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Victorian Law Reform Commission  
GPO Box 4637  
Melbourne Victoria 3001 Australia  
DX 144, Melbourne

**Re: Review of the *Adoption Act 1984* and *Adoption Regulations 2008***

The Australian Christian Lobby (ACL) welcomes the opportunity to comment on the review of the *Adoption Act 1984* and the *Adoption Regulations 2008*.

The quality of care we provide to the most vulnerable members of the community speaks volumes about where our priorities lie as a society. The Victorian Law Reform Commission's close consideration of these important matters is a great opportunity to ensure we protect vulnerable children in Victoria. Adoption, despite some failures and wrong turns in the past, has provided and continues to provide tremendous benefit to children in need.

Whilst adoption is only one method of providing a stable family to a child who, for whatever reason, is in need of parents, it is an important one and deserves focused attention. Where parents are unable or unwilling to parent their children appropriately for a limited period time, permanent care orders under the *Children, Youth and Families Act 2005* (Vic) and parenting orders under the *Commonwealth Family Law Act 1976* (Cth), may be appropriate methods in many circumstances. In contrast to these orders, adoption changes the legal relationship between child and parents. This can have positive benefits where there is a need for a greater sense of permanence, attachment, stability and belonging for both the child and the adoptive parents.

Where the circumstances mean that the child might benefit most from the security offered by adoption, it is essential that a legislative structure that facilitates an open and regulated process is available.

This submission will discuss a limited number of the questions raised by the discussion paper whilst leaving many of the questions for others to explore.

## 1. Ensuring the best interests of the child are the paramount consideration

### Discussion Paper Question 1.

Although the needs and wishes of those seeking to adopt children are important, the best interests of the child must be the paramount consideration, that is to say, more important than any other consideration, or supreme in the eyes of decision makers.

This means that the generous and heartfelt desire to adopt a child must never come before the best interests of the child. This important principle already defines the administration of the Adoption Act and the Adoption Regulations and should remain in place.

The discussion paper refers to inconsistencies in the terminology found in the Adoption Act and the Adoption Regulations. ACL agrees these inconsistencies should be resolved.

Consider section 9 of the *Adoption Act 1984* which provides that:

*In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration.*

In contrast, the *Family Law Act 1975* (Cth), uses the term ‘best interests of the child’, and the 1997 *Review of the Adoption of Children Act 1965* (NSW), recommended the use of the term ‘best interests of the child’ when faced with a similar inconsistency to that before this committee.

Article 21 of the *United Nations Convention on the Rights of the Child* (CRC) provides that:

*States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...*

Adopting consistent terminology is a worthwhile endeavour. Both the Act and Regulations should be amended to ensure the use of consistent terminology, in line with Commonwealth and international law. This is essential to avoid confusion, dispute or inconsistent application of the law by decision makers. For example, section 9 of the Adoption Act should be changed to require that the ‘In the administration of this Act the best interests of the child shall be the paramount consideration’. This terminology is consistent with the Family Law Act and international obligations.

## Discussion Paper Question 2.

The Adoption Act does not provide explicit guidance or principles about how to ensure that decisions are in the best interests of the child or guidance about what factors should be considered when determining the best interest of the child. Further guidance may be of use to decision makers.

Whilst ACL does not have any specific recommendations as to drafting, ACL supports the inclusion of additional guidance in the adoption act to assist decision makers when determining the best interests of a child.

ACL suggests that any change should consider the breadth of matters found in the *Family Law Act 1975* (Cth), the *Children, Youth and Families Act 2005* (Vic), all Adoption Acts in other Australian states and territories and our obligations under international covenants, with the view to incorporating as complete and considered a list as possible. This would ensure decision makers take into account the most significant matters of importance when making decisions.

## Discussion Paper Questions 5 and 6.

ACL supports the inclusion of a positive obligation to identify the father and seek consent before adoption is approved. Such an obligation should be reasonable and should be dispensed with in cases of incest, rape, or if there would be an unacceptable risk of harm to the child or mother if the father were made aware of the child’s birth or proposed adoption.

## Discussion Paper Question 13

ACL supports the inclusion of a requirement for a child aged 12 and over to consent to an adoption.

