Submission
No 221

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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MONASH University
Castan Centre for Human Rights Law

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The Director
Standing Committee on Law and Justice
Parliament of New South Wales
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Sir/Madam

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into Adoption by Same Sex Couples.

This submission was prepared on behalf of the centre by Dr Adiva Sifris, Dr Paula Gerber and Research Assistant Ms Alyse Richmond.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely

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Submission to the Parliament of New South Wales Legislative Council Standing Committee on Law and Justice

Inquiry into Adoption by Same Sex Couples

Prepared by Dr Adiva Sifris, Dr Paula Gerber
Research Assistant Ms Alyse Richmond

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1. Introduction

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

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

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[1] See Ruth McNair, 'Outcomes for Children Born of A.R.T. in a Diverse Range of Families', (Occasional Paper Victorian Law Reform Commission 2004)

2. The Current Law in NSW – *Adoption Act 2000* (NSW)

Where parties are in a heterosexual relationship s 30 of the *Adoption Act 2000* (NSW) (the *Adoption Act*) allows a step-parent under stringent circumstances to apply adopt a biological child of their partner. As the law stands the non-biological parent in a same-sex couple will not be considered a step-parent and thus is not eligible to apply to adopt his or her partner's biological child. Step-parent adoption will extinguish the legal relationship between the child and one of his or her birth parents, and for this reason is not encouraged.[2]

In the case of non-relative adoptions which are often of an infant child, adoption is 'the process whereby a court irrevocably extinguishes the legal ties between a child and the natural parents or guardians and creates analogous ties between the child and his adopters.'[3] The legal consequences of adoption are thus to deny a biological parent any legal status, rights or responsibilities regarding the child. It is therefore of considerable significance for the relinquishing parents, the adopters and most importantly the child. The *Adoption Act* stipulates a number of threshold requirements that a couple must cross in order to be eligible to apply to adopt a child. For the purposes of this submission, the most important of these threshold requirements are, that in accordance with the *Adoption Act,* only married couples or heterosexual couples living in a de facto relationship may apply to adopt child.[4] There is also provision for one person to apply to adopt a child.[5] Thus, while one member of a same-sex couple may make application to adopt a child on their own, they cannot do so with their partner as a same-sex *couple*.

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2 In some overseas jurisdictions such as some of the States in United States of America and Provinces in Canada where a child is conceived during the same-sex relationship the non-biological parent may adopt the child without severing the legal relationship with the birth mother. This is referred to as second parent adoption.

3 Stephen Cretney, Judith. Masson and Rebecca Bailey Harris, *Principles of Family Law* 7th ed, Sweet and Maxwell, London, 2003) 791.

4 *Adoption Act 2000* (NSW) ss 23, 26 and 28.

5 *Adoption Act 2000* (NSW) ss 23, 26 and 27.

Adoption is primarily a service to children and its major purpose 'is to provide a stable family for a child in need, rather than to meet the need or desire of an adult for a child'.[6] In accordance with the *Adoption Act,* the basic requirement which applies to all prospective persons who wish to make application to adopt a child is that they must be 'of good repute and are fit and proper persons to fulfil the responsibilities of parents'.[7] The Castan Centre for Human Right Law agrees that in the interests of prospective adopted children, eligibility criteria are both necessary and desirable. However, it contends that the *Adoption Act* in its present form arbitrarily discriminates against same-sex couples purely on the basis of their sexuality, rather than their ability to provide a stable and loving home for a child. The existing eligibility criteria should be amended so that the only factors taken into account, are what is in best the interests of the child (consistent with the UN Convention on the Rights of the Child), and not the sexual orientation of the prospective parents.

3. Australia's International Obligations

Section 7(f) of the *Adoption Act* states that one of the objects of the legislation 'is to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements'. Allowing same-sex couples to adopt is consistent with Australia's obligations under international law. No specific article of the Convention on the Rights of the Child ('CROC') deals directly with the issue of parentage or for that matter, the number of parents which a child may or may not have. Article 7(1) emphasises the right of the child to know and be cared for by his or her parents as far as possible.[8] 'Parent' is not defined in CROC, but there is no reason to assume that it is limited to heterosexual parents or, for that matter, to a two-parent model;

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

7 *Adoption Act 2000* (NSW) ss 27 and 28.

