a child is born in a variety of circumstances such as through assisted reproductive technology, statutory parentage presumptions come into play to determine who are the parent(s) to that child: *Status of Children Act 1996* (NSW).

<sup>5</sup> In the ACT, a child born through surrogacy can be recognised as the child of the intended parent(s) through a surrogacy parentage order, with the consent of the surrogate mother: *Parentage Act 2004* (ACT). A surrogacy parentage order operates in a similar fashion to an adoption; it severs the legal relationship between the child and the surrogate mother (and her partner, if any) and awards it to the intended parent(s). The intended parent(s) are then fully recognised as the legal parents to that child across all territory law (*Parentage Act 2004* (ACT), s 29) and federal law (see *Family Law Act 1975* (Cth), s 60HB).

of a child-parent relationship entitles a child to automatic inheritance entitlements if their parent dies without a will.<sup>6</sup>

- **Legal parentage provides stability for a child if their parents separate.** The legal recognition of a child-parent relationship ensures that parents are responsible to their children (for example, through child support obligations upon a non-resident parent) if the parental relationship breaks down.<sup>7</sup> In parental separations, decisions relating to where a child will live and how time with the child is divided between parents are answered by first determining *who* the child's legal parents are.<sup>8</sup> Parents (including adoptive parents) have a presumption in their favour, obliging the Family Court to consider the appropriateness of granting each parent equal time with the child (or significant and substantial time) post-separation.<sup>9</sup>
- **Legal parentage provides certainty for a child if one of their parents dies.** If one parent dies, the other legal parent automatically assumes sole parental responsibility for that child.
- **The legal recognition of child-parent relationships underpins many entitlements and protections to children (and parents).** Many state and federal government entitlements and protections, such as those relating to health care, social security, taxation, superannuation, criminal law, workers' compensation and workplace entitlements, are dependent on the legal recognition of a child-parent relationship. For example, a child is entitled to workers' compensation if their parent dies whilst at work<sup>10</sup>; a parent is entitled to carer's leave if their child is injured or ill<sup>11</sup>; parents and their children are recognised as a family for the purposes of Medicare and tax rebates<sup>12</sup>, and so on. All these entitlements and protections are first premised on the legal recognition of a child-parent relationship.

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<sup>6</sup> For example, see *Probate and Administration Act 1898* (NSW), s 61B.

<sup>7</sup> For example, see duty of parents to maintain their children: *Child Support (Assessment) Act 1989* (Cth), s 3.

<sup>8</sup> For example, see *Family Law Act 1975* (Cth), s 63C (parenting plans) *contra* s 64C (parenting orders).

<sup>9</sup> *Family Law Act 1975* (Cth), s 65DAA.

<sup>10</sup> For example, see *Workers Compensation Act 1987* (NSW), ss 25(1)(b) & 25(5).

<sup>11</sup> For example, see *Workplace Relations Act 1996* (Cth), ss 240 (definition of *child*), 244 (definition of carers' leave) & 245 (guarantee of paid carers' leave).

<sup>12</sup> For example, see *Health Insurance Act 1973* (Cth), s 10AA(1)(b) (definition of *registered family* for Medicare purposes) and *Income Assessment Act 1997* (Cth), s 995.1 (definition of *child*).

### 2.1.2 WHY ADOPTION MATTERS FOR SAME-SEX FAMILIES

Until recent reforms in NSW<sup>13</sup>, most children living in same-sex families in NSW only had **one** of their parents legally recognised. This meant that children generally could not benefit from the rights and protections which stem from the legal recognition of their parents (see **section 2.1.1**).

In 2008, the NSW Government amended parentage presumptions in the *Status of Children Act 1996* (NSW) to grant legal parentage to the lesbian co-mother of a child born through assisted reproductive technology (ART). In NSW, where a child is born through ART to a woman with a female de facto partner who consented to the ART procedure, both of these women are now recognised as the legal parents of that child in law<sup>14</sup>, and on the child's birth certificate.<sup>15</sup> The GLRL strongly advocated for these changes which provide legal recognition to a vast number of same-sex families.<sup>16</sup>

However, these parentage presumptions are limited in their scope as they only apply to children born through ART to *lesbian* couples who consented to a fertilisation procedure at the *time of conception*. Therefore, despite the broad coverage of these presumptions, some same-sex families are still **not** covered by these new parentage presumptions. For these same-sex families, adoption reform is the **only** way in which both same-sex parents can be legally recognised as the legal parents of their children.

In particular, adoption reform is important for:

- **Long-term foster carers.** In NSW, there is no barrier to same-sex couples becoming foster carers.<sup>17</sup> Indeed, several foster care agencies have actively sought same-sex couples for many years to redress the shortage of foster carers.<sup>18</sup> If a child is in the long-term care of a same-sex couple, that couple can be awarded sole parental responsibility for that child.<sup>19</sup> However, once the child turns 18, there is no legal mechanism to formalise the relationship between same-sex foster parents and their adult children. The ability of same-sex couples to adopt as a couple would provide such a mechanism to long-term foster carers. This would mean that these children would no longer miss out on all the benefits conferred by legal parentage, both in childhood and adulthood. Same-sex couple adoption in such a case would reinforce the position of adoption as a child-

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<sup>13</sup> *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), Schedule 2.

<sup>14</sup> In all NSW laws and, by virtue of s 60H in the *Family Law Act* and related amendments, federal laws.

<sup>15</sup> *Status of Children Act 1996* (NSW), s 14(1A).

<sup>16</sup> See Jenni Millbank (2003) *And Then... The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of our Relationships with the Children we Raise*, Final Report, Sydney: GLRL.

<sup>17</sup> See the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

<sup>18</sup> Erin O'Dwyer (2005) 'Same-sex couples enlisted to solve foster-parent crisis', *Sun-Herald*, 2 October. Available at: <[www.smh.com.au/news/national/samesex-couples-enlisted-to-solve-fosterparent-crisis/2005/10/01/1127804697500.html](http://www.smh.com.au/news/national/samesex-couples-enlisted-to-solve-fosterparent-crisis/2005/10/01/1127804697500.html)> [Accessed 23 January 2009].

<sup>19</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 149(1) & 149(2).

centred service which protects the best interests of children both in childhood and into adulthood.

- **Migrating families.** Same-sex couples who have had or adopted children in interstate or overseas jurisdictions that do not recognise two parents of the same sex may apply for adoption orders to recognise the second parent once they live in NSW. This allows a birth certificate to be re-issued that recognises both parents. Again, same-sex couple adoption in such a circumstance would confer onto these children the benefits of legal parentage.
- **Step-parents.** Under the *Adoption Act*, heterosexual step-parents can currently apply to adopt a partner's child in certain circumstances.<sup>20</sup> Where a child already has two legal parents there is a general presumption against step-parent adoption as it would sever the rights of one of the existing parents.<sup>21</sup> However, in appropriate circumstances, step-parent adoption could allow a step-parent to formalise the relationship with their child and confer onto the child the benefits of full legal parentage.

The case study, *Re F & D* (2005) 33 Fam LR 568, provides an excellent example of a situation where same-sex step-parent adoption would be particularly beneficial to children and their families (see **Appendix 1**). In *Re F & D*, the mother of three children had died many years earlier; the father and the father's new male partner were parenting the children of the marriage. As a result of their mother's death, the children only had one legal parent – their father. In this case, a parenting order for joint parental responsibility was given by the Family Court to recognise the step-father's role in the children's lives. The parenting order did not make the step-father a legal parent, but it conferred more limited rights relating to parental responsibility. However, if same-sex step-parent adoption were available, the couple could have pursued this avenue instead. Adoption would have then given a durable legal parental status to the step-father generally across all state and federal law, which continued after the children reached adulthood. By contrast, parenting orders expire once a child turns 18 and do not confer all the advantages of full parental recognition, such as inheritance rights for children. For more information on the legal differences between parenting orders and adoptions see **Table 2 in Appendix 1** of this submission.

Where children are already living in same-sex families, permitting same-sex couple adoption would further objects (a) and (b) of the *Adoption Act*, by providing a potential mechanism to confer upon those children all the benefits of having two legally-recognised parents. Unlike parenting orders, these benefits and protections would apply when the child is a minor and after the child becomes an adult.

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<sup>20</sup> *Adoption Act 2000* (NSW), s 30.

<sup>21</sup> *Adoption Act 2000* (NSW), s 30(c) & (d).



### 2.1.3 LEGAL PARENTAGE, RIGHTS OF THE CHILD AND INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The GLRL agrees with the Australian Human Rights Commission that denying a child the legal recognition of their parents may interfere with fully realising that child's human rights under the Convention on the Rights of the Child (CRC).<sup>22</sup> In particular, blanket discrimination against same-sex couples in adoption law 'prevents an objective case-by-case assessment of what is in an individual child's best interests', and therefore may breach Australia's obligations under the CRC.<sup>23</sup>

Article 2(2) of the CRC specifically states that a child should be protected from all forms of discrimination on the basis of the *status*, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. The Australian Human Rights Commission is of the view that the 'status' of a child's parents, includes the sexual orientation of the child's parents.<sup>24</sup> 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.

The UN Committee on the Rights of the Child, which monitors the implementation of the CRC, has further articulated that young children in particular need especial protection where they are born to 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 discrimination *in whatever forms it takes and wherever it occurs* - within families, communities, schools or other institutions.<sup>25</sup>

International human rights law also recognises the rights of families to protection by society and the State.<sup>26</sup> The UN Human Rights Committee, which monitors the ICCPR, specifically says that there is no international definition of 'family' - but that the concept of family can include

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<sup>22</sup> Human Rights & Equal Opportunity Commission (HREOC) (2007) *Same-Sex: Same Entitlements - National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC, pp. 47-51.

<sup>23</sup> HREOC, n22 above, p. 51.

