

19 September 2016



Att: Lachlan Zangari
Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne VIC 3000
via law.reform@lawreform.vic.gov.au

Dear Mr Zangari,

The Victorian Gay & Lesbian Rights Lobby (VGLRL) provides the following submission to the Victorian Law Reform Commission's *Review of the Adoption Act 1984 – Consultation Paper*.

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our organisation's mission and vision.

We thank you and your staff for taking the time to review this paper. We would be pleased to make ourselves available at any stage to address any questions in relation to the matters raised herein.

Yours sincerely,

Ms Rachael Hambleton
Co-Convener, VGLRL

Mr Sean Mulcahy
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Submission: Adoption Act Review

1. Cohabitation requirement (question 23)

- 1.1 Couples in domestic relationships must show that they live together and have lived together as a couple in a domestic relationship for at least two years. The same requirement does not apply to married couples, despite this being part of adoption practice.¹ This requirement does not treat same-sex and married couples equally.
- 1.2 This requirement would also appear to be inconsistent with reforms to relationships law which removed the requirement that both people in a domestic relationship live in Victoria in order to register their relationship.² The effect of this is that a couple must live together for two years in order to adopt but need not live together in order to register their relationship.
- 1.3 This cohabitation requirement arises from how ‘domestic relationship’ is defined.³ The same definition, or similar definitions, is commonly used in other Victorian legislation.⁴ However, other legislation uses a broader definition of ‘domestic relationship’ that ‘differs from the principal definition by expressly recognising relationships where people may not necessarily live under one roof, yet are mutually committed to and supportive of each other within their shared lifestyle as a couple.’⁵

Recommendation: The definition of ‘domestic relationship’ in the *Adoption Act* should be amended to remove the cohabitation requirement

2. Adoption by single parents, stepparents and relatives (questions 24, 26)

Adoption by single parents

- 2.1 Single people in Victoria are only able to adopt in limited circumstances: there must be ‘special circumstances in relation to the child’ which make the adoption ‘desirable.’⁶ ‘Special circumstances’ is not defined in the Act, but the Consultation Paper explains:
In practice, the special circumstances requirement has meant that single people are only able to adopt children with special needs... [that is,] children older than 12 months of age, children with disabilities and children from difficult backgrounds. This practice is not specified in the

¹ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 90 (n 13).

² *Relationships Amendment Act 2016*.

³ *Adoption Act 1984* s 4.

⁴ *Statute Law Amendment (Relationships) Act 2001*; *Statute Law Further Amendment (Relationships) Act 2001*.

⁵ Explanatory Memorandum, *Statute Law Further Amendment (Relationships) Bill 2001*, 1. For further explanation, see <http://www.vgllr.org.au/your-rights/relationships>.

⁶ *Adoption Act 1984* s 11(3).

Adoption Act or the Adoption Regulations but appears to be an interpretation of the special circumstances requirement.⁷

- 2.2 In 2007, the Commission concluded that ‘single people are able to provide secure and loving environments for children’ and recommended that the special circumstances requirement be removed.⁸ That recommendation was not implemented. A recent review of South Australia’s adoption legislation concluded that children brought up in single-person households can be expected to do ‘just as well’ as children ‘who grew up in different-sex couple households.’⁹
- 2.3 The special circumstances requirement would also appear to be inconsistent with ART reforms,¹⁰ whereby single women have the ability to start a family through ART services but single people can only adopt a child in special circumstances. Furthermore, the requirement would appear to be inconsistent with parenting laws,¹¹ whereby a single person can have full parental responsibility for a child under permanent care orders but can only apply to adopt in special circumstances.
- 2.4 The different treatment of single people and couples in the *Adoption Act* is also at odds protections under the *Equal Opportunity Act* and *Charter of Human Rights and Responsibilities Act*, which state that people should not be treated differently because of their relationship status.¹²
- 2.5 This special circumstances requirement is also inconsistent with Department of Health and Human Services’ guidelines, which state that ‘it is in the best interests of children to have the maximum range of prospective adoptive parents available.’¹³

Recommendation: Consistent with the Commission’s 2007 recommendations, the special circumstances requirement for single people should be removed

Adoption by the parent’s partner

- 2.6 A parent’s partner may adopt their partner’s child under the *Adoption Act*.¹⁴ This can encompass a number of scenarios, including stepparent adoption where the child has another living natural parent, adoption by the partner of a single parent in circumstances where there is no previous partner recognised as a legal parent of the child, adoption by the partner of an commissioning parent to a surrogate child. For ease of use, the term ‘stepparent adoption’ is used here to encompass all these scenarios.
- 2.7 The Act only permits step-parent adoptions through an application to the County Court where it must be shown that:

⁷ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 92 [7.35].

