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Department of Communities, Child Safety and Disability Services  
Strategy, Engagement and Innovation  
Policy and Legislation  
Child and Family Legislative Review  
GPO Box 806  
BRISBANE QLD 4001

Dear Secretary

## **Review of the operation of the Adoption Act 2009**

### **1. Introduction**

- 1.1 Australian Lawyers for Human Rights (ALHR) thanks the Child and Family Legislative Review for the opportunity to comment on the operation of the *Adoption Act 2009* ('the Act').
- 1.2 ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.
- 1.3 The focus of this submission is on reform to allow same sex couples to adopt. ALHR

notes that Queensland, South Australia and the Northern Territory are the only Australian jurisdictions that do not allow same sex couples to adopt.

- 1.4 ALHR uses the term ‘same sex couples’ throughout this submission, as this is the commonly utilised term in discussions about reforming adoption legislation to allow non-heterosexual couples to adopt. However ALHR recognises that trans and intersex couples may not identify as ‘same sex’. Where this submission refers to same sex couples, that term should be read to also include all couples whose partners do not identify as male, female or heterosexual. ALHR notes that its proposed amendments to the Act would enable couples of any gender or sexual orientation to adopt.
- 1.5 ALHR supports other submissions that recommend consideration or reform to make it easier for people without a spouse to adopt, particularly when it involves a child or children known to the adoptive parent.

## **2. Summary of recommendations**

- 2.1 That the Act be amended to enable same sex couples to adopt.
- 2.2 That same sex adoption be specifically achieved by the removal of sections 76(g)(ii), 89(7)(b)(v)(A) and 92(1)(h).
- 2.3 That in the event that Queensland amends the Act to allow for same sex adoption, that no anti-discrimination exemptions are provided.
- 2.4 That the Government give careful consideration to making it less onerous for people without a spouse as defined in the Act to adopt.

## **3. Non-Discrimination and Equality before the Law**

- 3.1 ALHR submits that by preventing same sex couples from adopting, the Act breaches the principles of non-discrimination and equality.
- 3.2 The rights to non-discrimination and equality are fundamental to human rights law and ensure the universal enjoyment of human rights. They are found in a wide range of human rights treaties.<sup>1</sup>
- 3.3 Article 26 of the International Covenant on Civil and Political Rights (‘ICCPR’) provides that all persons are entitled without any discrimination to the equal protection of the law and the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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<sup>1</sup> I International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171, arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of the Child, Nov. 20, 1989 (entered into force Sept. 2, 1990), 1577 UNTS 3, art 2; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006), art. 5.

- 3.4 The United Nations Human Rights Committee ('HRC') has expressed the view that the scope of Article 26 is not restricted to the prohibition of discrimination in relation to the rights provided for in the ICCPR but obliges States to ensure that the content of legislation and its application are not discriminatory.<sup>2</sup>
- 3.5 It is also clear that Article 26 includes protection against discrimination on the grounds of sexual orientation. The HRC expressed the view that the reference to 'sex' in articles 2 and 26 of the ICCPR should be taken to include sexual orientation and sexual orientation is a prohibited ground of discrimination.<sup>3</sup>
- 3.6 The HRC has examined the meaning of 'discrimination' as no definition is found within the ICCPR.<sup>4</sup> The HRC notes that guidance can be found in other human rights treaties that do contain a definition. The HRC considers that 'discrimination' means 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'
- 3.7 Other aspects of the Universal Declaration of Human Rights and subsequent treaties, which reflected social norms at the time, have been modified in light of contemporary social standards.<sup>5</sup> The ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) can address contemporary issues not contemplated when those treaties were made.<sup>6</sup> ALHR submits that current societal attitudes to gender and sexuality must inform what is required under human rights standards about discrimination on these grounds.
- 3.8 Principle 24 of the Yogyakarta Principles specifically provides that everyone has the right to found a family regardless of sexuality or gender identity.<sup>7</sup> The Yogyakarta Principles were formulated by a range of international human rights experts including judges, a former UN high commissioner, members of treaty bodies, academics, NGO's and others to clearly articulate the application of international human rights law to gender identity and sexual orientation.
- 3.9 Queensland's *Anti-Discrimination Act 1991* lists lawful sexual activity, sexuality and gender identity as grounds upon which discrimination is unlawful.<sup>8</sup>

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<sup>2</sup> *Broeks v Netherlands* (172/1984) [12.3] UN Doc A/42/40 (1987); *Zwaan-de Vries v Netherlands* (182/84) [12.3] UN Doc A/42/40 (1987); UN Human Rights Committee, General Comment 18: Non-discrimination, CCPR 10/11/89 (1989) [12].