<sup>24</sup> HREOC, n22 above, p. 48. The UN Committee on the Rights of the Child has further articulated that discrimination against children on the basis of sexual orientation is discrimination for the purposes of article 2 of CRC: Committee on the Rights of the Child (2003) *General Comment No. 3: HIV/AIDS and the Rights of the Child* (32<sup>nd</sup> Session), para. [6].

<sup>25</sup> Committee on the Rights of the Child (2005) *General Comment No. 7: Implementing Child Rights in Early Childhood* (41<sup>st</sup> Session), para. [12] [our emphasis].

<sup>26</sup> ICCPR, art 23(1).

unmarried couples and their children, single parents and their children, as well as nuclear and extended families *where these are recognised as a family* by a State:

The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. *However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.* Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, "nuclear" and "extended", exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.<sup>27</sup>

In all Australian jurisdictions, including in the area of family law (such as the *Property (Relationships) Act 1984* (NSW) and the *Family Law Act 1975* (Cth)), Australia recognises that same-sex couples are comparable to heterosexual de facto couples (see **section 3**). As such, it is clear that NSW and Commonwealth law recognises same-sex couples and their children as a familial group, and therefore same-sex families arguably have the protection of article 23(1) of the ICCPR.

The GLRL believes that a blanket exclusion on same-sex couples from being able to adopt children in their care is a breach of Australia's obligations under the CRC and the ICCPR. Therefore, rather than ensuring adoption law meets its stated objective of complying with Australia's international treaty obligations, discrimination against same-sex couples in the *Adoption Act* actually stands in the way of this particular object of the Act.

## 2.2 REMOVING DISCRIMINATION AGAINST SAME-SEX COUPLES

Apart from providing a legal mechanism for the recognition of child-parent relationships already in existence, adoption is also a process for finding children new adoptive families. The *Adoption Act* currently bars same-sex couples from applying as a couple to be assessed for an adoption placement. Curiously, there is no such barrier on gay and lesbian *individuals*.<sup>28</sup> The GLRL believes this discrimination against same-sex couples is thus arbitrary and irrational.

The GLRL notes that, consistent with the objects of the *Adoption Act*, no adult has the right to adopt a child.<sup>29</sup> Adoption is not a service for adults – whether gay or straight – but a service for the child concerned.<sup>30</sup> Therefore, the debate about same-sex adoption is not about the *right to*

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<sup>27</sup> UN Human Rights Committee (1990) *General Comment No. 19: Protection of the Family, The Right to Marriage and Equality of Spouses (Art 23)* (39th session), para. [2] [our emphasis].

<sup>28</sup> *Adoption Act 2000* (NSW), s 27.

<sup>29</sup> *Adoption Act 2000* (NSW), s 8(1)(c).

<sup>30</sup> *Id*, s 8(1)(b).

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.

The GLRL acknowledges that even if permitted, unknown child adoption by same-sex couples is likely to be rare. As the data shows, there are very few children available for adoption in Australia overall.<sup>31</sup> Furthermore, to the best of our knowledge, same-sex couples cannot take advantage of intercountry adoption programs at present, as no sending country with which Australia has an intercountry adoption agreement currently allows same-sex de facto couples to be placed with a child. Many sending countries have very stringent (and in many cases, discriminatory) health, age and personal status requirements that would preclude many Australians, let alone gay and lesbian Australians from being eligible to adopt a child.<sup>32</sup>

Nevertheless, the GLRL calls strongly for the removal of discrimination against same-sex couples in adoption eligibility criteria for these reasons:

- **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. This discrimination is arguably in breach of Australia's international obligations under the ICCPR<sup>33</sup> and therefore is a barrier to fully realising object (f) of the *Adoption Act*. 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. Sexual orientation is simply not a determinant of whether a person makes a good parent (see **section 4**).

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<sup>31</sup> AIWH, n1 above.

<sup>32</sup> The Commonwealth Attorney-General's Department lists the intercountry adoption programs available to Australian citizens and eligibility criteria for each: <[www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption\\_Currentintercountryadoptionprograms](http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_Currentintercountryadoptionprograms)> [Accessed 16 January 2008]. For example, the following classes of persons are *ineligible* to apply under each of this intercountry adoption programs:

- China: single people or de facto couples, Jehovah's Witness followers, people with a history of cancer, blindness, binaural hearing loss or 'limb or trunk dysfunction' are ineligible to apply.
- Philippines: non- Christians and atheists are ineligible to apply.
- Thailand: only married couples (or single female applicants who want to be placed with a 'special needs child') are eligible to apply.

<sup>33</sup> The UN Human Rights Committee decisions in *Young* and *X* emphasise that where same-sex de facto couples are denied equality with heterosexual de facto couples for no legitimate or justifiable reason that discrimination will be in breach of article 26 of the ICCPR (the right to equality before the law). *Young v Australia* [2003] CCPR/C/78/D/941/2000 (18 September 2003), para. [10.4]; *X v Columbia* [2007] CCPR/C/89/D/1361/2005 (14 May 2007), para [7.2]; see also HREOC, n22 above, pp. 42-44.

- **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<sup>34</sup>, 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.
- **Same-sex couples are foster carers.** In NSW, same-sex couples may become authorised as foster carers and many same-sex couples are in fact in the care of foster children. However, many 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.
- **The option of a same-sex couple family should be available to relinquishing parents.** Relinquishing parents and families are intricately involved in the adoption process. Relinquishing parents and families are consulted on where their children will ultimately be placed. Relinquishing parents are also involved in formulating an adoption plan, which may include contact with the child and his or her adoptive parents.<sup>35</sup> As such, the adoption process is guided by the consent and wishes of the relinquishing parent(s) (and the child, if possible). 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.

For example, in 2007, two gay men in Western Australia were chosen to be the adoptive parents by a child's birth family. In a radio interview, Grandma "Linda", the birth grandmother of the child, explained why her daughter chose this couple as the adoptive parents:

We all wanted to look at the best choices for the child. So then, talking to the adoption agency [...] they gave us a list of people. We were able to check on their circumstances. And for my husband and myself, [...] our parents didn't love us. And we wanted the best thing for him; someone that would love and treasure him. We looked at this gay couple and we found that they had a huge supporting family; grandmothers, aunts, uncles, sisters, brothers. [...]

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<sup>34</sup> Australian Bureau of Statistics (ABS) (2005) 'Same-sex couple families', *Year Book Australia*, Catalogue No. 1301.0, Canberra: ABS, p. 142; Jenni Millbank (2002) *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, Sydney: GLRL, p. 21.

<sup>35</sup> *Adoption Act 2000* (NSW), s 46.

Now, since he's been with them – this has been quite a while – he has come along in leaps and bounds. He is doing so well. He is a happy, laughing boy.<sup>36</sup>

See **Appendix 2** for a full transcript of the interview with Grandma “Linda”.

- **Same-sex adoption reform is consistent with legal developments in Australia and elsewhere.** 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.<sup>37</sup> The ACT and WA currently allow same-sex couples to apply for both unknown and known child adoption<sup>38</sup>, whilst Tasmania allows same-sex partners to adopt a partner's child.<sup>39</sup> Overall, NSW, ACT, WA, NT, Tasmania and Victoria have either full or some recognition of same-sex families (see **section 3.1**). Internationally, many comparable countries now also allow same-sex adoption (see **section 3.2**).
- **Allowing same-sex couple adoption will not make it harder for heterosexual couples to adopt.** During parliamentary debate on the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), one Member expressed concern that allowing same-sex couples the ability to apply for adoption could make the process more difficult for heterosexual couples as there were few children available.<sup>40</sup> Whilst it is true that few children are adopted each year, allowing same-sex couples to adopt will not make it harder for heterosexual couples to adopt. Firstly, lesbian and gay individuals are already eligible to apply to be assessed for adoption. Therefore, lesbian and gay people are *already* in the pool of eligible persons to apply for adoption, but simply, not as *couples*.

Secondly, it is important to emphasise that same-sex de facto couples only account for approximately 0.7 per cent (9,724 out of 1,379,666) of all married and de facto couples

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<sup>36</sup> Interview with “Linda” on Mornings with Geoff Hutchinson, *ABC Perth Radio*, 15 June 2007.

<sup>37</sup> See for example, *Property (Relationships) Legislation Amendment Act 1999* (NSW) and *Miscellaneous Acts Amendment (Same Sex Relationships) Bill 2008* (NSW).

<sup>38</sup> *Adoption Act 1994* (WA), ss 38(2) & 39(1)(e); *Adoption Act 1993* (ACT), s 18(1).

<sup>39</sup> *Adoption Act 1997* (Tas), ss 20(1) & 20(2A).

<sup>40</sup> New South Wales (2008) *Hansard*, Legislative Assembly, 4 June, p. 8211.

**Ms Katrina Hodgkinson** (Shadow Minister for Community Services): I also talked to the lobby about the adoption of children who are not known to people living in a gay relationship. I said that I would be uncomfortable for gay people to adopt children that they did not know because heterosexual couples had so much difficulty in going through adoption. I do not believe precedence should be given to gay couples to adopt unknown children. However, if the child is a part of their family or is known to them and already has a relationship with one member of the couple, go for it. That is great. If the child is living in a happy and stable home, it is wonderful. We could not really ask for any more than the happy and safe upbringing of a child.

in NSW.<sup>41</sup> Furthermore, a couple must be living together continuously for 3 years before they are able to apply for adoption.<sup>42</sup>

Thirdly, even if same-sex couples were eligible to adopt in NSW, they will not have access to intercountry avenues of adoption at present. To the best of our knowledge, all existing sending countries with which Australia has adoption agreements do not allow same-sex couples to be placed with children. With over 75 per cent of adoptions now involving children adopted from overseas, the majority of adoptions will continue to only consist of married couples.<sup>43</sup>

Fourthly, as noted before, relinquishing parents generally choose with whom their child will be placed. Making same-sex couples eligible to apply for adoption simply gives relinquishing parents added choice; it does not force them to give their child to any particular set of parents.