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

sexuality appears to be an irrelevant consideration.[9] Nothing in the wording of Article 7 refers to heterosexual parents and the preamble recognises that a child 'should grow up in a family environment in an atmosphere of happiness and understanding'.[10] Discussions of the Committee on the Rights of the Child appear to contemplate a flexible, dynamic, evolving model of parentage, and reports of this committee specifically state that 'the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single parent family, common law family and adoptive family'.[11] Children are born and raised in diverse family forms and there is no reason to suggest that some of these children have the rights and protections set out in CROC, while others do not.

Australia's international obligations concerning the rights of a child to have two heterosexual parents came under the judicial microscope in *McBain's* case.[12] The Catholic Church asserted that, CROC, the International Convention on Economic Social and Cultural Rights and the International Convention on Civil and Political Rights (ICCPR), recognised the right of the child to be born into a family consisting of a male and a female parent, with the Universal Declaration of Human Rights and the ICCPR specifically linking family with marriage.[13] On that basis, it was argued that according to the ICCPR, marriage is a necessary precursor to founding a family. Justice Sundberg of the Federal Court rejected this argument, noting that when read as a whole, these

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9 John Tobin, '*The Convention of the Rights of the Child:* The Rights and Best Interests of Children', (Occasional Paper Victorian Law Reform Commission, 2004) 7-11. Tobin is writing in connection with same-sex parents adopting children, but no distinction can be made, in principle, between adoption and a child conceived in any other way. CROC does not distinguish between the mode of achieving parentage.

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

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

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

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

obligations 'tell against the existence of an untrammelled right of the kind for which the Catholic Church contends'.[14] The General Comments issued by the Human Rights Committee in relation to Article 23 have gone some way to resolving some of these ambiguities.[15] The Committee recognises that the notion of 'family' might be construed differently according to the norms of various societies and the content of domestic law. The Committee explicitly refers to diverse family forms such as 'unmarried couples and their children and or single parents and their children'. It would appear, therefore, that the definition of family is not confined by marriage and may include a wide variety of living arrangements.[16] The recognition of family forms other than the nuclear family makes possible the inclusion of same-sex families with children within the concept of 'family'.[17] Opening up adoption to same-sex couples in no way impair Australia's compliance with its international obligations.

3.1 The Implications of Adoption by Same-sex Couples for Children: The Interests of the Child

On an international level, CROC ensures that the best interests of the child are 'a primary consideration'.[18] Domestically, Australian legislation is entrenched in the 'interests of the child'. Section 7(a) of the *Adoption Act* establishes the best interest of the child as the paramount consideration in the adoption process.[19] There is no evidence to support assertions that children raised in same-sex families are worse off than those raised in heterosexual units.

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14 *McBain* [2000] 99 FCR 116, 120.

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

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

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

18 See Article 3(1) CROC.

19 See *Adoption Act 2000* (NSW) s 7(a)

3.2 The Empirical Evidence

The increase in the number of same-sex families has given rise to an upsurge in social science and legal research presenting arguments for and against same-sex parenting. The centrality of children's interests has prompted those in favour of lesbian parenting to rely upon empirical research proving that children raised in lesbian-led families are 'no different' to those raised in heterosexual families. To do so requires researchers to prove a negative; namely, that lesbian parenting is 'not harmful' to children. This has been referred to as a 'deficit model', as it commences with the assumption that lesbian parents lack the attributes essential for effective parenting.[20]