<sup>3</sup> *Mr Nicholas Toonen v Australia*, Communication No. 488/1992, U.N. Doc.A/49/40 (1994) [8.7]; *Mr Edward Young v Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

<sup>4</sup> UN Human Rights Committee, General Comment 18: Non-discrimination, CCPR 10/11/89 (1989) [6]-[7].

<sup>5</sup> Eg. *Case of the Mayagna (Sumo) Awas Tingni Community -v- Nicaragua*(Inter-American Court of Human Rights, Series C No. 79, 2001) at [148] (commending an evolutionary interpretation of international human rights instruments).

<sup>6</sup> Koen de Feyter, 'Treaty Interpretation and the Social Sciences' (Paper presented at the International Conference on Methods of Human Rights Research, Maastricht, 22-24 Nov 2007, 3.

<sup>7</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.yogyakartaprinciples.org>

<sup>8</sup> *Anti-Discrimination Act 1991 (QLD)* s 7.

- 3.10 ALHR submits that the discrimination against same sex couples in the Act is clearly incongruous with the language of the *Anti-Discrimination Act*.
- 3.11 ALHR submits that the obligation not to discriminate imposes a positive duty on the Government to prevent discrimination within its jurisdiction. The Queensland Government can do this through amending the Act to allow same sex couples to adopt.

#### 4. **Best Interests of the Child**

- 4.1 The core objective of the Act is to provide for an adoption system that ‘promotes the wellbeing and best interests of the adopted person throughout their lives’<sup>9</sup>. In encompassing childhood and adulthood, this is broader than similar legislation in other Australian jurisdictions.
- 4.2 While the Act does not directly reference the Convention of the Rights of the Child, (‘CROC’), it does so obliquely through incorporating the Hague Convention which refers to CROC.
- 4.3 Australia was heavily involved during the drafting of CROC and ratified it in 1990.<sup>10</sup> Though not imposing a direct obligation on Queensland, Australia’s ratification does impose an obligation on the Commonwealth to carry out its obligations under CROC in good faith.<sup>11</sup>
- 4.4 Article 3(1) of CROC states:  
  
*‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration’.*
- 4.5 Article 21 of CROC provides that for countries that recognise or permit the system of adoption, that the best interest of the child shall be the paramount consideration.
- 4.6 No international human rights treaty provides a definition for ‘parent’, ‘parents’ or ‘family’ that limits such a concept to a nuclear family comprising of a heterosexual couple. Despite the regular use of the language, there is no ‘right’ to be raised by a heterosexual couple. Such a concept is an anathema to the principles of equality and non-discrimination and insulting to the diverse range of families that exist in the community.
- 4.7 ALHR submits that in order to properly meet the paramount consideration of providing for the best interest of the child, that same sex couples should be treated in exactly the same manner as heterosexual couples and should not be excluded as potential placements. The exclusion of same sex couples as potential adoptive parents necessarily limits the available placements that may be in a child’s best interest.

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<sup>9</sup> *Adoption Act 2009 (QLD)* s 5(a)

<sup>10</sup> John Tobin, ‘The *Convention on the Rights of the Child*: The Rights and Best Interests of Children Conceived Through Assisted Reproduction’, (Occasional Paper Victoria Law Reform Commission 2004) 1.

<sup>11</sup> Ibid 1 - 2. See also Vienna Convention on the Law of Treaties, May. 23 1969, United Nations, 1151 UNTS 331, art 26.

4.8 Furthermore, despite regular allegations to the contrary there is no scientifically based empirical evidence that children raised by same-sex parents do less well than children raised by heterosexual couples.

4.9 In a review of outcomes for children born of assisted reproductive technologies D Ruth McNair concluded:

*'family functioning (processes) rather than family structure is the critical factor in determining children's outcomes. Family processes that improve outcomes for children include family cohesion, minimal conflict, good quality parent–parent and parent–child relationships, consistent parenting style that includes a high level of reward and minimal coercion, and positive inter - generational family relationships'*<sup>12</sup>.