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.

- **Removing same-sex discrimination in adoption law is supported by several law reform bodies.** Since 1997, law reform bodies in Australia have supported the removal of discrimination against same-sex couples in adoption, including:
  - NSW Law Reform Commission (1997)<sup>44</sup> and (2006)<sup>45</sup>,
  - Australian Human Rights Commission (2007)<sup>46</sup>,
  - Victorian Human Rights Commission (2007)<sup>47</sup>, and
  - Tasmania Law Reform Institute (2003)<sup>48</sup>.

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<sup>41</sup> ABS (2007) *2006 Census of Population and Housing* [unpublished data]. Available at: <[www.coalitionforequality.org.au/2006census.pdf](http://www.coalitionforequality.org.au/2006census.pdf)> [Accessed 14 January 2009].

<sup>42</sup> *Adoption Act 2000* (NSW), s 28(4).

<sup>43</sup> 96.3 per cent of all intercountry adoptions in Australia in 2007-08 were by married couples: AIHW, n1, p. 17.

<sup>44</sup> NSW Law Reform Commission (NSWLRC) (1997) *Review of the Adoption of Children Act 1965* (NSW), Report No. 81, Sydney: NSWLRC, para. [6.119]-[6.123].

<sup>45</sup> NSWLRC (2006) *Relationships*, Report No. 113, Sydney: NSWLRC, p. 118.

<sup>46</sup> HREOC, n22 above, pp. 107-108.

<sup>47</sup> Victorian Law Reform Commission (VLRC) (2007) *Assisted Reproductive Technology and Adoption*, Final Report, Melbourne: VLRC, pp. 106-109.

### 3. SAME-SEX ADOPTION IN AUSTRALIA AND OVERSEAS

This section addresses part B of the terms of reference.

In just over one decade, every Australian legal jurisdiction has passed wide-reaching reforms to remove discrimination against same-sex couples.<sup>49</sup> Beginning in 1999 in NSW with the first comprehensive recognition of same-sex de facto couples<sup>50</sup>, all Australian states, territories and the Commonwealth now recognise same-sex de facto couples equally with heterosexual de facto couples.<sup>51</sup> These reforms mirror developments internationally in numerous jurisdictions since the late 1980s.<sup>52</sup>

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 (see section 2.1.1).

#### 3.1 AUSTRALIAN JURISDICTIONS

In Australia, same-sex adoption is allowed in the ACT, Western Australia and Tasmania. Most Australian jurisdictions have passed reforms recognising parent-child relationships for children in same-sex families:

- **Western Australia** introduced reforms to parentage presumptions and adoption laws in 2002.<sup>53</sup> Lesbian co-mothers of children born through ART are automatically ascribed parental status and are listed as parents on a child's birth certificate.<sup>54</sup> Same-sex couples are eligible to apply for adoption.<sup>55</sup>

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<sup>48</sup> Tasmania Law Reform Institute (2003) *Adoption by Same-Sex Couples*, Final Report No. 2, Sandy Bay: University of Hobart. Available at: <[www.law.utas.edu.au/reform/docs/AdoptionFinRepA4.pdf](http://www.law.utas.edu.au/reform/docs/AdoptionFinRepA4.pdf)> [Accessed 2 February 2009].

<sup>49</sup> Jenni Millbank (2006) 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples', 34(1) *Federal Law Review* 1.

<sup>50</sup> *Property (Relationships) Legislation Amendment Act 1999* (NSW).

<sup>51</sup> HREOC, n22 above, pp. 69-73.

<sup>52</sup> Comprehensive recognition of same-sex partners began with the passage of the *Registered Partnership Act 1989* (Denmark). Similar reforms have occurred since in many developed and developing nations.

<sup>53</sup> *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA).

<sup>54</sup> *Artificial Conception Act 1984* (WA), s 6A.

<sup>55</sup> *Adoption Act 1994* (WA), ss 38(2), 39(1)(e).

- The **Northern Territory** introduced reforms to parentage presumptions in 2003.<sup>56</sup> Lesbian co-mothers of children born through ART are automatically ascribed parental status and are listed as parents on a child's birth certificate.<sup>57</sup>
- **Tasmania** introduced reforms to adoption laws in 2003.<sup>58</sup> Same-sex couples who have registered their relationship in Tasmania are eligible to adopt a partner's child or a child which is a relative of either partner.<sup>59</sup>
- The **Australian Capital Territory** introduced reforms to parentage presumptions, surrogacy parentage orders and adoption laws in 2004.<sup>60</sup> Lesbian co-mothers of children born through ART are automatically ascribed parental status and are listed as parents on a child's birth certificate.<sup>61</sup> Same-sex couples are eligible to apply for adoption.<sup>62</sup> A consenting surrogate mother and her partner (if any) can relinquish their parental rights in favour of a same-sex couple after a child is born via an altruistic surrogacy arrangement.<sup>63</sup>
- **New South Wales** introduced reforms to parentage presumptions in 2008.<sup>64</sup> Lesbian co-mothers of children born through ART are automatically ascribed parental status and are listed as parents on a child's birth certificate.<sup>65</sup>
- The **Commonwealth** introduced reforms to parent-child definitions across federal law in 2008.<sup>66</sup> Lesbian co-mothers of children born through ART are automatically ascribed parental status via a parentage presumption in the *Family Law Act 1975* (Cth) ('FLA').<sup>67</sup>

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<sup>56</sup> *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT).

<sup>57</sup> *Status of Children Act 1979* (NT), s 5DA.

<sup>58</sup> *Relationships (Consequential Amendments) Act 2003* (Tas).

<sup>59</sup> *Adoption Act 1988* (Tas), s 20(2A).

<sup>60</sup> *Parentage Act 2004* (ACT).

<sup>61</sup> *Parentage Act 2004* (ACT), s 11.

<sup>62</sup> *Adoption Act 1993* (ACT), s 18(1)(b).

<sup>63</sup> *Parentage Act 2004* (ACT), ss 24(c), 25(2).

<sup>64</sup> *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW).

<sup>65</sup> *Status of Children Act 1996* (NSW), s 14(1A).

<sup>66</sup> *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) and *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

<sup>67</sup> *Family Law Act 1975* (Cth), s 60H.



Parents of children born through surrogacy arrangements which are recognised via a state or territory surrogacy scheme (such as the *Parentage Act* scheme in the ACT) are also automatically ascribed parental status via a parentage presumption in the FLA.<sup>68</sup> Widespread reforms have now cross-referenced these parentage presumptions relating to ART and surrogacy across all significant areas of federal law, including superannuation, immigration, taxation, health care and child support.<sup>69</sup> Same-sex de facto step-parents are recognised equally in the FLA<sup>70</sup> and everywhere else where married step-parents are recognised.

- **Victoria** introduced reforms to parentage presumptions and surrogacy laws in 2008.<sup>71</sup> Lesbian co-mothers of children born through ART will be automatically ascribed parental status and will be listed as parents on a child's birth certificate as soon as the laws commence.<sup>72</sup> A consenting surrogate mother and her partner (if any) will also be able to relinquish their parental rights in favour of a same-sex couple after a child is born via an altruistic surrogacy arrangement.<sup>73</sup>
- **Queensland** and **South Australia** have had no reforms in relation to same-sex parenting to date. However, many families in these states are recognised by parentage presumptions and definitions at the federal level (see '**Commonwealth**' above).

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<sup>68</sup> *Family Law Act 1975* (Cth), s 60HB.

<sup>69</sup> See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth).

<sup>70</sup> *Family Law Act 1975* (Cth), s 4(1) (definition of *step-parent*).

<sup>71</sup> *Assisted Reproductive Treatment Act 2008* (Vic).

<sup>72</sup> *Status of Children Act 1974* (Vic), ss 13, 14 [not yet commenced].

<sup>73</sup> *Status of Children Act 1974* (Vic), ss 17(1), 22(1) [not yet commenced].

<b>Table 1: Australia – same-sex adoption and foster carer eligibility</b>		
<b>Jurisdiction</b>	<b>Are gays and lesbians eligible to apply for adoption?</b>	<b>Are gay and lesbian couples eligible to apply to become foster carers?<sup>74</sup></b>
New South Wales	<b>Same-sex couples – no:</b> <i>Adoption Act 2000</i> (NSW), s 28. The definition of ‘couple’ includes married and de facto heterosexual couples: <i>Adoption Act</i> , Dictionary. <b>Individual gays and lesbians – yes:</b> <i>Adoption Act 2000</i> , s 27.	<b>Yes.</b> If a child is in long term care, same-sex couples can also be awarded sole parental responsibility for a child in their care: <i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW), s 149(2).
Victoria	<b>Same-sex couples – no:</b> <i>Adoption Act 1984</i> (Vic), s 11(1). The definition of couples includes Aboriginal customary marriages, and married and de facto heterosexual couples: s 4. <b>Individual gays and lesbians – yes:</b> <i>Adoption Act 1984</i> (Vic), s 11(3). However, single person adoption is only permitted in ‘special circumstances’: s 11(3).	<b>Yes.</b> Permanent care orders can also be made in favour of same-sex couples: <i>Children, Youth and Families Act 2005</i> (Vic), s 319(1).
Queensland	<b>Same-sex couples – no:</b> <i>Adoption of Children Act 1964</i> (Qld), s 12(1). The definition of ‘spouse’ only includes married partners, not de facto partners (irrespective of gender): s 67A. <b>Individual gays and lesbians – yes:</b> <i>Adoption of Children Act 1964</i> (Qld), s 12(3). However, sole person adoption is only permitted in ‘exceptional circumstances’, such as where a ‘special needs’ child: s 12(3)(b) & (c).	<b>Yes:</b> <i>Child Protection Act 1999</i> (Qld), ss 131 – 135; cf <i>Acts Interpretation Act 1954</i> (Qld), ss 32DA, 36 (definition of ‘spouse’ and ‘de facto partner’). Long-term guardianship orders can also be made in favour of same-sex couples in relation to a child in their care: <i>Child Protection Act 1999</i> , s 61(f).