In Australia a number of law reform commissions have examined the empirical data relating to same-sex couples. As early as 1997, the NSW Law Reform Commission commented that '[t]here is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents.'[21] The Victorian and Tasmanian law reform bodies have provided the most extensive responses to the question of whether same-sex parenting is in the interests of the child. In 2003, the Tasmanian Law Reform Institute ('the Institute') submitted a report on adoption by same-sex couples. The Report recommended that the *Adoption Act 1988* (Tas) 'be amended to permit a couple to apply for adoption regardless of the gender or marital status of the partners making up the couple'.[22] This conclusion was reached after a painstaking analysis of the empirical data available. While the Institute acknowledged that much of the research was controversial and flawed, they found that it was no less reliable than equivalent research into other areas of child development and psychology, and stated that:

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

21 New South Wales Law Reform Commission, 'Review of the Adoption of Children Act 1965 (NSW)', Report 81 (1997) [6.120].

22 Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) Recommendation 1. See also Recommendation 3(a) which recommended that 'both step-parent and relative adoptions should be available to the same-sex partner of a parent or a relative of a child.'

> The problem appears to be that anti-gay scholars either have a tendency to view any evidence of difference as evidence of harm or alternatively they employ double standards by attacking the studies, not so much because their research methods are inferior to most studies of family relationships, but because these critics oppose equal family rights for lesbians and gays.[23]

The Institute concluded that the best interests of children required that same-sex couples be eligible to adopt children. The Institute openly criticised arguments regarding sexual identity on the basis that they reflected prejudices about homosexuality as an undesirable, wrong or a pathological condition.[24]

The Victorian Law Reform Commission (VLRC) approached the question of the children's interests from a much broader perspective. Its reference included not only adoption which is assessed on a case by case basis, but also eligibility criteria for assisted reproduction and consequential amendments such as recognition of parentage.[25] As part of its investigation the VLRC commissioned Dr Ruth McNair to prepare an occasional paper into the 'Outcomes for Children Born of A.R.T.' A good portion of this paper is dedicated directly to the outcomes for children with same-sex parents. In this publication the author carefully summarised, analysed and examined the outcomes of these studies from the perspectives of the outcomes for the children themselves, their family functioning and the wider social environment. Dr McNair concluded that **'family functioning (processes) rather than family structure is the critical factor in determining children's outcomes'**.[26] These conclusions echoed earlier findings that family structure is only important where it is associated with secondary effects such as poverty.[27] The VLRC responded positively to these findings, stating that 'there is sound

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23 Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) 5.

24 See Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 4 (2003) 6.

25 See Victorian Law Reform Commission Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?' Consultation Paper(2003).

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

27 Elizabeth A Vandewater and Jennifer E Lansford, 'Influences of Family Structure and Parental Conflict on Children's Well-Being' (1998) 47 *Family Relations* 323. See also the New Zealand Law Commission, *New Issues in Legal Parenthood*, Report 88, (2005) [2.10].

evidence that children born into families with non-biological parents or same-sex parents do *at least as well* as other children'[28] (emphasis added). This conclusion, phrased in the positive, replaces the deficit model of 'just as good' with a positive pronouncement of 'at least as well'.

Nancy Polikoff, a renowned academic from the United States of America, summed up the results of the empirical data as follows:

> By now there have been more than fifty peer reviewed studies with small samples published. While these studies have often included samples of convenience, many of them utilized control groups. All of them concluded that there is no relationship between the sexual orientation of a parent and the well being of a child. To summarize, gay and lesbian parents have equal parenting abilities to heterosexuals, and raise children as happy, healthy and well adjusted as children raised by heterosexual parents. The studies show no difference in the rate of psychiatric, emotional or behavioural difficulties and no differences in the quality of peer relationships, self esteem or popularity of children raised by lesbian and gay parents.[29]

It is thus clear, that the same-sex family structure is not in itself a cause of negative outcomes for children and should not in itself determine whether a couple is eligible to adopt children. The criteria for determining a suitable family environment for a child should be according to a person's/couples individual merits as parents, rather than their sexuality.

4. The Experience in other Australian and Overseas Jurisdictions that Allow the Adoption of Children by Same-sex Couples

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

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28 See Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption,* Position Paper One: Access (2005) [2.66].

