

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



To whom it may concern,

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

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) provides the following submission in relation to the Review to permit adoption by same sex couple under Victorian law. Broadly speaking, this submission supports the removal of discrimination and promotion of diversity and inclusion by allowing same-sex couples to adopt under Victorian law.

This submission can be made public and we would be pleased to make ourselves available to the Reviewer at any stage to discuss the matters therein.

**1. About the VGLRL**

The VGLRL is a community based advocacy group that works towards equality, social justice and human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work with and for the community along with other non-profit organisations, health bodies and government representatives to create positive change in the area of human rights and policy development. In particular, the VGLRL works constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our mission and vision.

**2. Principles within this submission**

There are many children in same-sex parented families living in Victoria who lack certainty about their legal parentage. The best interests of children are served by legal recognition of their relationships with their social parents, regardless of the parents' gender, sexual orientation or biological connection to the children. The overriding argument of this submission is that same-sex couples ought to be permitted to adopt children in exactly the same manner as heterosexual couples. There is simply no reason to discriminate against same-sex couples and their children in adoption law. The relevant criterion for adoption ought to be the couple's ability to provide a loving and stable family environment, rather than their sexuality.<sup>1</sup>

**3. The law in Victoria**

*The Adoption Act 1984* (the **Act**) and the *Adoption Regulations 2008* (the **Regulations**) provide the legislative framework for person(s) wishing to adopt a child in Victoria and set out the procedures that must be followed for each adoption.

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<sup>1</sup> *Adoption Regulations 2008* reg 35.

The Act currently provides that adoption orders may be made in favour of a man and a woman who have been married or in a stable de facto relationship of not less than two years.<sup>2</sup> An adoption order can therefore not be made in favour of same-sex couples. Adoption applications can be made in favour of single people and, seemingly, same-sex attracted single people. However, the Act states that single applicants are only able to adopt if the court is satisfied that special circumstances exist which make adoption by that person desirable.<sup>3</sup> Any applicants must also satisfy the Department of Human Services that they are fit and proper persons to adopt a child.<sup>4</sup>

The law, as it stands currently stands, violates the *Equal Opportunity Act 2010* and the *Charter of Human Rights and Responsibilities Act 2006*. The Act discriminates on the grounds of gender identity, lawful sexual activity, marital status, sex and sexual orientation – all of which are listed as protected attributes under section 6 of the *Equal Opportunity Act*. The Act also contravenes section 8 (recognition and equality before the law) and section 17 (every child’s right to protection and their best interests) of the *Charter of Human Rights and Responsibilities Act*.<sup>5</sup>

In our view, amending the Act to permit adoption by same-sex couples is not an overly complex matter. We note that our organization does not possess technical legal expertise in legislative drafting nor family law. However, we suggest the following amendments could be made to remove discrimination against same-couples from the current Act.

<b><i>Relevant section</i></b>	<b>Wording of the section</b>	<b>Possible amendment</b>
4(1) Definitions	<i>“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;</i>	<i>“domestic relationship” has the same meaning as Relationships Act 2008 (Vic) s35</i>  NB: All references to ‘de facto relationship’ in the Act should be amended to ‘domestic relationship’.

<sup>2</sup> *Adoption Act 1984* s 11(1).

<sup>3</sup> *Ibid* s 11(3).

<sup>4</sup> *Ibid* s 13(1).

<sup>5</sup> In *AB and Victorian Equal Opportunity & Human Rights Commission and Department of Human Services and Separate Representative of J* [2015] VCC, Pullen J considered that a claim under s 11(3) of the Adoption Act might give rise to the applicability of the Charter in the context of same-sex adoption.

<p>4(1) Definitions</p>	<p><i>"de facto spouse" means—</i>  <i>(a) in relation to a man who is living with a woman in a de facto relationship, the woman with whom he is living in that de facto relationship;</i>  <i>(b) in relation to a woman who is living with a man in a de facto relationship, the man with whom she is living in that de facto relationship;</i></p>	<p><i>"domestic partner" means a person with whom the person is in a domestic relationship</i></p> <p>NB: All references to 'de facto spouse' in the Act should be amended to 'domestic partner'.</p>
<p>4(5) Definitions</p>	<p><i>(5) If a man or woman living in a de facto relationship is also married, a reference in this Act (except section 55) to a spouse of such a man or woman (as the case requires) does not include a reference to the spouse to whom the man or woman is married.</i></p>	<p><i>(5) If a <b>person</b> living in a <b>domestic relationship</b> is also married, a reference in this Act (except section 55) to a spouse of such a <b>person</b> does not include a reference to the spouse to whom the <b>person</b> is married.</i></p>
<p>10 Who may be adopted</p>	<p><i>(1) Subject to this Act, the Court may make an order for the adoption of a person who—</i>  <i>(a) had not attained the age of eighteen years before the date on which the application was filed in the Court; or</i>  <i>(b) has been brought up, maintained and educated by the applicant or either of the applicants, or by the applicant and a deceased spouse or de facto spouse of the applicant, as the child of the applicant or of the applicant and deceased spouse or de facto spouse as if the applicant were the parent of that child, or the applicant and deceased spouse or deceased de facto spouse of the applicant were the parents of that child.</i></p>	<p><i>(1) Subject to this Act, the Court may make an order for the adoption of a person who—</i>  <i>(a) had not attained the age of eighteen years before the date on which the application was filed in the Court; or</i>  <i>(b) has been brought up, maintained and educated by the applicant or either of the applicants, or by the applicant and a deceased spouse or <b>domestic partner</b> of the applicant, as the child of the applicant or of the applicant and deceased spouse <b>domestic partner</b> as if the applicant were the parent of that child, or the applicant and deceased spouse or deceased <b>domestic partner</b> of the applicant were the parents of that child.</i></p>