<sup>74</sup> This table considers the legislative provisions regulating the provision of foster care services. It reports on whether there are any legislative barriers to same-sex couples being foster carers. There may other barriers not present in the face of the legislation which prevents same-sex couples from actually becoming foster carers, such as hostile attitudes or discriminatory foster care agencies.

Western Australia	<p><b>Same-sex couples – yes:</b> <i>Adoption Act 1994 (WA)</i>, ss 38(2), 39(1)(e). The couple definition includes married, and de facto couples (irrespective of gender).</p> <p><b>Individual gays and lesbians – yes:</b> <i>Adoption Act 1994 (WA)</i>, s 38(2).</p>	<p><b>Yes.</b> An order for enduring parental responsibility can be made in favour of same-sex couples for a child in need of protection: <i>Children and Community Services Act 2004 (WA)</i>, s 60(1).</p>
South Australia	<p><b>Same-sex couples – no:</b> <i>Adoption Act 1988 (SA)</i>, ss 12(1). The definition of ‘married relationship’ only includes married couples or heterosexual de facto couples: s 4(1).</p> <p><b>Individual gays and lesbians – yes:</b> <i>Adoption Act 1988</i>, s 12(3). However, sole person adoption is only permitted in ‘special circumstances’: s 12(3)(b).</p>	<p><b>Yes:</b> <i>Family and Community Services Act 1972 (SA)</i>, ss 6(1), 41-42. A guardianship order can be made in favour of any one or two persons as the court think appropriate: <i>Children’s Protection Act 1993 (SA)</i>, s 38(1)(d).</p>
Tasmania	<p><b>Same-sex couples – partly:</b> <i>Adoption Act 1997 (Tas)</i>, ss 20(1), 20(2A). Same-sex couples who have registered their ‘significant relationship’ within the meaning of the <i>Relationships Act 2003 (Tas)</i> may adopt the natural or adoptive child of their partner, or a child which is a relative of one of the partners: s 20(2A).</p> <p><b>Individual gays and lesbians – yes:</b> <i>Adoption Act 1997 (Tas)</i>, s 20(4). However, sole person adoption is only permitted in ‘exceptional circumstances’: s 20(4).</p>	<p><b>Yes.</b> A long-term care and protection order can made in favour of one or two persons ‘as the Court considers appropriate in the circumstances’: <i>Children, Young Persons and Their Families Act 1997 (Tas)</i>, s 42(4)(d).</p>
Australian Capital Territory	<p><b>Same-sex couples – yes:</b> <i>Adoption Act 1993 (ACT)</i>, s 18(1) (adoption by people in ‘domestic partnership’). ‘Domestic partnership’ includes marriage, civil partnership (irrespective of gender) or de facto partners (irrespective of gender): <i>Legislation Act 2001 (ACT)</i>, s 169.</p> <p><b>Individuals gays and lesbians – yes:</b> <i>Adoption Act 1993</i>, s 18(3).</p>	<p><b>Yes.</b> An order for enduring parental responsibility can be made in favour of any person in certain circumstances: <i>Children and Young People Act 2008 (ACT)</i>, s 482.</p>

	However, sole person adoption is only permitted after having regard to the wishes of the birth parents: s 18(3).	
Northern Territory	<p><b>Same-sex couples - no:</b> <i>Adoption of Children Act 1994</i> (NT), s 13(1). The couple definition only includes married couples and couples married according to customary Aboriginal law: s 3.</p> <p><b>Individual gays and lesbians - yes:</b> s 14(1). However, sole person adoption is only permitted in 'exceptional circumstances': s 14(1)(b).</p>	<p><b>Yes.</b> A protection order, including a long-term parental responsibility direction, can be made in favour of any person in certain circumstances: <i>Care and Protection of Children Act 2007</i> (NT), s 128-130.</p>

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*Case Study: Same-sex adoption in Western Australia*

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*Five years following the same-sex reforms in Western Australia, the Former Western Australian Attorney-General **Jim McGinty** had this to say about same-sex adoption law reform...*

*We wanted to get rid of irrelevant considerations, old prejudices, we wanted to make sure that child was first and centre when it came to adoption and we wanted the only criteria to be the child's interests and that is what the legislation now reflects.*

*I don't think a person's sexual orientation in any way at all influences or determines their capacity to love a child, to support that child and to bring it into a caring environment.<sup>75</sup>*

*Prior to the 2008 state election, the Western Australian **Premier Colin Barnett** was asked whether the new Coalition government would rollback gay law reform (including same-sex adoption) in Western Australia. The now-Premier said...*

*No, we are not proposing to change the legislation. I think it has worked well and I have had no complaints. I did have some concerns about some parts of it, but I have not seen any adverse consequence.<sup>76</sup>*

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<sup>75</sup> Author unknown (2007) 'A-G defends gay adoption', *ABC News*, 14 June. Available at: <[www.abc.net.au/news/newsitems/200706/s1950882.htm](http://www.abc.net.au/news/newsitems/200706/s1950882.htm)> [Accessed 12 January 2009].

<sup>76</sup> Gay and Lesbian Equality (WA) (2008) 'Lobby welcomes Barnett's support for gay laws' (press release), 22 August. Available at: <[galewa.asn.au/index.php?option=com\\_content&task=view&id=617&Itemid=70](http://galewa.asn.au/index.php?option=com_content&task=view&id=617&Itemid=70)> [6 February 2009].

### 3.2 INTERNATIONAL JURISDICTIONS

The following comparable countries allow same-sex adoption:

- Belgium (since 2006)
- Denmark (1999)<sup>77</sup>
- Iceland (2000)<sup>78</sup>
- Israel (2008)<sup>79</sup>
- The Netherlands (2001)<sup>80</sup>
- Norway (2002)<sup>81</sup>
- South Africa (2003)<sup>82</sup>
- Spain (2004)
- Sweden (2003)<sup>83</sup>
- United Kingdom (2002, commenced in 2005)<sup>84</sup>
- Several provinces and territories of Canada<sup>85</sup>, and
- Several states the United States<sup>86, 87</sup>

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<sup>77</sup> *Registered Partnership Act 1989* (Denmark), s 4(1).

<sup>78</sup> *Act on Registered Partnership 1996* (Iceland), art 6.

<sup>79</sup> Reuters (2008) 'Israel to expand same-sex adoption rights', 10 February. Available at: <[in.reuters.com/article/worldNews/idINIndia-31865020080210](http://in.reuters.com/article/worldNews/idINIndia-31865020080210)> [Accessed 2 February 2009].

<sup>80</sup> *Civil Code, Book 1* (Netherlands).

<sup>81</sup> *Registered Partnership Act 1993* (Norway), s 4.

<sup>82</sup> *Du Toit v Minister for Welfare and Population Development* (2003) 4 CHRLD 21.

<sup>83</sup> *Registered Partnerships Act* (SFS 1994:1117) (Sweden), ch 3, s 1.

<sup>84</sup> *Adoption and Children Act 2002* (UK).

<sup>85</sup> *Adoption Act* RSBC 1996 c. 5 (British Columbia); *The Charter Compliance Act* SM 2002 c. 24 (Manitoba); *Child Welfare Act* RSA 2000 c. C-12 (Alberta); *Adoption Act* SNL 1999 c. A-2.1 (Newfoundland); *Adoption Act* SNWT 1998 c. 9 (Northwest Territories); *SCM and NCJ* (2001) 202 DLR (4th) 172 (regarding Nova Scotia); *Child and Family Services Act* RSO 1990 c. C.11 (Ontario) (see also *Re K* (1995) 23 OR (3d) 679 regarding Ontario); *Civil Code of Quebec* SQ 1991 c. 64 (Quebec); *Adoption Act* SS 1998 c. A-5.2 (Saskatchewan).

<sup>86</sup> Including California, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania and Vermont. See *Vermont Stat Ann Tit 15A 1-102(b)* (*Supp 2000*) (Vermont); *California Family Code* §9000(f) (California); *Connecticut Gen Stat* 45a-724(3).

<sup>87</sup> See NSWLRC, n45 above, p. 118.

## 4. A REVIEW OF THE RESEARCH ON SAME-SEX PARENTING

This section addresses Parts A and D of the terms of reference.

Over the last 30 years, there has been a significant body of research into same-sex parenting and child welfare outcomes. This research clearly finds that the sexuality of a child's parents has no connection to the child's moral and cognitive development, wellbeing or happiness. When comparing children of heterosexual parents to children of lesbians and gay men no significant differences have been found in welfare or developmental outcomes.

### 4.1 MEET THE PARENTS

In 2002, the GLRL released its report, *Meet the Parents*, reviewing social science and psychological research spanning 25 years.<sup>88</sup> The report convincingly showed that the children of lesbians and gay men do not demonstrate any important differences in child welfare outcomes. The report emphasised that the sexuality or gender of the parent(s) had no bearing on children's wellbeing. Rather, the happiness of the relationship between adults in the household, and the openness of warmth and communication between adult/s and the children did have a major impact on children.<sup>89</sup>

Children raised by gays and lesbians showed no discernible differences with regards to:

- Levels of happiness, satisfaction with life and social adjustment,
- Teasing or ostracism, quality of friendships, popularity, sociability or social acceptance,
- Anxiety or depression, psychiatric state or levels of self esteem,
- Moral and cognitive development,
- Gender/sex role identification, or
- Sexual orientation.<sup>90</sup>

In some cases, children parented by same-sex couples have even demonstrated better development outcomes than those raised in other familial structures. Some research suggests that children benefit from seeing a more equitable division of paid and unpaid domestic labour characteristic of same-sex partnerships. Children may also develop more empathetic attitudes

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<sup>88</sup> Millbank, n34 above, pp. 37-50.

<sup>89</sup> Millbank, n34 above, pp. 46-49.