## 2. Eligibility and Community Attitudes

### Discussion Paper Question 24

The discussion paper raises the question as to whether eligibility to adopt should be extended to single people beyond that which is already available to single people under 'special circumstances'.

*(a) Is this requirement consistent with the best interests of the child?*

*(b) Should this requirement be amended? If yes, what criteria should apply to adoptions by single people?*

The current requirements legislate that single people can adopt a child only if there are 'special circumstances in relation to the child' which make the adoption 'desirable'. This requirement is appropriate to ensure the best interests of the child are paramount and should not be changed.

The welfare of a child is a more important consideration than the desires of adults, no matter how heartfelt, to become parents. This important point must be remembered when considering what family structures are in the best interests of the child and should form the policy approach driving the legislation.

In a previous report the Victorian Law Reform Commission expressed a view that the special circumstances requirement be removed. The recommendation was not implemented.

The Commission is invited to consider the reasons behind the Australian Christian Lobby's opposition to giving single persons the same eligibility for adoption as couples (beyond that which is afforded to single persons under the current 'special circumstances' eligibility). This position flows from evidence that the well-being of children is best served when they experience the love of both a mother and father in a safe, secure and stable relationship. (This is discussed in further detail below).

Public policy should always aim to achieve the best outcome as its starting point, rather than seek to broaden the law without reference to the core policy outcome being sought; as the legal maxim goes 'hard cases make bad law'.

If the vision is to ensure the best outcomes for children and the evidence points to the ideal family structure being a mother and father in a secure and stable relationship then the eligibility of single persons in the Adoption Act should reflect that evidence. Considerations about consistency with contemporary attitudes and law are secondary in a policy approach that puts the best interests of the child first.

The current provisions in the Adoption Act, which allow single persons to adopt only when there are 'special circumstances in relation to the child' which make the adoption 'desirable', are consistent with an approach that ensures 'hard cases' are accommodated, whilst at the same time not affecting the general approach towards eligibility which emphasises stable relationships.

Inevitably, discussion of this topic raises the matter of the inconsistency of the Act in its approach to acceptable parenting structures following recent amendments, achieved through the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015*. These amendments allow same-sex couples

and people who do not identify with a specific sex or gender to adopt. The limitations in this inquiry's terms of reference mean that a direct comparison of the issues raised by both the single parent question before the Commission and the eligibility changes pursuant the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* likely fall outside the scope of the inquiry, although it should be obvious that the two issues around eligible family structures raise related questions.

Most single parents are caring for their children admirably, countless children are raised in alternative family structures, including single parent households, and such children are not precluded from living fulfilling and happy lives. Yet these positive outcomes for many individuals do not change the fact that whilst a single parent can be a good parent, no matter how great a single parent mother may be, she is not a father, and no matter how great a single parent father is, he is not a mother. Men and women provide unique, complementary roles, both of which are important in the development of children.

Whilst many children live in family structures that do not contain both a mother and father, this is often by tragic circumstance or desertion, not usually the result of government policy. Alternate family structures do not preclude good outcomes for many such children, however, to establish such a situation within the legislative framework that from the outset does not include both a mother and father in today's context where there are many willing couples and few children in need of adoption is unjust to that child and contrary to the 'best interests of the child'.

A change to public policy that would give the same eligibility to single persons as to couples should only occur if such a change can be grounded on solid evidence that outcomes for children will be no different or better than if they were placed with couples. Without such evidence, such a change would be a direct contravention of policy maker's responsibility to always act in the best interest of the child.

What evidential basis is there that children should be raised by both a mother and father?

Whilst not all findings are consistent, it is relevant to the single person eligibility question before the Commission that most of the available research suggests that children in sole-mother families tend to be at higher risk of maltreatment than those in married families.<sup>1</sup>

There are a number of limitations to the Australian child protection data, however, research suggests that sole-mother families and sole-father families are overrepresented in Australia's child protection systems.<sup>2</sup>

Whilst research suggests there is no single cause for child maltreatment, and multiple risk factors are associated with child maltreatment, such as poverty, domestic violence and substance abuse,<sup>3</sup> both economic status and family structure are relevant to outcomes for the child; this is true whether emphasis is placed on the emotional, physiological or intellectual well-being of young children.<sup>4</sup>

When discussing research on family structures and child protection data it is important to note that methodological limitations exist. A paper by the *Australian Institute of Family Studies*<sup>5</sup> has listed a number of limitations for child protection data that should be noted, namely:

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<sup>1</sup> Cathryn Hunter and Rhys Price-Robertson. "Family structure and child maltreatment: Do some family types place children at greater risk?". CFCA PaperNo. 10 *Australian Institute of Family Studies*, November 2012. 12 pp. <https://aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143277/cfca10.pdf>

<sup>2</sup> Ibid.