⁸ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 109.

⁹ Lorna Hallan, *Adoption Act 1988 (SA) Review* (2015) 44.

¹⁰ *Assisted Reproductive Treatment Act 2008*.

¹¹ *Children, Youth and Families Act 2005*.

¹² *Equal Opportunity Act 2010* s 6(h); *Charter of Human Rights and Responsibilities Act 2006* s 8.

¹³ Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 33.

¹⁴ *Adoption Act 1984* s 11(5).

- a parenting order ‘would not make adequate provision for the welfare of the child’;¹⁵
- exceptional circumstances exist which warrant making an adoption order;¹⁶ and
- an adoption order would make better provision for the welfare and interests of the child than a parenting order.¹⁷

In addition, the *Family Law Act* requires that stepparents obtain Family Court permission before applying to the County Court for an adoption order and, in doing so, must demonstrate that it would be in the child’s best interests to do so.¹⁸

- 2.8 Victoria’s adoption policy is that, ‘in all but a few cases’, parenting orders better meet ‘the welfare and interests of children raised by a relative or stepparent’ than adoption orders.¹⁹ However, adoption might be preferred where greater ‘legal security’ is needed and it would give a child ‘a greater sense of belonging within the family.’²⁰ Exceptional circumstances might exist where a parent has been ‘totally absent from the child’s life’, or where the parents have a ‘history of violence’ or a child was ‘conceived by rape.’²¹ The Commission has also previously stated that ‘if the child was born as a result of donor insemination to a single woman... [and] the child’s mother subsequently enters into a relationship, it may be that such a situation would amount to ‘special circumstances.’”²²
- 2.9 In 2007, the Commission expressed the view that it ‘agrees that the current policy, which favours Family Court parenting orders over step-parent... adoptions, is appropriate where the child has a second parent.’²³ The Consultation Paper sets out a number of concerns about stepparent adoptions:
- In the case of adoption by a stepparent, the adoption terminates one parent’s legal relationship with the child. Adoption by a stepfather, for example, severs the father’s legal relationship with the child, along with the legal connection with his family. This may decrease the chances of the child having ongoing contact with that side of the child’s family.*²⁴
- 2.10 In scenarios where the child has no other legal parent (e.g. the child was born to a single parent, the child was born through international surrogacy and one commissioning parent is already recognised, or the other parent has died) or where the other legal parent consents to the adoption, there should be a simpler process. It must be remembered that the *Family Law Act* requires that stepparents first obtain Family Court permission before applying to the County Court for an adoption order and, in doing so, demonstrate that it would be in the child’s best

¹⁵ *Adoption Act 1984* s 11(6)(a).

¹⁶ *Adoption Act 1984* s 11(6)(b).

¹⁷ *Adoption Act 1984* s 11(6)(c).

¹⁸ *Family Law Act 1975* (Cth) s 60G.

¹⁹ Department of Human Services, Government of Victoria, ‘Stepchildren and Adoption: Information for Parents and Stepparents’ (2009).

²⁰ Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 135.

²¹ Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 134.

²² Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 108.

²³ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 108.

²⁴ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 98 [7.80].

interests to do so.²⁵ It is burdensome on stepparents to first apply to the Family Court and demonstrate that it is in the child's best interests that leave be granted to seek an adoption order and then apply to the County Court and demonstrate the criteria above, particularly as they have already shown that it is in the child's best interests that leave be granted.

Recommendation: The criteria for stepparent adoption, particularly when the child has no other legal parent or where the other legal parent consents to the adoption, should be simplified.

Clarity and circularity

2.11 The Consultation Paper states that circularity and a lack of clarity in the *Adoption Act* 'appears to have the effect that single people, other sole applicants and stepparents are unable to obtain the approval needed to be able to adopt.'²⁶ This issue should be addressed immediately.

Adoption by relatives

2.12 Relatives of a child (for example, aunts, uncles or grandparents) may apply to adopt that child.²⁷ This would generally occur in circumstances where the child's parents die or are unable to care for them.