29 Nancy Polikoff, 'Lesbian and Gay Parenting: The Last Thirty Years' (2005) 66 *Montana Law Review* 51, 55.

and Tasmania have been at the forefront in amending their legislation to allow same-sex couples to adopt.[30] (discussed in detail in the next section). In the remaining jurisdictions, while individually lesbian women are eligible to apply to adopt, two women as a couple will not be regarded as the child's legal parents, eligibility to adopt is limited to heterosexual couples. In some of these states the couples must be married, while in others it is sufficient if they are living together on a genuine domestic basis. Furthermore, adoption by single applicants is limited to 'exceptional' or 'special' circumstances, which is a euphemism for 'special needs' children. Table 1 below, 'Australia – Eligibility for Adoption' contains the up-to-date eligibility criteria and other relevant information pertaining to adoption legislation in each Australian State and Territory.

Most recently, The VLRC, as part of its enquiry into *Assisted Reproductive Technology & Adoption* recommended that the Victorian adoption legislation be amended to allow the courts to make adoption orders in favour of same-sex couples.[31]. They also recommended that the same-sex partner of a parent of a child should be allowed to adopt the child.[32] The Victorian reforms were introduced after a painstaking and exhausting five year process during which every aspect relating to the legal recognition of same-sex families, including the eligibility of same-sex couples to adopt children, was investigated. The VLRC emphasised the interests of the child as the paramount consideration and concluded that as result of same-sex couples being excluded from the adoption process 'a child in need may potentially be deprived of the opportunity to be placed with the most suitable carers.'[33] The Commission thus recommended that *the Adoption Act 1984* (Vic) be reformed to allow same-sex couples to be eligible to adopt and that same-sex couples be assessed on the same criteria as opposite-sex partners.

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30 *Adoption Act 1994* (WA) s 39, *Adoption Act 1993* (ACT) s18 and *Adoption Act 1988* (Tas) s 20 (2A).

31 See Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption,* Final Report (2007) Recommendation 67.

32 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption,* Final Report (2007) Recommendations 67 and 68.

33 Victorian Law Reform Commission, 'Assisted Reproductive Technology and Adoption: Final Report' (2007) 106

A number of overseas jurisdictions have extended their adoption legislation to include same-sex couples. In the United States, a number of states allow second parent adoption which enables the partner of the legally recognised parent to adopt the latter's child. These include California, Connecticut, Delaware, District of Columbia, New Jersey, New York, Indiana and Massachusetts.[34] In addition a number of states for example California, New Jersey, Illinois, Connecticut, District of Columbia and Oregan allow same-sex couples to apply to adopt a child as a couple. In Canada, there is almost uniform recognition of adoption by same-sex parents who live together in a genuine domestic relationship.[35] In both the United States and Canada, the judiciary has been active in extending the laws of adoption to same-sex couples.[36] In the United Kingdom, the *Adoption of Children Act 2002* (UK) c 38 provides that same-sex couples are eligible to adopt children. This has been achieved through changing the definition of couple which reads as 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.'[37] The increasing number of same-sex families thus represents a worldwide phenomenon, evoking a global response, with many overseas jurisdictions extending their adoption legislation to include same-sex couples.

5. The Recognition of Same-sex Families in Australia

In 2002, Western Australia introduced a package of reforms allowing same-sex couples to adopt children, all women to access clinical donor insemination (irrespective of their marital status) and recognising the consenting non-birth mother as a parent.[38] Shortly

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34 See See John Seymor and Sonia Magri 'A..R.T. Surrogacy and Legal Parentage: A Comparative Legislative Review', (Occasional Paper Victorian Law Reform Commission 2004) 56.