<sup>90</sup> Mike Allan & Nancy Burrell (1996) 'Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research', *Journal of Homosexuality* 32(2): 19; Charlotte Patterson (1992) 'Children of Lesbian and Gay Parents', *Child Development* 63: 1025; Fiona Tasker & Susan Golombok (1996) 'Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families', *Developmental Psychology* 32: 3; Fiona Tasker & Susan Golombok (1997) *Growing Up in a Lesbian Family*, New York: Guildford Press.

towards other social difference.<sup>91</sup> Lesbian and gay parents have also been found to use less physical discipline than other parents.<sup>92</sup>

## 4.2 OTHER REVIEWS AND POSITIONS

Since our 2002 report, several other organisations and individuals have conducted their own reviews of the social research into same-sex parenting. All of these reviews have found that children with lesbian and gay parents are not disadvantaged in terms of child development and welfare outcomes:

- **Australian Psychological Society.** In 2007, the Australian Psychological Society published its own review of the literature into same-sex parenting. It stated:

[T]he family studies literature indicates that it is family *processes* (such as the quality of parenting and relationships within the family) that contribute to determining children's wellbeing and 'outcomes', rather than family *structures*, per se, such as the number, gender, sexuality and co-habitation status of parents. The research indicates that parenting practices and children's outcomes 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 considerable legal discrimination and inequity remain significant challenges for these families.<sup>93</sup>

- **Victorian Law Reform Commission.** In 2004, Dr Ruth McNair completed an occasional paper for the VLRC Inquiry into Assisted Reproductive Technology and Adoption.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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<sup>91</sup> Lisa Saffron (1998) 'Raising Children in an Age of Diversity – Advantages of Having a Lesbian Mother' in Gillian Dunne (ed) *Living Difference: Lesbian Perspectives on Work and Family Life*, New York: Harrington Park Press at 37; Charlotte Patterson & Raymond Chan (1997) 'Gay Fathers' in Michael Lamb, *The Role of the Father in Child Development*, 3<sup>rd</sup> edition, New York: Wiley at 254-255.

<sup>92</sup> Suzanne Johnson & Elizabeth O'Connor (2001) *Lesbian and Gay Parents: The National Lesbian and Gay Family Study*, San Francisco: American Psychological Association.

<sup>93</sup> Elizabeth Short, Damien Riggs, Amaryll Perlesz, Rhonda Brown & Graeme Kane (2007) *Lesbian Gay Bisexual and Transgender (LGBT) Parented Families: A Literature Review Prepared for the Australian Psychological Society*, Melbourne: Australian Psychological Society. Available at: <[www.psychology.org.au/publications/statements/lgbt\\_families/](http://www.psychology.org.au/publications/statements/lgbt_families/)> [Accessed 6 February 2009].

<sup>94</sup> Ruth McNair (2004) *Outcomes for Children Born of ART in a Diverse Range of Families* (Occasional Paper), Melbourne: Victorian Law Reform Commission.

<sup>95</sup> McNair, n93 above, pp. 55-66.

<sup>96</sup> McNair, n93 above, pp. 50-55.

- **Canadian Department of Justice.** In 2006, the Canadian Department of Justice commissioned a review of the literature into same-sex parenting as part of its same-sex reform process. The authors of the Canadian report highlighted that ‘some of the most methodologically sound studies’ have conclusively found that children parented by gay or lesbian parents were not disadvantaged in their social competence or development.<sup>97</sup>

The Canadian Department of Justice report further highlighted that although there were preliminary findings to suggest young people with lesbian or gay parents experienced ‘possibly more’ homophobic discrimination, the children did not demonstrate any difference in peer acceptance or social adjustment at school in comparison to heterosexually-parented children.<sup>98</sup> These findings suggest that children parented by gays and lesbians are good at building resilience to homophobic discrimination; an explanation also offered by the VLRC Report.<sup>99</sup>

- **Australian Medical Association.** In 2002, the Australian Medical Association publicly stated its support for removing discrimination against same-sex couples and families based on its own analysis of how legal discrimination impacted on health outcomes.<sup>100</sup>

What the research ultimately highlights is that legislation which fosters discriminatory attitudes against lesbian and gay families hurts children in these families. No child should be legally or socially victimised because of their familial structure. There is simply no empirical basis to deny lesbians and gay men equality before the law in relation to parenting-related legislation.

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<sup>97</sup> Paul Hastings, Johanna Vyncke, Caroline Sullivan, Kelly McShane, Michael Benibgui & William Utendale (2006) *Children’s Development of Social Competence Across Family Types*, Canada: Department of Justice, p. 34.

<sup>98</sup> Hastings et al, n96 above, p. 36.

<sup>99</sup> McNair, n93 above, pp. 62-63.

<sup>100</sup> Australian Medical Association (2002) *Position Statement on Sexual and Gender Diversity*, para [6.6]. Available at: <<http://www.ama.com.au/node/552>> [Accessed 6 February 2009].



## 5. OUR REFORM PROPOSAL

This section addresses part E of the terms of reference.

### 5.1 THE *NAPPIES* PROCESS: COMMUNITY-INITIATED REFORM

In 2000, the GLRL commenced an extensive 3-year community consultation process into same-sex family recognition and parenting law reform. The GLRL's consultation commenced in October 2000 with a series of four focus groups with lesbian and gay parents (and prospective parents) held in Newtown, Darlinghurst, Paddington and Parramatta.<sup>101</sup>

In 2002, the GLRL released its comprehensive review of same-sex parenting practices and welfare outcomes as reported in sociological and psychological research spanning 25 years (see **section 4.1**).<sup>102</sup>

Building upon our 2000-2001 parents' consultations and our 2002 research review, the GLRL issued a discussion paper in 2002 outlining our proposals for parenting law reform.<sup>103</sup> This discussion paper was widely distributed to individuals, organisations and media in the gay & lesbian and broader communities.

From December 2002 to February 2003, the GLRL hosted a fresh round of focus groups with lesbian and gay parents (and prospective parents), community lawyers and policy workers in Sydney, the Blue Mountains, Newcastle and Lismore. Feedback on our discussion paper was incorporated into a final report released in 2003, *And Then... The Brides Changed Nappies*.<sup>104</sup> The *Nappies* report made 11 law reform and social policy recommendations aimed at securing legal equality for same-sex parents and their children.

### 5.2 *NAPPIES* ENACTED

In 2006, the major law reform recommendations from our *Nappies* report were endorsed by the NSW Law Reform Commission in the Commission's review of the *Property (Relationships) Act 1984* (NSW).<sup>105</sup>

In 2008, two of our recommendations in relation to lesbian co-mother parentage presumptions<sup>106</sup> and birth certificates<sup>107</sup> were enacted in reforms under the *Miscellaneous Acts*

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<sup>101</sup> Kristy Machon & Naomi Sharp (2001) *Gay and Lesbian Parenting Consultations Report*, Sydney: GLRL, p. 6.

<sup>102</sup> Millbank, n34 above.

<sup>103</sup> Jenni Millbank (2002) *And Then... The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of our Relationships with the Children we Raise* (1<sup>st</sup> edition), Sydney: GLRL.

<sup>104</sup> Millbank, n16 above.

<sup>105</sup> See recommendations 8, 18 - 23; in NSWLRC, n45 above.

<sup>106</sup> Recommendation 2 in Millbank, n16 above, pp. 16-18.

<sup>107</sup> Recommendation 3 in Millbank, n16 above, pp. 10-11.

*Amendment (Same Sex Relationships) Act 2008* (NSW).<sup>108</sup> Two further recommendations<sup>109</sup> have been enacted following inclusive federal reforms to family law and child support under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) and the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth).<sup>110</sup>

Our recommendations for adoption changes represent the final significant area of outstanding law reform from the *Nappies* report.

### 5.3 THE OUTSTANDING RECOMMENDATIONS: ADOPTION REFORM

The GLRL made several significant recommendations in relation to adoption law reform. Our law reform proposals – which have been noted and largely mirrored in recommendations made by the NSW Law Reform Commission<sup>111</sup> – are:

- **Adoption eligibility for same-sex couples.** To remove discrimination against same-sex couples, the definition of a ‘de facto relationship’ in the *Adoption Act* should simply reflect the definition in the *Property (Relationships) Act 1984* (which includes same-sex partners). This will remove discrimination against same-sex couples and give same-sex partners the eligibility to apply for adoption as a couple. This will also ensure that step-parent provisions in the *Adoption Act* will apply equally to same-sex partners where they are actually in the position of a step-parent.
- **Second-parent adoption.** As noted in **section 2.1.2**, whilst the 2008 reforms to parentage presumptions were an important and significant step, their scope was limited to children born through ART to lesbian couples who consented to the fertilisation procedure at the time of conception. Some same-sex parents are not covered by these presumptions and require an adoption mechanism. However, as will be explained, the existing step-parent adoption provision is not adequate for this purpose for a number of reasons. Therefore, the GLRL recommends introducing a new **second parent adoption** provision allowing the de facto partner of a parent to adopt their partner’s child where the existing legal parent(s) consent.

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<sup>108</sup> See presumptions of parentage applying to children born through fertilisation procedures to lesbian de facto couples: *Status of Children Act 1996* (NSW), s 14(1A). See also amendments to *Births, Deaths and Marriages Registration Act 1995* (NSW), Schedule 3, Part 4 (savings provisions relating to amendment of birth registry and certificates).

<sup>109</sup> Recommendations 8 & 9 in Millbank, n16 above, pp. 21–24.

<sup>110</sup> See *Family Law Act 1975* (Cth), s 60H (parentage presumptions relating to children born through artificial conception procedures). From 1 July 2009, the new parentage presumptions will also apply to the child support regime: *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), Schedule 6, s 22B (amendments to *Child Support (Assessment) Act 1989* (Cth), s 5(1) (definition of ‘parent’)).

<sup>111</sup> Recommendations 20 – 23, see NSWLRC, n45 above.