2.13 The criteria are very similar to that in place for stepparent adoption and, as discussed above, Victoria's adoption policy is that, 'in all but a few cases', parenting orders better meet 'the welfare and interests of children raised by a relative' than adoption orders.²⁸

2.14 In 2007, the Victorian Law Reform Commission expressed the view that it 'agrees that the current policy, which favours Family Court parenting orders over... relative adoptions, is appropriate where the child has a... extended family.'²⁹ The Consultation Paper sets out a number of concerns about stepparent adoptions:

When a relative adopts a child, this can distort family relationships. For example, when a grandmother adopts a child, in law she becomes the child's mother and the mother becomes the child's sister.³⁰

Recommendation: The criteria for relative adoption should remain and continue to operate on a non-discriminatory basis towards LGBTI relatives

3. Religious exemptions (question 25)

3.1 A religious body that provides adoption services may refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, if the body acts in accordance with its religious doctrines, beliefs or principles.

²⁵ *Family Law Act 1975* (Cth) s 60G.

²⁶ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 101 [7.108].

²⁷ *Adoption Act 1984* s 12.

²⁸ Department of Human Services, Government of Victoria, 'Stepchildren and Adoption: Information for Parents and Stepparents' (2009).

²⁹ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 108.

³⁰ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 98 [7.81].

- 3.2 The VGLRL has long-advocated for reforms of the religious exemptions contained in the *Equal Opportunity Act* and *Charter of Human Rights and Responsibilities Act*. The Moran Adoption Review,³¹ Young Charter Review,³² and the Royal Commission into Family Violence³³ have also recommended reform of the religious exemptions. We believe that broad permanent exemptions for educational institutions and religious bodies should be removed, in light of the fact that there already exists a general justification defence in the *Equal Opportunity Act*.³⁴
- 3.3 If the religious exemptions are to remain, some amendments should be made to provide clarity and increase transparency. Firstly, the ‘beliefs or principles’ aspect of the exception for religious bodies should be removed because they are unduly broad and because it is also difficult to ascertain the ‘beliefs and principles’ of a body corporate.³⁵ Secondly, in the interests of transparency, religious organisations intending to discriminate by reliance on the exemptions should be required to notify prospective employees or service users of this, in line with similar requirements under South Australian law.³⁶ For example, CatholicCare has refused to provide services to prospective same-sex adoptive couples but ‘is working cooperatively to ensure that any LGBTI couples looking to apply are referred to another agency.’³⁷ To ensure that prospective parents are informed, CatholicCare should advertise that it does not provide services to same-sex couples. Finally, the Government has already taken action to reintroduce an inherent requirements test in relation to employment, whereby a religious employer must show that it is an inherent requirement of the particular role than the employee adheres to religious doctrines.³⁸
- 3.4 Another option may be to limit the religious exemptions,³⁹ particularly in relation to publically funded services or services for young and/or vulnerable LGBTI people. There have been examples of limitations to exemptions introduced to anti-discrimination statutes. As part of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act*, amendments were introduced to restrict religious exemptions in the delivery of aged care services.⁴⁰ In the absence of removal of the permanent exemptions for religious organisations, this change represented a sensible compromise as a provider could remove itself from being effected by the change by ceasing to receive public funds for its services.

³¹ Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples Legislative Review* (2015).

³² Michael Young, *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act* (2015) 72-4.

³³ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 162.

³⁴ *Equal Opportunity Act 2010* s 89(1). This position would appear to be supported by the Australian Christian Lobby: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report (2015) [4.60].

³⁵ *Christian Youth Camps v Cobaw Community Health Services* [2014] VSC 75 (16 April 2014) [321], [414].

³⁶ *Equal Opportunity Act 1984 (SA)* s 34(3).

³⁷ Department of Health and Human Services, Government of Victoria, ‘Adoption by Same-Sex and Gender Diverse Couples: Fact Sheet for Prospective Parents’ (2016).

³⁸ Equal Opportunity Amendment (Religious Exceptions) Bill 2016.

³⁹ This was proposed in the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 cl 17. However, this proposed clause was not enacted.

⁴⁰ *Sex Discrimination Act 1984* (Cth) s 37(2)(a).

- 3.5 Given the complexities of this matter, the VGLRL has developed a positions paper on religious exemptions, which we include as an addendum to this submission.