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

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

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

38 The *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) s 26 introduced s 6A into the *Artificial Conception Act 1985* (WA). This section came into force on 21 September 2002.

afterwards the Australian Capital Territory and the Northern Territory also passed legislation recognising the consenting non-birth mother as a parent.[39]

New South Wales was the next Australian jurisdiction to pass progressive legislation presuming, the consenting non-birth mother of a child conceived through assisted conception procedures to be the mother of the child where parties are living in a de facto relationship.[40] Following the recommendations of the VLRC, Victoria has passed a package of reforms allowing all women to access donor insemination.[41] Furthermore if two women are living on a genuine domestic basis the consenting non-biological mother is presumed to be the legal parent of a child conceived during a lesbian relationship.[42]

The Federal Government has responded to a recent report of the Human Rights and Equal Opportunity Commission identifying 58 Federal Acts as discriminating against same-sex couples.[43] In November 2008, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) was passed. In accordance with this legislation s 60H of the *Family Law Act 1975* (Cth) was amended to recognise the consenting non-birth mother as a parent or if such recognition is operative on a State or Territory level.[44]

Thus, in Australia, all levels of government have recognised the same-sex family unit and made a determined effort to eradicate discrimination against same-sex couples and their

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39 *The Law Reform (Gender, Sexuality And De Facto Relationships) Act 2003* (NT) s 41 inserted s 5DA(1) into the *Status of Children Act 1978* (NT)) This section commenced on 17 March 2004. The *Parentage Act 2004* (ACT) repealed *The Artificial Conception Act* 1985 (ACT) and came into effect on 22 March 2004 see The *Parentage Act 2004* (ACT) ss 8(1) and 11(4).

40 Schedule 2 of the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) introduces s 14(1A) into the *Status of Children Act 1996*(NSW) and commenced on the 19 September 2008..

41 *Assisted Reproductive Treatment Act 2008* (Vic) s 10

42 *Assisted Reproductive Treatment Act 2008* (Vic). Section 147 amends Part III of the *Status of Children Act 1974* (Vic) and introduces ss 13 and 14. These amendments will come into operation on the 1 January 2010 unless they are proclaimed earlier.

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

44 *Family Law Act 1975* (Cth) ss 4AA and 60EA 60H(1).

children.[45] The NSW legislature has been an active participant and a driving force in this recognition process. The amending of the NSW *Status of Children Act 1996* and the granting of legal recognition to the consenting non-birth mother of child conceived during the course of genuine same-sex relationship is confirmation of the belief that the sexuality of parents is of little consequence to the interests of the children they raise. In passing this legislation NSW has already validated same-sex parenting and with it the suitability of same-sex couples to parent. In light of these developments, it would be illogical for NSW to make a decision to exclude same-sex couples from the adoption process.

6. Conclusion

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

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

To achieve parity between same-sex couples and heterosexual couples, and remove discrimination from the legislation, only minor amendments are required to the existing legislation. In particular, the existing definition of 'de facto relationship' which reads as

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

'the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another' should be amended to read: **'the relationship between two persons, irrespective of sex, who live together on a bona fide domestic basis'**.