- **Giving further consideration to the recognition of multi-parent families and co-parenting arrangements.** From our consultations and research review, it is clear that there are some same-sex families who have complex co-parenting arrangements involving more than two parents. These familial scenarios may have some recognition via parenting orders through the Family Court. However, there is no existing, durable 'opt-in' mechanism to recognise such families which have more than two parents across all laws. In this submission, the GLRL outlines some of the potential legal issues which arise for children with more than two parents. We discuss existing options and offer some potential further solutions for further discussion. We support the NSW Law Reform Commission's recommendation for a consultative review into such familial situations and a consideration of whether legal reform to recognise more than two parents is necessary or desirable.<sup>112</sup>

### 5.3.1 ADOPTION ELIGIBILITY FOR SAME-SEX COUPLES

Section 28 of the *Adoption Act* relates to the criteria couples must meet to be assessed as eligible to adopt a child. The couples' criteria stipulate that prospective adoptive parent(s) must:

- Reside in NSW,
- Be of 'good repute' and 'fit and proper persons to fulfil the responsibilities of parents',
- Be, generally, at least 21 years of age (and 18 years older than the child), and
- Have been continuously living together for at least 3 years.<sup>113</sup>

Nothing in the objective criteria above necessarily precludes same-sex couples from qualifying as prospective adoptive parents. However, same-sex couples are prevented from demonstrating their individual merit and capacity to provide a loving and stable home to a child due to a discriminatory couple definition contained in the Dictionary to the *Adoption Act*.

The definition of *couple* in the *Adoption Act* refers only to:

...a man and a woman who:

- (a) are married, or
- (b) have a de facto relationship.<sup>114</sup>

Following this definition, the definition of *de facto relationship* is also restricted to people in heterosexual relationships. A *de facto relationship* is defined using a 1984 definition, which has since been superseded across all NSW law (except for the *Adoption Act*)<sup>115</sup>:

*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.<sup>116</sup>

<sup>112</sup> NSWLRC, n45 above.

<sup>113</sup> This has been amended to 2 years by the *Adoption Amendment Act 2008* (NSW) [not yet commenced].

<sup>114</sup> *Adoption Act 2000* (NSW), Dictionary.

<sup>115</sup> See *Property (Relationships) Act 1984* (NSW), s 4.

<sup>116</sup> *Adoption Act 2000* (NSW), Dictionary.

Furthermore, the definition of *spouse* also discriminates against same-sex partners:

*spouse* of a person means:

- (a) a person to whom the person is married, or
- (b) a person of the opposite sex with whom the person has a de facto relationship of at least 3 years.<sup>117</sup>

As a result of these definitions, same-sex couples are prevented from even making an adoption application at the outset, let alone being considered on their individual merits. A simple change to the definitions of *couple*, *de facto relationship* and *spouse* – reflecting the non-discriminatory definitions in the *Property (Relationships) Act 1984* – is all that is required to remove discrimination against same-sex couples. If this occurs, same-sex couples would be able to apply to be assessed according to the objective criteria which apply to all couples.

Furthermore, by changing the definition of a *de facto relationship*, the definition of *step-parent* in the *Adoption Act*<sup>118</sup> would also include a step-parent who was of the same sex. This would ensure the existing step-parent adoption provisions in the *Adoption Act*<sup>119</sup> would apply equally to all step-parents, regardless of their gender.

**Recommendation 1:**

Change the definitions of *couple*, *de facto relationship* and *spouse* in the Dictionary of the *Adoption Act 2000* (NSW) to reflect the non-discriminatory de facto definitions in the *Property (Relationships) Act 1984* (NSW).

This will ensure same-sex couples will be eligible 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.

### 5.3.2 SECOND-PARENT ADOPTION

The parenting reforms in 2008 provided recognition to many lesbian couples who conceived children through ART together. Despite the breadth of the new parentage presumptions, there are some scenarios where the presumptions cannot apply or cannot provide a remedy for previous discrimination. For these lesbian and gay co-parents, a **second-parent adoption** mechanism is required.

Examples include:

- **Adoptive gay fathers.**<sup>120</sup> A gay man and his partner adopted two children overseas, before migrating to Australia. However, discriminatory adoption laws in their country of origin did not allow them to officially adopt the children as a couple. Only one of the men

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> *Adoption Act 2000* (NSW), s 30.

<sup>120</sup> These facts describe the situation of a gay father who contacted the GLRL, 14 January 2009.

could legally adopt the children; the other was granted a parenting order. These children have only one legal parent and only one parent listed on their birth certificate. Second-parent adoption is required for the gay co-father to legally join his partner as an adoptive parent.

- **Lesbian couple with a child born in a non-recognition state.** A woman with a female partner gave birth to a child born through ART in Queensland. At present, Queensland law does not provide parental recognition to the co-mother; therefore, the child has one legal parent under Queensland law and only the birth mother is listed on the birth certificate. After their child is born, the mothers move to NSW for work. In NSW, the parentage presumption applies to their family regardless of the omission of the child's co-mother from the birth certificate.<sup>121</sup> However, the mothers find themselves in constant difficulty in proving their parental status in NSW, such as when applying for a passport for their child or taking the child to hospital. They are unable to have their child's birth certificate amended as it was issued in Queensland. Second-parent adoption in NSW would allow them to formally have the co-mother's parental status recognised in NSW, with a new birth certificate re-issued.
- **Lesbian couple conceiving through sexual intercourse.**<sup>122</sup> A lesbian woman and her partner agreed to conceive a child through sexual intercourse with a male friend. The women intended to parent together, and the man never intended to be a parent. However, due to their method of conception, the legal parents to the child are the biological mother and biological father. Second-parent adoption, with the consent of both legal parents, is required for the co-mother to legally join her partner as the adoptive parent.

At present, the existing step-parent adoption provision, even if it available to same-sex couples, would not be appropriate for families in these circumstances. This is because the existing step-parent provision involves the following:

- **Age of child requirement.** The existing step-parent adoption provision requires a child to be five-years-old before a step-parent can apply to adopt them.<sup>123</sup> This means that children in some same-sex families could not have their co-parent recognised until they were at least five-years-old.
- **Length of relationship requirement.** The existing step-parent adoption provision requires a step-parent to have lived continuously with the child and the child's parent for at least 3 years before an application for adoption can be made.<sup>124</sup> This requirement makes sense in the context of a new step-parent, as step-parent adoption severs the

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<sup>121</sup> *Status of Children Act 1996* (NSW), s 4(1)(a).

<sup>122</sup> These facts appear in *ND and BM* [2003] FamCA 469.

<sup>123</sup> *Adoption Act 2000* (NSW), s 30(a).

<sup>124</sup> *Adoption Act 2000* (NSW), s 30(b).

relationship with the child's existing biological or adoptive parent. However, this requirement cannot address situations where lesbian and gay couples have made the decision to conceive or adopt children jointly, but the co-parent has not been legally recognised from the point of the child's birth or adoption due to discriminatory laws in other jurisdictions (as in scenarios one and two above).

- **Presumption against adoption.** The existing step-parent adoption provision has a presumption against making an adoption order.<sup>125</sup> This presumption also stems from the assumption that a child will have another legal parent whose parental status will be severed in favour of the new step-parent. However this presumption does not address the situation where there is only one existing legal parent (e.g. where a co-parent is not recognised, as in the first two scenarios above) or where there is a second consenting legal parent (e.g. as in the third scenario above).

In its 2006 report, the NSW Law Reform Commission made a recommendation to introduce a new **co-mother adoption** mechanism. The NSW Law Reform Commission said that a co-mother adoption mechanism would 'address the disadvantage suffered by children who were born in jurisdictions without a ... [lesbian co-mother] parentage presumption', such as that which now exists in the *Status of Children Act 1996* (NSW).<sup>126</sup> For the reasons highlighted above, the NSW Law Reform Commission said that the existing step-parent adoption mechanism was not well suited to address this issue and that the co-mother adoption mechanism should not include the temporal requirements (such as the age of child and length of relationship requirements) stipulated in the step-parent adoption provision.<sup>127</sup>

The GLRL supports the recommendation of the NSW Law Reform Commission but believes there is no reason to limit this adoption provision to co-mothers only. Gay co-fathers, such as those described in the first scenario above, could also benefit from a second-parent adoption provision where a gay co-father has been denied legal recognition as a parent.

The GLRL supports the introduction of a **second-parent adoption mechanism** which allows a child to be adopted by the *spouse* (as defined in the *Adoption Act*) of their parent (i.e. the co-parent).

To reduce the administrative and legal costs of applying for adoption orders, the GLRL believes that there should be a **presumption in favour** of making the adoption order where there is only one legal parent or a second parent who is consenting. However, at the very least, there should be no presumption against make the adoption order.

The definition of *spouse* in the *Adoption Act* will require same-sex de facto partners to have been together for at least 3 years before they are eligible for applying to adopt under any new second-parent adoption provisions. Therefore, there will be no need for a specific temporal requirement as in section 30(b) of the *Adoption Act*.

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<sup>125</sup> *Adoption Act 2000* (NSW), s 30(d).

<sup>126</sup> NSWLRC, n45, para. [5.82].

<sup>127</sup>Id, para. [5.81].

Furthermore, the general requirements for **adoption by a couple** in section 28 of the *Adoption Act*, such as the residence, fitness and age criteria, could also apply to the second-parent adoption mechanism (in the same way as the step-parent adoption mechanism currently operates) by simply adding a mirror provision to section 28(2) (additional requirements for step-parent couple adoption) which applies to co-parents.

As is currently the case for step-parent adoption under section 95(3) of the *Adoption Act*, consequential amendments will also be required to ensure the existing legal parent's parental rights are not severed by the recognition of the co-parent.

Importantly, second-parent adoption is already available in other jurisdictions, including Tasmania, New Zealand, South Africa, The Netherlands and some parts of Canada and the United States.