4.10 In a 2003 paper the Tasmania Law Reform Institute found that the usual prejudices and allegations made against same sex parenting including instability of the couple's relationship, parental suitability, developmental concerns, the sexuality of the child, bullying at school, and heightened risk of sexual abuse were all without merit.<sup>13</sup>

4.11 In the same paper the Tasmanian Law Reform Institute recommended that same sex couples be able to adopt arguing that:

*'It is increasingly being recognised that that emotional security, stability and criteria assessing the best interest of the child are the ideal basis for decisions regarding adoption rather than criteria relating to sexual orientation and marital status.'*<sup>14</sup>

4.12 ALHR is of the view that neither international human rights law nor genuine sociological research regards the sexuality of a child's parents as a matter affecting their capacity to provide for the best interests of a child.

4.13 ALHR submits that the CROC preamble succinctly captures how the best interests of a child can be provided for:

*'Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'*

4.14 ALHR submits that the best interest of the child requires that potential adoption placements not be limited by the sexuality of the potential adoptive parents.

## **5. Other jurisdictions and the value of uniformity**

5.1 While some areas of law such as family and corporations law are now predominantly national in scope and uniformity, others areas including laws governing adoption remain state and territory based.

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<sup>12</sup> Ruth McNair, 'Outcomes for Children Born of A/R/T/ in a Diverse Range of Families', (Occasional Paper Victorian Law Reform Commission 2004) 2.

<sup>13</sup> Claire Buxton and Kate Warner, 'Adoption by same sex couples', (Issues Paper No. 4 Tasmania Law Reform Commission February 2003) 22 – 26.

<sup>14</sup> Ibid 18.

- 5.2 However with only South Australia, Northern Territory and Queensland not allowing same sex adoption, the Queensland Government now has the very real opportunity to join the majority of the states and territories in ensuring that the best interest of the child, not the sexuality of the potential parents, is the paramount consideration for adoption in Queensland.
- 5.3 At present were a same sex couple living in Queensland wishing to adopt as a couple they would be need to relocate interstate. That does a disservice to both same sex couples and Queensland.
- 5.4 As can be seen below, since 2002 there has been a slow but steady progression of other jurisdictions enacting reform to enable same sex couples to adopt.
- 5.5 **Western Australia** was the first jurisdiction to provide for same sex adoption when it passed the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)*; a far reaching reform act that removed a number of discriminatory and criminal provisions from Western Australian legislation, provided access to IVF for lesbian couples and amended the *Adoption Act 1994*.
- 5.6 Whilst Western Australia has no anti-discrimination exemptions for faith-based adoption agencies, it is one of only two Australian jurisdictions to ban altruistic surrogacy. With commercial surrogacy banned in all Australian jurisdictions, altruistic surrogacy provides one avenue to male same sex couples to adopt.
- 5.7 **The Australian Capital Territory** provided for same sex adoption in 2004 by amending the *Adoption Act 1993 (ACT)* following the passing of the *Parentage Act 2000*. No anti-discrimination exemptions are provided for faith-based adoption agencies.
- 5.8 **New South Wales** amended the *Adoption Act 2000 (NSW)* to allow for same sex couples to adopt in 2010 following the passage of the *Adoption Amendment (Same Sex Couples) Bill 2010*.
- 5.9 New South Wales' amending legislation also contained amendments to enable the birth parents to express a wish as to the preferred background of any prospective adoptive parents of the child. Such a wish is not binding on the Director-General.
- 5.10 The New South Wales Bill also amended the *Anti-Discrimination Act 1977* and provided faith-based adoption agencies with an exemption from anti-discrimination provisions enabling them to discriminate in the provision of their services on the ground of sexuality.
- 5.11 **Tasmania** amended its *Adoption Act 1988* to allow same sex couples to adopt in 2013 following passage of the *Adoption Amendment Bill 2013*. Tasmania does not provide any anti-discrimination exemptions for faith-based adoption agencies.
- 5.12 **Victoria** became the latest jurisdiction in Australia to legalise same sex adoption with the passage of the *Adoption Amendment (Adoption by Same-Sex Couples) Bill* in December 2015.
- 5.13 As in New South Wales, faith-based adoption agencies are entitled to

discriminate in providing adoption services to same-sex couples.