<p>10A Application for adoption order</p>	<p><i>An application for an adoption order under sections 11 and 12 may be made—</i></p> <p><i>(a) in the case of a man and a woman who are married or living in a relationship referred to in section 11(1), if the man and woman have been married to each other or living in that relationship with each other for not less than 2 years;</i></p> <p><i>(b) in the case of a person who is married or living in a relationship referred to in section 11(1) and who proposes adopting a child of his or her spouse or de facto spouse, or a child who is related to his or her spouse or de facto spouse, if that person and his or her spouse or de facto spouse (as the case requires) have been married to each other or living in that relationship with each other for not less than 2 years.</i></p>	<p><i>An application for an adoption order under sections 11 and 12 may be made—</i></p> <p><i>(a) in the case of <b>two people</b> who are married or living in a relationship referred to in section 11(1), if the <b>persons referred to in section 11</b> have been married to each other or living in that relationship with each other for not less than 2 years;</i></p> <p><i>(b) in the case of a person who is married or living in a relationship referred to in section 11(1) and who proposes adopting a child of <b>their</b> spouse or <b>domestic partner</b>, or a child who is related to <b>their</b> spouse or <b>domestic partner</b>, if that person and <b>their</b> spouse or <b>domestic partner</b> (as the case requires) have been married to each other or living in that relationship with each other for not less than 2 years.</i></p>
<p>11 Persons in whose favour adoption orders may be made</p>	<p><i>(1) An adoption order may be made in favour of a man and a woman—</i></p>	<p><i>(1) An adoption order may be made in favour of a <b>couple</b> —</i></p>
<p>11 Persons in whose favour adoption orders may be made</p>	<p><i>(1A) The Court must not make an adoption order under subsection (1) in relation to a man and woman living in a de facto relationship unless the Court is satisfied that neither the man nor the woman is married to another person at the time that the order is made.</i></p>	<p><i>1A) The Court must not make an adoption order under subsection (1) in relation to a <b>couple</b> living in a <b>domestic relationship</b> unless the Court is satisfied that neither <b>person</b> is married to another person at the time that the order is made.</i></p>

<p>53 General effect of adoption orders</p>	<p><i>(1) Subject to this Act and to the provisions of any other Act that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order—</i>  <i>(a) the adopted child shall be treated in law as a child of the adoptive parent or adoptive parents, and the adoptive parent or adoptive parents shall be treated in law as the parent or parents of the child, as if the child had been born—</i>  <i>(i) to the adoptive parent; or</i>  <i>(ii) to the adoptive parents in lawful wedlock;</i></p>	<p><i>(1) Subject to this Act and to the provisions of any other Act that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order—</i>  <i>(a) the adopted child shall be treated in law as a child of the adoptive parent or adoptive parents, and the adoptive parent or adoptive parents shall be treated in law as the parent or parents of the child, as if the child had been born <b>to the adoptive parent or adoptive parents</b></i></p>
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Consideration should also be given to amending the Regulations, particularly regulation 38(3) and Schedule 21.

#### 4. Other jurisdictions

Four States and territories in Australia allow same-sex couples to apply to adopt; the Australian Capital Territory, New South Wales, Tasmania and Western Australia.<sup>6</sup>

The *Adoption Act 2000* (NSW) provides that ‘two persons who are a couple may, subject to this Act, adopt a child.’<sup>7</sup> The couple must be:

- resident or domiciled in the State;<sup>8</sup>
- of good repute and fit and proper persons to fulfill the responsibilities of parents;<sup>9</sup>
- unless a birth parent or relative of the child, either 21 or more years of age or 18 or more years older than the child;<sup>10</sup>
- living together for a continuous period of not less than two years.<sup>11</sup>

<sup>6</sup> See *Adoption Act 2000* (NSW) s 28; *Adoption Act 1993* (ACT) s 14; *Adoption Act 1994* (WA) s 39; *Adoption Act 1998* (TAS) s 20.

<sup>7</sup> *Adoption Act 2000* (NSW) s 28(1).

<sup>8</sup> *Ibid* s 28(1)(a).

<sup>9</sup> *Ibid* s 28(1)(b).

<sup>10</sup> *Ibid* s 28(3)(a).

<sup>11</sup> *Ibid* s 28(4).

