

The Secretariat
Adoption by Same-Sex Couples Review
Department of Premier & Cabinet
1 Treasury Place
Melbourne VIC 3002

By Email: SameSexAdoption@dpc.vic.gov.au

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Dear Secretariat

Review to permit adoption by same-sex couples under Victorian law

The Human Rights Law Centre (**HRLC**) is grateful for the opportunity to make a submission to the Victorian Government's review to remove discrimination against same-sex families and their children in adoption laws (the **Review**). The HRLC strongly supports the Government's commitment to end discrimination in Victoria's adoption laws. The reforms would remedy a significant injustice in the law, provide much needed legal certainty and practical benefit to families led by same-sex parents, and further the goal of achieving equality for LGBTI people in Victoria.

We believe the technical issues raised by the Review are best addressed by those with expertise in legislative drafting, statutory interpretation and family law. However, this submission contains a number of observations and small number of recommendations based on the HRLC's experience and expertise. We are happy for this submission to be made public.

About the Human Rights Law Centre

The HRLC is an independent not-for-profit organisation that protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building. The HRLC works in partnership with lesbian, gay, bisexual, transgender and intersex (LGBTI) organisations to protect and promote the rights of LGBTI people.

The current law in Victoria

Section 11(1) of the *Adoption Act 1984* (the **Act**) provides that only a man a woman, whether married or in a de facto relationship, can apply to adopt a child. This excludes same-sex couples or potentially other people in relationships that fall outside the category of man and woman.

While provisions in the Act allowing single people to adopt in 'exceptional circumstances' have been used to enable one party to a same-sex relationship to adopt a child, the availability of this option clearly falls short of allowing the opportunity for same-sex couples to apply under s 11(1) and be considered as adoptive parents on an equal basis to heterosexual couples.

Adverse impact of the current law

Large numbers of families are negatively impacted by the operation of the Act.¹ There are many children in same-sex parented families that are currently deprived of the legal certainty of recognition of their relationships to their parents and siblings. These children live in a diverse range of families and situations – under permanent care orders, in step-parent families, in intergenerational families or where they have been born through international surrogacy.

In these types of situations, parenting orders can be put in place but the child still cannot legally be adopted by their same-sex parents. This means that once the child turns 18 years old the parenting orders expire and the legal relationship between parent and child ceases. These children are left in limbo without the security, stability and practical benefits of legal recognition. The best interests of these children are served by allowing their parents to adopt.

The numbers of ‘stranger-adoptions’ in Victoria are very low. Nevertheless, as recognised by the Government’s commitment to end discrimination, there is no logical justification for continuing discrimination against same-sex couples in these situations. Indeed, over 40 years of international and Australian research demonstrates that children in same-sex parented families do just as well, if not better, emotionally, socially and educationally as their counterparts in heterosexual families.²

Inconsistency with Australian best practice and existing legal frameworks

The current exclusion of same-sex couples from the terms of s 11(1) is out of step with the majority of Australian jurisdictions that provide for same-sex adoption³ and the Federal Government’s policy of non-discrimination relating to federal inter-country adoption arrangements.⁴

The exclusion is also inconsistent with the principles of non-discrimination and equality enshrined in Victoria’s human rights framework, namely, the *Equal Opportunity Act 2010* (Vic) and the Charter. In addition, section 17 of the Charter provides that families are entitled to be protected by society and the State, and that every child has the right, without discrimination, to such protection as is in his or her best interests. Currently, by failing to provide the legal certainty of parentage to children in many situations, as described above, the terms of the Act are also inconsistent with s 17 of the Charter.

Options for reform

The simplest pathway to achieving equality in the current law would be to replace the references to male and female in the Act with gender neutral language and ensure that drafting throughout the Act accommodates couples in same-sex relationships, whether de facto relationships, registered relationships or overseas foreign marriages or civil unions.

Where possible, we suggest that the term ‘same-sex ‘ not be employed in the drafting to ensure that transgender, gender diverse and intersex people are not inadvertently excluded from the scope of the reform.

¹ The HRLC suggests that the Reviewer refer to the submission of the Rainbow Families Council for further information if required.

² Deborah Dempsey, *Same-Sex Parented Families in Australia*, CFCA Paper No. 18, Australian Institute of Family Studies, December 2013 (available at: <http://www.aifs.gov.au/cfca/pubs/papers/a145197/cfca18.pdf>)

³ Western Australia, New South Wales, Tasmania and the Australian Capital Territory.

⁴ Ben Riley, ‘Same-sex couples included in overseas adoption agreement for the first time’, *Star Observer*, 5 May 2014 (available at <http://www.starobserver.com.au/news/local-news/same-sex-couples-included-in-overseas-adoption-agreement-for-the-first-time/122370>)

Additional policy issues for consideration

In addition, the Reviewer might wish to flag a number of issues for consideration in future reviews of the Act and associated regulations and policies. These issues may be raised by other submissions to this Review.

- Whether distinguishing between various adoption scenarios in the law would be appropriate, including assessment processes and tests.
- Whether s 11(1) should also be amended to include applications made by single people, rather than providing that single people may only adopt in 'exceptional circumstances'.
- If birth certificates are issued to adoptive parents, whether amendments to the *Births Deaths and Marriages Registration Act 1998 (Vic)* or associated regulations are required.
- Further consideration of legal protections required for children born to parents through international surrogacy arrangements.

The HRLC does not express a view on the policy questions above, given they fall outside the scope of this review, but notes that these matters require consideration by Government and should be subject to consultation with affected communities and relevant stakeholders.

Additional measures required to accompany reform

When discrimination against same-sex couples is removed from the Act, it will be necessary to ensure that adoption agencies and other third parties are provided with necessary education and training to support the implementation of the reforms. This would include clarifying that service providers, including religious organisations, are not permitted to discriminate against same-sex couples.

The HRLC recognises that the majority of religious organisations do not discriminate against same-sex couples. Nevertheless, it is important that the principle of non-discrimination is upheld by all agencies and same-sex couples should have the assurance of legal certainty in this regard.

In order to fulfil the Government's commitment to remove discrimination, the HRLC recommends the Act be amended in such a manner so as to exclude the possibility of religious organisations relying on the permanent statutory exceptions available in the *Equal Opportunity Act 2010 (Vic)*. For example, the Act could be amended to clearly state that religious organisations and their staff are not able to rely on sections 82 and 84 of the *Equal Opportunity Act 2010 (Vic)*.

An alternative or additional measure would be to ensure that all government contracts entered into with adoption agencies contain a requirement that service providers deliver services on a non-discriminatory basis and/or that accreditation processes include LGBTI inclusive competencies and compliance with the principle of non-discrimination.

Conclusion

We commend the Government on its commitment to equality for lesbian, gay, bisexual, transgender and intersex people. Our hope is that this Review will result in a legislative proposal that achieves this aim and delivers long overdue certainty and stability to many LGBTI families across Australia, and the promise of future reform to resolve the issues faced by those who do not benefit from the discrete issues dealt with by this Review.

Yours sincerely



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