**Recommendation 2:**

Introduce a new **second-parent adoption provision** similar in effect to the step-parent adoption provision under section 30 of *Adoption Act*.

The second-parent adoption provision should allow a child to be adopted by the *spouse* (as amended, see **recommendation 1**) of their parent. 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.

### 5.3.3 MULTI-PARENT FAMILIES

In several inquiries<sup>128</sup>, as well as our consultation<sup>129</sup>, the legal recognition of multi-parent families – that is, families where more than two parents are involved in a co-parenting arrangement – present significant challenges due to the diversity of family structures and parental roles (which may also change over the lifetime of a child).

As an example, a lesbian couple (the 'birth mother' and 'co-mother') may equally co-parent with a gay man (the 'donor-dad') and, possibly, his partner (the 'co-father'). In some situations, these three (or four) parents may have equal time and care-giving responsibilities and share financial responsibilities for the child. They are all equal parents. In such cases, the lack of legal parentage for all the parents means a child will be denied some of the benefits, protections and entitlements which they would otherwise enjoy if their third (or fourth) parent were legally recognised (see **section 2.1.1**).

However, in other families, for example, a known sperm donor may have an important limited or contact relationship with the child who is otherwise raised by a lesbian couple; but such a relationship nevertheless falls somewhere below the expectations and responsibilities of a full-time parent. In such circumstances, a Family Court parenting order by consent may be enough to recognise the known donor with respect to parental responsibility and contact arrangements. Families can also draw up informal parenting agreements that are non-binding

<sup>128</sup> Victorian Law Reform Commission (2005) *Assisted Reproductive Technology and Adoption: Position Paper Two – Legal Parentage*, Melbourne: VLRC, pp. 30-32; NSWLRC, n45 above, pp. 113-115, 122.

<sup>129</sup> Millbank, n16 above, pp. 5-6, 10-11.

and non-enforceable – but may be enforceable with respect to financial matters such as a promise to provide child support – which otherwise allow flexibility for changing roles and circumstances over time.

As the diversity of multi-parenting arrangements is wide-ranging and no one-size-fits-all, there has been no legal consensus on how to recognise families with more than two parents, and indeed, whether this is necessary or desirable.<sup>130</sup> The GLRL believes the issue of multi-parent families deserves separate and detailed inquiry as there is a real question in our communities as to how best to ensure children’s rights and interests are protected where they have more than two parents.

Some potential (and existing) options include:

- Multi-parent adoption,
- Parenting orders – and potentially extending their role and recognition,
- Extending the functional recognition of parent-child relationships, and
- Symbolic non-legal recognition on the birth certificate.

There may be also be strong arguments for a mixture of the above options or even leaving the status quo. The GLRL recommends a specific inquiry into the needs of multi-parent families.

### **5.3.3.1 Multi-parent adoption**

One suggestion has been a consideration of whether multi-parent adoption could be desirable.<sup>131</sup> This would give an ‘opt-in’ mechanism for a third (or fourth) parent to adopt their child where the existing legal parent(s) consent. There is one reported case of a three-parent adoption being granted by the Court of Appeal in Ontario, Canada for a child with two mothers and one father. In that case, the lesbian co-mother was legally recognised as a parent to the child *in addition to* (rather than replacing, as in step-parent adoption) the existing biological mother and father.<sup>132</sup>

The main advantages of adoption is that it provides a durable parental status to all the parents that is widely recognised across most (if not all) laws – including interstate and overseas laws – and does not expire once a child turns 18.

#### **Recommendation 3:**

Consider whether changes to the *Adoption Act 2000* (NSW) could be drafted to permit co-parent adoption that granted legal status to more than two parents.

### **5.3.3.2 Parenting orders**

<sup>130</sup> NSWLRC, n45 above, p. 122.

<sup>131</sup> VLRC, n128 above, pp. 30-32; NSWLRC, n45 above, pp. 122; Millbank, n16 above, p. 21.

<sup>132</sup> *AA v BB* (2007) ONCA 2 (Rosenberg JA, McMurty CJO and Labrosse JA agreeing) (2 January 2007).



Another option is extending the role and recognition of parenting orders. Currently, any person 'concerned with the care, welfare and development' of a child can pursue a parenting order through the Family Court, with or without the parent(s)' consent.<sup>133</sup> This includes a known donor who has an interest in the care and development of a child.<sup>134</sup> Parenting orders can determine issues such as who shares parental responsibility for the child, where the child will live and how time spent with the child will be divided. For many co-parenting arrangements where a third (or fourth) parent has a role a little below that of a full-time parent, a parenting order may suffice.

The main disadvantages of a parenting order are that order expires once the child turns 18 and, unlike an adoption, the order does not confer parental status in other laws. The main advantages of parenting orders are their flexibility and their ability to be adjusted with changing circumstances (for example, as a child grows).

There is an argument for people who have been granted parental responsibility under a parenting order to have their status clarified more explicitly in some laws which confer child-parent entitlements.<sup>135</sup> There may also be an argument for allowing a parenting order to be *converted* into an adoption order, with the consent of the adult child, once the parenting order expires at the age of majority.

#### **5.3.3.3 Functional recognition**

Another option is extending the definitions of 'parent' or 'child' in certain relevant laws which confer parent-child entitlements to recognise broader parental and care-giver relationships. This has already been done in several instances, such as veterans' entitlements and workers' compensation legislation<sup>136</sup>, which recognise a person acting in the position of a parent (*in loco parentis*) or someone on whom the child is dependent – regardless of whether that person is in fact a legal parent to the child.

There may be the need to audit parent-child definitions in federal and state laws to ensure that parent-child definitions are broad enough to include third (or fourth) parents in select laws and for select purposes. However, there is also a risk that the broadening of functional parental recognition could incur responsibilities on people who were never intended to be parents or impose parental figures without the consent of existing parent(s). Therefore this option requires detailed inquiry.

#### **5.3.3.4 Symbolic, non-legal recognition on the birth certificate**

In our *Nappies* consultation, it emerged in our focus groups that some lesbian families had been including the name of their donor in the space of 'father' on their child's birth certificate; not because their donor was indeed intended to be a father, but because they wanted to be open

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<sup>133</sup> *Family Law Act 1975* (Cth), ss 65C(c), 65D(1).

<sup>134</sup> For example, see *Re Patrick* (2002) 28 Fam LR 579.

<sup>135</sup> See HREOC, n22 above, pp. 101-104, 108.

<sup>136</sup> *Id.*, pp. 104-105.

with their children about their biological heritage *and* because, at the time, the option of putting the co-mother on the birth certificate was not available.<sup>137</sup>

In other cases, particularly where there were three intended parents, multi-parent families in our focus groups told us that were also placing the donor-dad's name on the birth certificate thinking that this would give a legal status to the donor-dad. However, this assumption is not correct in law, as the law clearly specifies that a sperm or egg donor is not a legal parent to a child conceived through a fertilisation procedure (i.e. not through sexual intercourse).<sup>138</sup> Adding a person's name to the birth certificate incorrectly (according to law) does not make them a legal parent.

To recognise the needs and desires of such families, the GLRL recommended allowing parents who wish to acknowledge the child's known donor on the birth certificate the ability to do so by adding a third category which would not raise any legal presumptions as to parentage.<sup>139</sup> In other words, this would be a symbolic non-legal category used to list people of significance to the child, such as their donor or their godparents. This option should be available for parent(s) who wish to take advantage of it in addition to the (incoming) donor registry which is intended to keep the donor's details private until the child is an adult or other circumstances occur.<sup>140</sup> This option would be appropriate for families where a known donor is intended to have a contact relationship with the child and for whom a parenting order would likely suffice. However, it would not be sufficient for families where there are three (or four) equal parents. For such families, multi-parent adoption may be a better solution. Nevertheless, many lesbian and heterosexual families – and children – could benefit from a new symbolic, non-legal category on the birth certificate allowing parent(s) who wish to, the ability to list persons significant to their child.

**Recommendation 4:**

Amend the *Births Deaths and Marriages Regulations 2006* (NSW) to allow parent(s) to name known donors of children born through assisted reproductive technology on the birth certificate. This would not raise any legal presumptions.

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<sup>137</sup> Millbank, n16 above, p. 11.

<sup>138</sup> *Status of Children Act 1996* (NSW), s 14(2); *Family Law Act 1975* (Cth), s 60H(1)(d).

<sup>139</sup> Millbank, n16 above, p. 11.

<sup>140</sup> See *Assisted Reproductive Technology Act 2007* (NSW), ss 33-41.

## APPENDIX 1: CASE STUDY – THE NEED FOR SAME-SEX STEP-PARENT ADOPTION

### ***Re F and D (2005) 33 Fam LR 568***

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FEDERAL MAGISTRATES COURT – FAMILY LAW DIVISION

*Judgment delivered by Emmett FM, 4 March 2005 in Parramatta, Sydney.*

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#### A. FACTS:

- A father had the care of three children (aged 14, 12 and 8) from a previous marriage. The mother of the children had passed away in 1996 from breast cancer. (I.e. the children only had one legal parent – their father.)
- From January 2003, the father's new (male) de facto partner had jointly cared for the children as a step-parent.
- The father and his male partner applied to the court for parenting orders to confer joint parental responsibility onto them, as a couple. This would ensure the step-father could participate in day-to-day matters relating to the care and welfare of the children, including the ability to make medical decisions and determine school arrangements on the behalf of the children.

#### B. JUDGMENT – PARENTING ORDER WAS GRANTED:

In granting the step-father an order for joint parental responsibility with the father, Emmett FM gave both men glowing praise on their parenting ability:

It is rare to encounter the parenting qualities exhibited by each of the Applicants [i.e. the father and step-father] in this case. They are united and sensitive in their parenting approach and are to be unreservedly commended for the success they appear to be having in the healthy and stable environment they are providing and the consequent benefit of that environment to each of the Children in their development both short and long term.