Recommendation: The religious exemptions at sections 81-84 of the *Equal Opportunity Act* should be repealed, acknowledging that there already exists a general justification defence in the *Equal Opportunity Act*

Recommendation: If the religious exemptions are to remain, 'beliefs or principles' should be deleted from section 82(2)(a) of the *Equal Opportunity Act*

Recommendation: If the religious exemptions are to remain, a requirement to advertise should be introduced based on similar provisions in the *Equal Opportunity Act 1984* (SA) along the following terms:

- the religious organisation must have a written policy stating its position;
- a copy of the policy must be provided on request, free of charge to members of the public.

Recommendation: If the religious exemptions are to remain, a limitation should be introduced that stipulates that the prohibition on discrimination applies to anything done by a religious body that is exercising functions of a public nature or, alternatively, a stipulated set of services (e.g. adoption services) following section 82(2) of the *Equal Opportunity Act*

4. Eligibility criteria (questions 27, 28)

- 4.1 All adoption applicants must be assessed as suitable.⁴¹ The assessment is made against the suitability criteria (or 'prescribed requirements') contained in the *Adoption Regulations*⁴² as well as the Department of Health and Human Services' Adoption Manual and other related guidelines.
- 4.2 In our view, the suitability criteria may be too prescriptive, particularly the policy requirements around the weight and age of adoption applicants⁴³ and the mental and physical health of adoptive parents,⁴⁴ which may amount to discrimination on the basis of age or disability. Consideration should also be given to whether the suitability criteria should differ based on the age of the child and whether the child has a pre-existing relationship with the adoptive parents. In all cases, the primary criterion should be the applicants' capacity to provide a stable, secure and beneficial emotional and physical environment during a child's upbringing. Certain requirements can have a detrimental affect on LGBTI people seeking to adopt.

Criminal history

- 4.3 One of the prescribed requirements is that 'the criminal history (if any) of the household members does not make the applicants unsuitable.'⁴⁵

⁴¹ *Adoption Act 1984* s 15(1)(a).

⁴² *Adoption Regulations 2008* regs 35, 37.

⁴³ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 104 [7.121]-[7.122]; *Adoption Regulations 2008* reg 35(b).

⁴⁴ *Adoption Regulations 2008* reg 35(a).

⁴⁵ *Adoption Regulations 2008* reg 35(j).

- 4.4 Whilst this is a sound requirement, this can adversely affect some gay or bisexual men. For example, a man convicted of an offence for consensual homosexual sex in the 1970s could have the offence disclosed on their criminal history check or checks required to comply with this regulatory requirement.
- 4.5 Discrimination on the basis of an expunged homosexual conviction is prohibited under the *Equal Opportunity Act*.⁴⁶ However, this only applies to historical homosexual convictions that have been expunged on application to the Secretary of the Department of Justice. The VGLRL has previously recommended that an attribute of irrelevant criminal record be included in the *Equal Opportunity Act*, modelled on similar Northern Territory,⁴⁷ Tasmanian⁴⁸ and Commonwealth legislation.⁴⁹

Recommendation: An attribute of ‘irrelevant criminal record’ should be inserted in the *Equal Opportunity Act*

Recommendation: The eligibility criteria in the *Adoption Regulations* should be amended to state ‘the relevant criminal history’

Infertility issues

- 4.6 The Department of Health and Human Services’ Adoption and Permanent Care Procedures Manual requires that adoption applicants complete fertility treatment.⁵⁰
- 4.7 Obviously, this requirement is inappropriate for same-sex couples seeking to adopt and points to a common criticism that the Manual is outdated and antiquated, particularly in light of recent reforms.

Recommendation: The Department of Health and Human Services should review the Adoption and Permanent Care Procedures Manual to accommodate applications by same-sex couples.

Ability to access adoption leave

- 4.8 The Department of Health and Human Services expects that adoption applicants take 12 months off work if a child is placed with them, to develop bonding and attachment.⁵¹
- 4.9 Whilst the *Fair Work Act* stipulates that an employee is entitled to 12 months of unpaid adoption leave,⁵² the availability of adoption leave may be limited for some employees, including employees of under 12 months service or casual employees who have not been working on a regular or systemic basis.⁵³ Furthermore, there is only a requirement for unpaid leave. While Victorian public sector workers are entitled to a minimum of eight weeks paid of adoption

⁴⁶ *Equal Opportunity Act 2010* (Vic) s 6(pa).

⁴⁷ *Anti-Discrimination Act 1996* (NT) s 19(1)(q).