<sup>3</sup> Ibid. p. 2.

<sup>4</sup> Kerr, Don, "Family Transformations and The Well-being of Children: Recent Evidence from Canadian Longitudinal Data." *Journal of Comparative Family Studies*. 35, no. 1, 2004, p. 73.

<sup>5</sup> Family structure and child maltreatment: Do some family types place children at greater risk?. pp.3-4, 7.

- Some family types are more likely than others to come to the attention of child protection authorities
- Child protection data is influenced by a number of policy and social factors
- There are inconsistencies in the ways that data is collected.

The same paper also highlights methodological limitations of the research on family structure and child maltreatment which potentially affect such research. Consider the following:

- Some studies do not control for mediating factors
- Risk factors are different to causal factors
- There are different definitions of family structure and child maltreatment
- There is a dearth of longitudinal research
- Much of the research treats family structures as static.

Despite these methodological limitations, research studies into family structure can provide us with insights that should inform the Commission's recommendation with regards to sole person eligibility for adoption. Family structure studies of note:

- Sidebotham, P., Heron, J., & The ALSPAC Study Team University of Bristol. (2006). Child maltreatment in the "children of the nineties": A cohort study of risk factors. *Child Abuse & Neglect*, 30, 497–522.
  - Found that children from sole-mother families had a higher risk of registration on the child protection register than those living in two parent families.
- Dufour, S., Lavergne, C., Larrivee, M-C., & Trocme, N. (2007). Who are these parents involved in child neglect? A differential analysis by parent gender and family structure. *Children and Youth Services Review*, 30, 141–156.
  - Found that 'single-parent' families were overrepresented in the child protection system.
- Regnerus, Mark (Jul 2012). "How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study". *Social Science Research*. 41 (4): 752–770. doi:10.1016/j.ssresearch.2012.03.009. PMID 23017845
  - Found that children appear most apt to succeed well as adults – on multiple counts and across a wide variety of domains – when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.
- Kerr, Don. (2004). "Family Transformations and The Well-being of Children: Recent Evidence from Canadian Longitudinal Data." *Journal of Comparative Family Studies*. 35, no. 1: 73-90. <http://www.jstor.org/stable/41603917>
  - Found that, without exception across child outcomes, children living in lone parent families are reported to experience the highest levels of childhood difficulties.
- Turner, H. A., Finkelhor, D., & Ormrod, R. (2007). Family structure variations in patterns and predictors of child victimization. *American Journal of Orthopsychiatry*, 77(2), 282–295.
  - In contrast to the other studies, found no significant differences in rates of child victimisation between 'single-parent' and 'two-parent' families.

A research paper from the *Australian Institute of Family Studies* found that whilst many children in single-parent families do just as well as the average child in a two-parent family, the general conclusion from a large body of data is that children from single-parent families overall fare less well than children from intact two-parent families.<sup>6</sup>

Solid consistent evidence showing outcomes for children will be no different or better with single persons than if they were placed with couples is not forthcoming, instead, the evidence points toward the other direction.

In today's context where there are many willing adoptive couples and few children in need of adoption, **the lack of a sound evidential basis on which to change the legislation means that eligibility of adoption for single persons should not be extended outside the existing 'special circumstances'.**

## Discussion Paper Question 25

Question 25 in the discussion paper asks:

25. *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. Is this consistent with amendments to the Adoption Act that enable same-sex couples, and people who do not identify with a specific sex or gender, to adopt?*

In considering whether the Adoption Act, as it now stands with the new same-sex eligibility and other provisions, and the *Equal Opportunity Act 2010* (EO Act) with its exemptions for faith based adoption providers, operates harmoniously with other relevant Victorian legislation including the Victorian Charter of Human Rights and Responsibilities, it is necessary to consider what rights under law are under discussion.