I have observed each of the Applicants in the witness box. Each has a responsible position in the community related to the nursing industry and each has an obvious devotion to the other and to the welfare of each of the Children. Each is also aware of the importance to the Children in having the comfort of pursuing a relationship with their mother's family, should they desire to have that opportunity. Each is also sensitive to the needs of the Children to talk about their mother and I am quite confident that any such discussions with ... [the Applicants] are a positive experience of the Children.

I am satisfied that together the Applicants provide security for the Children's future in respect of their care both emotionally and financially.

In the circumstances, it is appropriate that [the step-father's] parenting role be properly reflected in Orders for joint parental responsibility ... Accordingly, I have no

difficulty in being satisfied that the orders sought in the application are in the best interests of the Children ...<sup>141</sup>

### C. WHAT IF SAME-SEX ADOPTION WERE AVAILABLE IN THIS CASE?

The couple in *Re F & D* were forced to resort to a parenting order in order to secure legal recognition of the relationship between the three children and their step-father. If same-sex couples were eligible to apply for step-parent adoption, the same-sex couple in *Re F & D* may have opted for an adoption order rather than a parenting order.

As the **Table 1** below shows, there is a significant legal difference between parenting orders and an adoption – and significant benefits for children and their parents in allowing same-sex adoption.

**Table 2: The difference between parenting orders and adoptions<sup>142</sup>**

	<b>Parenting order for joint parental responsibility</b>	<b>Step-parent adoption</b>
<b>Legal parentage</b>	Does not grant legal parental status (i.e. legal parentage). Has no impact on a child's rights under law, including: <ul style="list-style-type: none"> <li>• May grant no entitlement under workers', accident or victims of crime compensation schemes,</li> <li>• No entitlement to a share of a parent's estate or superannuation if parent dies intestate.</li> </ul>	Grants legal parentage across all laws in NSW: <i>Adoption Act 2000</i> (NSW), s 95(2).  Grants children full entitlements, including compensation and inheritance rights, based on the recognition of the adoptive child-parent relationship.
<b>Parental responsibility</b> (i.e. ability to make decisions about a child's care, welfare and development)	Grants parental responsibility unless parental responsibility is removed by a court.	Grants parental responsibility unless parental responsibility is removed by a court: <i>Adoption Act 2000</i> (NSW), s 95(1).
<b>Durability of status</b>	Does not grant parental status – merely parental responsibility; order expires when the child turns 18 years.	Durable parental status throughout a child's life (even after the child becomes an adult).
<b>Portability of status – interstate</b>	Does not grant parental status in other state or territory laws. (Only parental <i>responsibility</i> is recognised across Australia.)	Adoptive parents are recognised as legal parents across all state and territory laws: <i>Adoption Act 1984</i> (Vic) ss 53, 66; <i>Adoption Act 1994</i> (WA), ss 75, 136;

<sup>141</sup> *F & D* [2005] FMCAfam 178, para. [30]-[34].

<sup>142</sup> For more information see Jenni Millbank (2006) 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', 34(2) *Federal Law Review* 1, pp. 44-45.

		<i>Adoption Act 1993 (ACT)</i> , ss 43, 54; <i>Adoption Act 1988 (Tas)</i> , ss 50, 59; <i>Adoption Act 1988 (SA)</i> , ss 9, 20; <i>Adoption of Children Act 1964 (Qld)</i> , ss 28, 37; <i>Adoption of Children Act 1994 (NT)</i> , ss 45, 49.
<b>Portability of status - federal law</b>	Does not grant parental status in federal law.	Adoptive parents are likely to be recognised as legal parents in most federal law, including: <ul style="list-style-type: none"> <li>• Family law and child support schemes: <i>Family Law Act 1975 (Cth)</i>, s 4(1); <i>Child Support (Assessment) Act 1989 (Cth)</i>, s 5(1).</li> <li>• Taxation: <i>Income Tax Assessment Act 1936 (Cth)</i>, s 6.</li> </ul>
<b>Portability of status - international</b>	May not grant parental status overseas.	Adoptive parents may be recognised as legal parents overseas (e.g. <i>Adoption Act 1955 (NZ)</i> , s 17).

## APPENDIX 2: GRANDMA "LINDA" SPEAKS...

**The birth grandmother of the first child adopted by a gay couple in Western Australia speaks about why her daughter chose a gay male couple to be the parents of her child.**

*Aired on "Mornings" with Geoff Hutchison, ABC Perth Radio 720AM, 15 June 2007.<sup>143</sup>*

**Announcer:** Linda called yesterday; it's not her real name but that's what we'll call her – it will do for now. She is the birth grandmother of the baby who we learned had been adopted out to a male gay couple. It was her daughter who gave birth to this boy ... Why did you call the program?

**"Linda":** I listened to all the bigoted views; to all the people that are ringing up trying to force their opinions on others. And I wanted to let you know that this child is doing wonderfully and we know very well that he is treasured and loved and it was the best thing we could have done in the world.

**Announcer:** Why did your family, your daughter, choose to have this child adopted out by these two men?

**"Linda":** OK, if I go back a bit. The so-called birth father or his family would have nothing to do with him. We made a decision as a family and we had a lot of help from the adoption agency. My daughter had to see a psychiatrist. We had to, you know, be on it and everything before we made the decision to adopt. ... We all wanted to look at the best choices for the child. So then, talking to the adoption agency ... you know, we were worried where he was going to go – that's sort of thing – how it's going to be. And we found that they gave us choices; they gave us a list of people. We were able to check on their circumstances. And for my husband and myself, we had a childhood with... our parents that didn't love us and we wanted the best thing for him; someone that would love and treasure him. We looked at this gay couple and we found that they had a huge supporting family; grandmothers, aunts, uncles, sisters, brothers. And we knew that he would be especially treasured by them, knowing that there's no chance they will ever have a baby; unlike a woman. And we wanted someone to treasure and love him. Now some people can say I'm a bit homophobic – and I admit that's true – but we had to look at the best thing for him. Now, since he's been with them – this has been quite a while – he has come along in leaps and bounds. He is doing so well. He is a happy, laughing boy. And I know; my husband knows – and even though it will always [inaudible] my daughter's heart for the rest of her life – that we made the right decision. In fact, we, sort of think, that he was meant for them.

**Announcer:** Was it difficult to reconcile the fact that the parents of this boy are gay men?

**"Linda":** Well, at first it was. We sort of looked at it; we looked at all the others... I do a fair bit of work with families, and then we thought, well we've got no right to judge someone's sexual preference. And certainly, our childhoods have not proved that heterosexual people are so great at childrearing either! And, I mean, I don't know what heterosexual couples do in bed and I'm really not interested. (Although some of things you hear would be shocking anyhow!) So we felt we had no right to judge them that way. And what we know is that they're a loving couple that care a lot for each other. This child [inaudible] round about their life and their family lives. And we just made the choice and we're glad we made that choice. And I don't care what anyone out there

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<sup>143</sup> Available at: <<http://www.squack.net/gale/20070615-720ABCPerth-Mornings-GayAdoption-Low.mp3>> [Accessed 12 January 2008].

says. You know, it's not a matter of being gay or not, it's a matter of being the best place and the best parents – and that's what these guys are.

**Announcer:** We're not able to identify the reasons why the child was given up for adoption or really anything about the child. This decision you made as a whole family? And was your daughter involved in this decision as well?

**"Linda":** Oh, she made the final decision and it was always hers. We're a very close family. And the entire family, which includes other children, and mine; we were all involved in the decision. And we all preferred ... we've had no regrets, none at all.

**Announcer:** You could have stayed in touch. Have you decided to do so, or not to do so?

**"Linda":** No, we get regular reports and photos. But we decided not to because, you know, whoever births the child or a man drops the seed, that doesn't mean that they are the parents. The parents are the people that bring them up and are there when they're sick. And are a there in good times and the bad times. So we want him to have parents; we don't want to mess him up. I've already written him a letter for when he's older, and so has my daughter. But, you know, I just don't – and neither does my daughter – want to push someone in his life [inaudible], and push him and mix him up because the best people are his parents. You know, these are his real parents. And he's got real grandparents. We're just blood relatives really.

**Announcer:** Can I ask you the essence of what those letters will contain when he reads them one day?

**"Linda":** Um, the reasons why, that we came to the decision as a family to adopt him as he couldn't be looked after. His father didn't want to acknowledge him. But that, you know, we wanted the best for him. And we are happy he went to the right place. ... I believe and my husband believes that he was allowed to be born; I mean she could've had an abortion. But he was allowed to be born because he was special and he was destined for those two guys.

**Announcer:** I'm speaking to Linda, that's what we're calling her. She's the birth grandmother of the baby who we learned yesterday had been adopted out to a gay couple. 1300 222 720. I don't know of a subject which has caused our phones to run so hot. Was it pretty hard for you and your husband and family to listen to the judgements of other people?

**"Linda":** Yes it was and I don't give them the right to judge. They have absolutely no right at all. What is good for the child is the main thing. They have no right at all to judge us. I'd like to thank the people that rang up and supported us. Um, I don't ask what these people do in bed and I'm sure that they have no right to have anything to do with these guys and what *they* do in bed! For God sakes, it's only a sexual preference! And there's a whole lot of creeps out there that... well, I don't know, you know what I mean? I just don't give them the right to judge and I don't accept their judgement. After listening to your program a little while, I cut it off and I thought I'm going to ring you. My husband listened to it quite a while and he sort of got pretty upset, because he went through a lot of prejudice and rejection as a child. He said that he'd always wanted to be loved; that's the thing he wanted. That's the thing I wanted as a child. We know that this child is loved.

**Announcer:** And that's the basis upon which you, your husband and your daughter made this decision to have these men be this child's adoptive parents?

**"Linda":** Yes.

**Announcer:** Are you happy with the decision?

**"Linda":** Very. And that would never change.

**Announcer:** "Linda", thank you for talking to me.

**"Linda":** You're very welcome.