Table 1: Australia - Eligibility for Adoption

State	Legislation	Who can adopt? (excluding step-parent)	Definitions of Couple	When can a Step-parent/second parent Adopt?
Australian Capital Territory	*Adoption Act 1993* s 18	• s **18 (1)(b)**: A couple 'who, whether married or not, have lived together in a **domestic partnership** for a period of not less than 3 years'. ❖ Heterosexual married and de facto couples. ❖ Same-sex couples. ❖ s 18(3): Single person.	'**domestic partnership**' is the relationship between two people whether of a **different or the same sex,** living together as a couple on a genuine domestic basis.' s 169 *Legislation Act* 2001 (ACT)	• s 18(2): **Only** in circumstances where the Court considers it '**not preferable**' to make an order for custody or guardianship.
New South Wales	*Adoption Act 2000* Sections 23, 26, 27, 28 and 30	• ss 26 and 28(4): A **couple** who have been living together for a continuous period of at least 2 years. ❖ s 28(4): Heterosexual married and de facto couples. ❖ s 27: One person	• s 23(1): 'Couple' means a **man and a woman** who: (a) Are married; or (b) Have a de facto relationship. 'De facto couple' applies to a **man and woman** living together on a genuine domestic basis without being married.	• s 30(a)-(d): the child is at least 5 years old; the step parent has lived with the child for a continuous period of not less than 2 years; there is consent in accordance with the *Adoption Act 2000*, and '**clearly preferable** in the best interests of the child to **any other action** that could be taken by law in relation to the child'.
Northern Territory	*Adoption of Children Act 1994* ss 13, 14 and 15	• s 13(1)(a): Man and woman **married** to each for not less than two years'. ❖ s 13(1) married couple. ❖ s 14(1)(b): Single person under exceptional circumstances.	• s 13(1) 'where the man and woman…are **married** to each other'.	• s 15(3)(a)-(c): guardianship or custody of the child under *Family Law Act* **does not make adequate provision** for the welfare and interests of the child; 'exceptional circumstances'; 'better provision'.
Queensland	*Adoption Children Act 1964* (Qld) s 12(1)	• s 12(1) 'husband and wife jointly'. ❖ s 12(1)and (2): **Husband and wife.** ❖ s 12(3)(c): One person under special circumstances.	• s 12(1) 'husband and wife jointly'.	• s 12(5): 'Welfare and interests of the child **'better served'** than under an order for guardianship and custody.
South Australia	*Adoption Act 1988* (SA) ss 10 and 12	• s 12(1): Two persons cohabiting together in a **marriage relationship** for a continuous period of at least five years(unless special circumstances). ❖ Heterosexual married and de facto couples. ❖ s 12(3)(b): One person in special circumstances.	• s 4(1): '**Marriage relationship**' means the relationship between two persons cohabiting as **husband and wife** or **de facto husband and wife.**	• s 10(1)(a): is **clearly preferable,** in the interests of the child, to any alternative order. • s 10(2): The Family Court of Australia has given that person leave to proceed with the application for adoption.

Table 1: Australia - Eligibility for Adoption

State	Legislation	Who Can Adopt? (excluding step-parents)	Definitions of Couple	When can a Step-parent /Second Parent Adopt?
Tasmania	*Adoption Act 1988* (Tas) s.20	• s 20(1) two persons who, for a period of not less than 3 years are married or in a registered deed of relationship. ❖ s 20(1): Married couple ❖ s 20 (2A): Parties in a 'significant relationship' **But** only where the partner is the natural or adopted parent of the child or a relative of the child. ❖ s 20(4): One person under exceptional circumstances.	*Relationships Act 2003* (Tas) s 4: Significant relationships – (1) Is a relationship between **two adult persons** (a) Who have a relationship as a couple; and (b) Who are **not married** to one another or related by family.	• s 20(7)(a)-(c):Court shall not make an adoption order unless: an order for custody or guardian would **not make adequate provision** to serve the welfare and interests of the child; and serves the welfare and interests of the child; and special circumstances exist.
Victoria	*Adoption Act 1984* ss 11-12	• s 11(1)(a) and (c): A man and a woman who are **married** to each other or living in a **de facto relationship** for not less than two years. ❖ Heterosexual married and de facto couples ❖ s 11(3) Single person under special circumstances.	s 4(1): 'De facto relationship' means the relationship of a **man and a woman** who are living together as husband and wife on a genuine domestic basis, although not married to each other.	• s 11(6)(a)-(d): Conditions to be satisfied. Order under *Family Law Act* **not adequate**; exceptional circumstances; better provision for welfare of child and in the case of an order in favour of a de facto spouse neither that spouse nor his or her de facto spouse is married to another person at the time that the order is made.
Western Australia	*Adoption Act 1994* s 39	•s 39(1)(d)and (e) (joint): **Married** couple or living together in **de facto relationship** for at least three years. ❖ Married couples. ❖ Heterosexual de facto couples. ❖ Same-sex de facto couples. ❖ s39(1): single person.	*Interpretation Act 1984* s 13A(1): 'De facto relationship' as a relationship other than marriage between two people who live together is a **'marriage like'** relationship. s 13A(3): 'It does not matter **whether the persons are different sexes or the same sex.'**	• s 68(1)(fa): Child's adoption by step-parent **preferable** to order under FLA. • s 4(1)(b): definition of 'step-parent'.