The *Adoption Act 1993* (ACT) provides that ‘an adoption order for a child or young person may be made in favour of two people jointly.’<sup>12</sup> The couple must be:

- living together in a domestic partnership of at least three years;<sup>13</sup>
- able to demonstrate the stability of, and commitment to, the domestic relationship;<sup>14</sup>
- on a register of suitable people.<sup>15</sup>

The *Adoption Act 1994* (WA) provides that two persons may apply jointly to adopt.<sup>16</sup> The couple must be:

- both Australian citizens;<sup>17</sup> and
- married or in a de facto relationship for at least three years.<sup>18</sup>

The *Adoption Act 1988* (Tas) provides that an order for the adoption of a child may be made in favour of two persons who are married or in a registered relationship.<sup>19</sup> The couple must be in a stable continuous relationship of a period of not less than three years.<sup>20</sup>

Two key points arise from other state and territory legislation. Firstly, other states and territories refer to their relationships legislation when defining de facto relationships. This should be followed in Victorian law, and the VGLRL have proposed replacing the term ‘de facto relationship’ with ‘domestic relationship’, which is defined under the *Relationships Act 2008*. Secondly, other states and territories use non-gendered language when referring to relationships (e.g. ‘couple’ as opposed to ‘man and woman’). This should be followed in Victorian law. As a principle that should be applied wherever possible, gendered terms such as “his” or “her” should be substituted with neutral terms such as “their”.

## 5. Categories of adoption

There are a range of scenarios in which same-sex couples and their children face significant hardship due to the current prohibition. We do not propose to discuss these at length but list some of the types of family scenarios currently impacted by the discrimination in the current law:

- families adopting children within their care under permanent care orders;
- intra-familial adoption if a child’s parents pass away;
- known parent adoption (for example, where a single parent with no previous partner recognized as the legal parent of the child establishes a relationship

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<sup>12</sup> *Adoption Act 1993* (ACT) s 14.

<sup>13</sup> *Ibid* s 14(b).

<sup>14</sup> *Ibid* s 14(c).

<sup>15</sup> *Ibid* s 14(d).

<sup>16</sup> *Adoption Act 1994* (WA) s 39(2).

<sup>17</sup> *Ibid* s 39(2)(a).

<sup>18</sup> *Ibid* s 39(1)(e)(i).

<sup>19</sup> *Adoption Act 1988* (Tas) s 20(1).

<sup>20</sup> *Ibid* s 20(2).

- with another adult and the family wishes for that adult to become a parent of the child); and
- where infants become available for adoption to unknown prospective couples.

## **6. Inter country adoptions**

We note that eligibility to adopt via state law also impacts eligibility to adopt via inter-country arrangements where the state law's eligibility criteria are compatible with the other country's arrangements.

Recently Australia signed its first inter-country adoption agreement with a country that permits same-sex couples to adopt – South Africa. It is important that the Reviewer consider the implications of this adoption agreement on in relation to adoption laws within Victoria, particularly Part IVA and IVB of the Act.

The VGLRL recognizes the development of amendments to address this issues above fall outside its technical expertise and does not propose to advance any particular drafting suggestions in this regard. We note the Federal Government's commitment<sup>21</sup> that all future services relating to inter country adoptions will be delivered on a non-discriminatory basis. We would encourage the Reviewer to highlight this principle and the impact of these changes on inter-country agreements in this final report to Government.

## **7. International surrogacy**

We note the ongoing public debate about the best approach to ensure the legal protection for children born through international surrogacy, particularly in countries that do not transfer parentage.

One proposal made within that debate is to amend domestic state adoption laws to accommodate this scenario. The VGLRL recognises there are a number of complex legal policy issues that fall outside the terms of this inquiry. We recommend, however, that the Reviewer note any information collected as part of this review and recommend that Government include consideration of the recognition of parentage of children born through international surrogacy as part of its foreshadowed broader adoption review.

## **8. Other recommendations of Victorian Law Reform Commission Final Report**

As noted in the Victorian Law Reform Commission Final Report on *Assisted Reproductive Technology and Adoption*,<sup>22</sup> some policies and procedures and regulations would also require amendment as a result of the legislative changes.

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<sup>21</sup> Benjamin Riley, 'Same Sex Couples Included in Overseas Adoption Agreement for the First Time', *Star Observer* (5 May 2014)  
<http://www.starobserver.com.au/news/local-news/same-sex-couples-included-in-overseas-adoption-agreement-for-the-first-time/122370>.

<sup>22</sup> Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (Melbourne: Victorian Law Reform Commission 2007).

Particularly, the Department of Human Services should review the *Adoption and Permanent Care Procedures Manual* to accommodate applications by same-sex couples, and Department and adoption agency staff should receive training to provide education about parenting by same-sex couples.

## 9. Conclusion

It is in the best interests of children and in line with international human rights law that the relationships between children and their same-sex parents should be legally recognised. The best way to achieve this is to amend the *Adoption Act 1984* and Regulations to allow an application for adoption to be made in favour of same-sex couples on an equal footing to opposite sex-couples

We thank the Reviewer for his time in reviewing this submission and we would be pleased to make ourselves available to the Reviewer at any stage should he have further questions in relation to these submissions.

Yours sincerely,



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