⁴⁸ *Anti-Discrimination Act 1998* (Tas) s 16(q).

⁴⁹ *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii).

⁵⁰ Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 55.

⁵¹ Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 36.

⁵² *Fair Work Act 2009* (Cth) s 70(a)(ii).

⁵³ *Fair Work Act 2009* (Cth) s 67.

leave⁵⁴ and the Commonwealth Paid Parental Leave Scheme provides 18 weeks parental leave pay for all employees, some employees may not be able to afford to take 12 months' leave. Also, there are still instances of employment agreements containing gendered parental leave clauses that would preclude, for example, a man from taking primary caregiver leave and a woman from taking secondary caregiver leave.⁵⁵

Recommendation: The Government should, as far as is possible, encourage employers to adopt gender-neutral paid parental leave provisions

Recommendation: The eligibility criteria for adoption should be simplified and codified clearly in the *Adoption Regulations*

5. Parents' wishes (question 32)

- 5.1 Under the *Adoption Act*, a child can express their wishes about the adoption in general.⁵⁶ In addition, a birth parent can express preferences about the race, religion and ethnic background of adoptive parents.⁵⁷
- 5.2 The adoptive parents must maintain the child's cultural identity and religious faith.⁵⁸ However, the affects of having to maintain a child's faith can be burdensome on adoptive parents,⁵⁹ and may not account for a child's own wishes as to their religious faith especially if the adoption is at an age where the child is unaware of their religious heritage.⁶⁰ Furthermore, the parents' wishes clause may restrict the pool of potential adoptive parents and may 'subordinate the welfare of the child to the necessity of complying with the statute.'⁶¹ It is particularly inappropriate in scenarios where the child has already become a part of the adoptive home through, for example, a fostering relationship, and could lead to a perverse outcome where adoption agencies may 'remove the child from such a home simply because of the religious factor.'⁶² Some academics have therefore argued that such a 'religion clause' should be repealed.⁶³
- 5.3 The Moran Adoption Review considered whether birth parents should be able to express wishes about the relationship status, sex or gender of adoptive parents. It recommended against allowing this as it would be inconsistent with reforms allowing same-sex and gender diverse

⁵⁴ Department of Economic Development, Jobs, Transport and Resources, Government of Victoria, *Public Sector Industrial Relations Policies* (2016) 7.

⁵⁵ Anna Brown, 'LGBTI Inclusive Practice and the Law' (Speech delivered at the Local Government Turns Rainbow Forum, Melbourne, 14 April 2016).

⁵⁶ *Adoption Act 1984* s 14(1)(b).

⁵⁷ *Adoption Act 1984* s 15(1)(b).

⁵⁸ *Adoption Regulations 2008* reg 35(f).

⁵⁹ Ayan Panja, 'Adoption: Giving Due Weight to Birth Parents' Religious Preferences', *The Guardian* (19 November 2010).

⁶⁰ 'Religious Factors in Adoption' (1953) 28:3 *Indiana Law Journal* 401, 405 n 25.

⁶¹ 'Religious Factors in Adoption' (1953) 28:3 *Indiana Law Journal* 401, 406.

⁶² 'Religious Factors in Adoption' (1953) 28:3 *Indiana Law Journal* 401, 408.

⁶³ 'Religious Factors in Adoption' (1953) 28:3 *Indiana Law Journal* 401, 409.

couples to adopt.⁶⁴ The Consultation Paper states, however, that ‘in practice parents’ wishes are not limited to those matters stated in the *Adoption Act*.’⁶⁵

- 5.4 By contrast, under the *Children, Youth and Families Act*, a birth parent can express preferences about any of the prescribed matters set out in the Regulations.⁶⁶ The Moran Adoption Review suggested that consideration be given to whether the approach under the *Children, Youth and Families Act* might be appropriate under the *Adoption Act*.⁶⁷

Recommendation: Subject to the codification and simplification of the eligibility criteria for adoption in the *Adoption Regulations*, birth parents should only be able to express preferences about those matters.