- 5.14 **South Australia** does not currently allow same sex adoption. However during 2014 – 15 South Australia’s Adoption Act 1998 and associated regulations were reviewed with public submissions closing on 30 May 2015. The review recommended that the Adoption Act be amended to enable same sex couples to apply to adopt a child. The government has not indicated whether it intends to act on the recommendation.
- 5.15 ALHR is of the view that it is likely that South Australia will amend its adoption laws to allow same sex adoption during the term of the current government.
- 5.16 **Northern Territory** does not allow same sex adoption. ALHR is not aware of any present intention by the Northern Territory legislature to amend its adoption laws to provide for same sex adoption.
- 5.17 The Northern Territory does however have a presumption of parentage for lesbian couples where one partner conceives through a fertilization procedure.<sup>15</sup>
- 5.18 **Other countries** in which same sex couples are able to adopt within the entire country or certain states or territories within that country include: Andorra, Argentina, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Israel, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, The United Kingdom (in. England, Wales, Scotland and Northern Ireland), the United States and Uruguay.<sup>16</sup>
- 5.19 As can be seen from the review of the various Australian jurisdictions above, the main difference between the jurisdictions that allow same sex adoption is whether they provide anti-discrimination exemptions to faith-based adoption agencies when carrying out adoptions services.
- 5.20 ALHR submits that the provision of anti-discrimination exemptions to faith-based adoption agencies is incompatible with having the best interests of the adopted person as the primary objective.
- 5.21 Enabling faith-based adoption agencies to discriminate against same sex couples is particularly concerning as they are carrying out a public good and receive public funding to do so. While it may have been political pragmatism that forced the inclusion of amendments to their respective anti-discrimination acts, ALHR is of the view that the through the provision of anti-discrimination exemptions, the governments in Victoria and New South Wales have sanctioned further discrimination against same sex couples.
- 5.22 However ALHR also notes that given that Queensland does not currently utilise faith-based adoption services to provide adoption services to the community, the provision of anti-discrimination exemptions would have no effect at this point in time.
- 5.23 ALHR also notes that as Queensland has a unicameral parliament, that the government does not face the situation of a hostile upper house. This means that the support of the Queensland government will be enough to amend the legislation

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<sup>15</sup> *Status of Children Act section 5DA*

<sup>16</sup> See: [https://en.wikipedia.org/wiki/LGBT\\_adoption](https://en.wikipedia.org/wiki/LGBT_adoption)

without having to ‘horse trade’ on the inclusion of other amendments including anti-discrimination exemptions.

- 5.24 ALHR does not object to the parent’s wishes concerning the placement of the child being taken into account so long as those wishes are not binding on the decision maker.

## **6. Recommendations and concluding remarks**

- 6.1 Based on international human rights law, practice in other jurisdictions and genuine sociological research, ALHR is of the view that the best interest of the child requires that the Act be amended to enable same sex couples to adopt.
- 6.2 ALHR submits that same sex adoption could be simply and effectively achieved in Queensland by the removal of sections 76(g)(ii), 89(7)(b)(v)(A) and 92(1)(h) of the Act.
- 6.3 To ensure that the best interest of the child remains the paramount objective principle ALHR recommends that no anti-discrimination exemptions be granted to faith-based adoption agencies.
- 6.4 Though not dealt with in this submission, ALHR is of the view that the Government should give careful consideration to making it less onerous for people without a spouse as defined in the Act to adopt. As is currently the case, this is likely to primarily benefit individuals who wish to adopt a ‘known’ child.
- 6.5 When the United Nations Postal Administration can release six new stamps depicting homosexuality, gay parenting and transgender figures amongst others<sup>17</sup>, the time has surely come for Queensland to reform its discriminatory adoption laws and join the majority of Australian states and territories in affording those in loving same sex relationships the ability to adopt.
- 6.6 If you would like to discuss any aspect of this submission, please contact Nathan Kennedy, President by email: [president@alhr.org.au](mailto:president@alhr.org.au)

Yours faithfully,

Nathan Kennedy

**President**

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<sup>17</sup> See <http://www.un.org/apps/news/story.asp?NewsID=53168#.VtVyVFJ05SU>