6. Birth certificates (questions 39, 40, 41)

- 6.1 Since 1996, Victorian law does not require birth certificates in Victoria to be in any particular form. The main legislation that relates to birth certificates in Victoria, the *Births, Deaths and Marriages Registration Act* leaves the form of birth certificates to the discretion of the Registrar of Births, Deaths and Marriages.⁶⁸ The *Adoption Regulations* contain a number of provisions relating to adopted people’s birth records and birth certificates. They require the Registrar to record details in the Births, Deaths and Marriages register, including the given names, family name, age and occupation of each adoptive parent.⁶⁹
- 6.2 When a child is adopted, a new birth certificate is created to replace the child’s original birth certificate, which is no longer valid. It names the adoptive parents as the child’s parents, indicates that the child was born to the adoptive parents, and does not mention the parents to whom the child was born.⁷⁰
- 6.3 The Consultation Paper highlights that there are technical difficulties with introducing changes to birth certificates and that Births, Deaths and Marriages is hoping to address these technical difficulties through ‘a replacement IT system, due to be implemented in 2017.’⁷¹

Information on birth parents

- 6.4 The Consultation Paper explains the impact of issuing a new birth certificate upon adoption on adopted and donor-conceived children and their natural parents:
- For some adopted people, this means a crucial part of their identity and origins is not reflected on the birth certificate – the main official record of their identity. It is also significant to some natural mothers and fathers, because their relationship with the adopted person is not reflected*

⁶⁴ Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples Legislative Review* (2015) 29-32, 41.

⁶⁵ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 110 [7.159].

⁶⁶ *Children, Youth and Families Act 2005* s 139(1)(c).

⁶⁷ Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples Legislative Review* (2015) 30.

⁶⁸ *Births, Deaths and Marriages Registration Act 1996* s 46.

⁶⁹ *Adoption Regulations 2008* reg 38(3)(b).

⁷⁰ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 25 [3.24], 125 [8.82].

⁷¹ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 128 [8.104].

*in the birth certificate. For them, this represents an extinguishment of their fundamental connection with the child.*⁷²

The Consultation Paper states that the view of donor-conceived people and people involved in adoption is:

*that birth certificates should always display the names of a child's genetic parents, to reflect the biological truth about his or her parentage, and to guard against the secrecy that has historically accompanied donor conception and adoption.*⁷³

- 6.5 The Commission previously considered these arguments in 2007 and concluded that no change should be made to the birth certificates of donor-conceived people, due to 'the primary role that birth certificates play as documents with legal consequences.'⁷⁴ It stated:

Having regard to these consequences, the Commission believes that only those people who are recognised as the legal parents of a child should be named on a birth certificate... A donor should not be recorded on the register of births or on a child's birth certificate.

*Although birth certificates do have symbolic value for many people, that is not their primary purpose. To include information on the birth certificates that does not give rise to legal obligations and which does not assist in identifying a person for legal and administrative purposes would create confusion about a person's legal status in respect of the child. This could lead to problems with organisations such as government agencies, schools and health providers.*⁷⁵

- 6.6 Parliament passed legislation in response to the Commission's 2007 report, including a provision relating to the birth certificates of children born through ART. This provision requires that when the Registrar issues a birth certificate relating to the birth of a person conceived by a donor treatment procedure, the Registrar must attach an addendum to the certificate stating that 'further information is available' about the person's birth.⁷⁶ The provision was introduced to ensure that information about the person's genetic origins is available to them.⁷⁷

- 6.7 Further more recent reforms allow contact between a natural parent and adopted person⁷⁸ and donor-conceived people to obtain identifying information about the donor.⁷⁹ The Consultation Paper also canvasses the introduction of an 'integrated birth certificate' that includes both the natural and adoptive parents of an adopted person.⁸⁰ This could conceivably extend to listing the donor on the birth certificate.

⁷² Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 125 [8.84].

⁷³ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 129 [8.108], citing Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 142.

⁷⁴ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 145-6.

⁷⁵ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Report* (2007) 145-6.

⁷⁶ *Births, Deaths and Marriages Registration Act 1996* s 17B; *Births, Deaths and Marriages Registration Amendment Regulations 2009*.

⁷⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4013-4 (Robert Hudson), 4014-5 (Robert Clark), 4015 (Peter Crisp), 4015-6 (Christine Campbell).

⁷⁸ *Adoption Amendment Act 2015*.

⁷⁹ *Assisted Reproductive Treatment Amendment Act 2016*.

⁸⁰ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 128 [8.101]-[8.104].

6.8 However, there are also strong arguments for why an adopted person's new birth certificate should look like the birth certificate of every other person:⁸¹

*Disclosure of the person's [adoptive] status should be a matter for the choice of that person and/or his/her adoptive parents and not inevitable through the production of the birth certificate. Further, the fact that a person is adopted is irrelevant to many people to whom a birth certificate may need to be produced.*⁸²

Furthermore, the adopted person can obtain the original birth certificate when the person turns 18.⁸³

Recommendation: An adopted person's birth certificate should include an addendum stating that 'further information is available' about the person's birth in a similar fashion to that required for children conceived through ART

Titles of parents

6.9 Birth certificates generally provide for the listing of a 'mother' and 'father'. For donor-conceived births, the mother and her female partner may apply to amend the birth certificate to list the partner as a 'parent' of the child⁸⁴ – the partner cannot be listed as a 'mother'. This is because of a provision in the *Children, Youth and Families Act*, which states that the woman who gives birth, in the context of ART, is the 'mother' and the woman's female partner is the 'parent' of the child.⁸⁵ VCAT have interpreted this provision to mean that the female partner cannot be listed as a mother.⁸⁶

6.10 It is unclear how same-sex couples would be listed in the context of adoption or surrogacy and whether they would be listed as 'parent' and 'parent' or 'mother'/'father' and 'mother'/'father'.⁸⁷ In its submission to the Moran Adoption Review, the Rainbow Families Council stated that the Government should:

*recognise both parents equally on birth certificates as "parent" and "parent", rather than mother and parent, which is confusing given families with two male parents.*⁸⁸

The Government indicated to the Rainbow Families Council that it would make amendments to the law to allow parents to have their relationship to their child properly reflected on their child's birth certificates and that this would allow for any combination of 'parent' and 'parent' or 'mother'/'father' and 'mother'/'father'. To date, these amendments have not been implemented.

⁸¹ Victorian Law Reform Commission, *Review of the Adoption Act 1984 – Consultation Paper* (2016) 126 [8.90].

⁸² Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 31.

⁸³ *Adoption Act 1984* s 92(2)(a).

⁸⁴ *Assisted Reproductive Treatment Act 1996* s 17A(2).

⁸⁵ *Status of Children Act 1974* s 13(1).

⁸⁶ *Arc-Dekker v Registrar of Births, Deaths and Marriages* [2016] VCAT 1529 (13 September 2016).

⁸⁷ The provisions for the certificate of adoption do not give a clear indication: *Adoption Act 1984* s 52; *Adoption Regulations 2008* reg 38(3)(b).

⁸⁸ Rainbow Families Council, *Submission to Adoption by Same-Sex Couples Legislative Review* (2015) 5.

- 6.11 Ensuring that a child's mothers and fathers are properly recognised on their birth certificate would provide peace of mind to the children of same-sex parents. The current practice creates artificial distinctions between parents and implies that one parent is the 'real' mother.⁸⁹

Recommendation: The law should be amended to recognise both parents on a birth certificate as either 'parent' and 'parent' or 'mother'/'father' and 'mother'/'father'

More than two parents

- 6.12 There is no provision for recognition of more than two parents on a child's birth certificate, 'even if all the parties agree that [an additional person] should be regarded as one of the child's parents.'⁹⁰ This issue was canvassed in the Commission's 2007 review, but was not resolved.
- 6.13 The *Family Law Act* contemplates that a child born through ART will have two parents,⁹¹ and there has not been a decision of the courts to our knowledge that has recognised more than two people as parents.
- 6.14 In its submission to the Moran Adoption Review, the Rainbow Families Council stated that the Government should consider an:
*appropriate legislative solution to families where there are more than two parents... where there is a co-parenting relationship (for instance two lesbian children have a child with a man who takes an active role as a parent, or two gay men have a child with a woman, who is not a surrogate but has an ongoing role as a parent).*⁹²

Recommendation: The Commission should investigate an appropriate legislative solution to enable more than two parents to be recognised on a child's birth certificate where all parties consent

⁸⁹ *Arc-Dekker v Registrar of Births, Deaths and Marriages* [2016] VCAT 1529 (13 September 2016) [13].

⁹⁰ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption – Consultation Paper* (2003) 106 [5.82].

⁹¹ *Family Law Act 1975* (Cth) s 60H discussed in *Reiby, Meadowbank & Anor* [2013] FCCA 2040 (11 December 2013) [124]-[154].

⁹² Rainbow Families Council, *Submission to Adoption by Same-Sex Couples Legislative Review* (2015) 5.