An exemption in the EO Act applies to 'religious bodies' and provides protection for faith-based adoption agencies to refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender. Pursuant to exemptions in the EO Act, religious bodies are able to discriminate against a person based on the person's 'marital status', 'sexual orientation' or 'gender identity' (for example), where the body acts in accordance with the 'doctrines, beliefs or principles' of the religion.

That exemption currently allows religious organisations to refuse to arrange adoptions of children to same-sex couples if that refusal conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

The *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* was intended to amend this exemption, to remove the religious liberty protection. However, the clause in the bill seeking to restrict the right of faith based adoption agencies was voted down in the Victorian parliament. This means that current law upholds freedom of thought, conscience, and religion protections for faith-based adoption agencies to refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, if that refusal conforms with the doctrines, beliefs or principles

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<sup>6</sup> Sarah Wise, 2003, "Family structure, child outcomes and environmental mediators: An overview of the Development in Diverse Families study", *Australian Institute of Family Studies*, viewed 22 September 2016, <<http://apo.org.au/node/6476>> p. 5.

of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

Section 14 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter), states:

- 1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
  - (a) *the freedom to have or to adopt a religion or belief of his or her choice; and*
  - (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
- (2) *A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

The right to freedom of thought, conscience, and religion lies at the foundation of freedom. High Court Chief Justice Anthony Mason and Justice Gerard Brennan phrased it this way:

*Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.*<sup>7</sup>

The right to freedom of thought, conscience, and religion is a fundamental right that is also recognised in international law, through the International Covenant on Civil and Political Rights (ICCPR), Article 18. The ICCPR and other early international human rights instruments, group religion, thought, conscience and belief together. This locates freedom of religion amongst the most fundamental rights in society, at the core of the freedom of the human person.

The realm of a person's thought (the *forum internum*) represents the most private and sacred aspect of their personhood and is the last bulwark against the power of the state. When the state enters into a person's conscience to determine what they may or may not think or believe by force of law, it steps outside its mandate as a government of a free and democratic society.

The right to freedom of thought, conscience, religion and belief is not restricted to individual thought or private expression but also recognises a historical and continuing manifestation of religious belief in work and activities carried out publicly by people of faith organised in groups and communities (the *forum externum*).

It is significant that, along with only a small number of other rights in the ICCPR, freedom of religion is a right from which no derogation is permitted even in a time of public emergency.<sup>8</sup> This underscores the fundamental importance of freedom of religion in a society that values human rights and fundamental freedoms.

This conception of freedom of religion is not widely reflected in current trends. Freedom of religion frequently loses out to other rights when conflicts occur and is relegated to lists of "exemptions" in various statutes.

Long considered the cornerstone of the western democratic tradition, fundamental freedoms are being eroded by human rights bodies and legislation. This is a major concern among religious groups relating to the legislation and litigation of human rights issues in general.

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<sup>7</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120, [6].

<sup>8</sup> *International Covenant on Civil and Political Rights*, Article 4(2).

The right to be free from discrimination is but one of many rights and freedoms enumerated under the *International Covenant on Civil and Political Rights* (ICCPR) and primarily relates to the need for all laws of the state to apply equally to all citizens. It is a protection against arbitrary law-making, or the inequitable treatment of persons through legislation.

Despite this, rights and freedoms have regrettably come to be viewed almost exclusively through a prism of non-discrimination in Australia – evidenced by the existence of widespread discrimination Acts across the commonwealth. There are four Commonwealth anti-discrimination Acts and either an anti-discrimination or equal opportunity act in most states and territories. Some of these include anti-vilification laws. This ballooning of a single right in legislation is fundamentally at odds with international law.

To remove the exemption afforded to religious bodies with respect to adoption would breach long standing rights to freedom of thought, conscience, religion and belief for birth parents and faith based agencies who object to placing children with same-sex couples.

The recent changes to the Adoption Act through the *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015*, which allows same-sex couples and people who do not identify with a specific sex or gender, have created a situation where Catholic adoption agencies would be unable to both provide an adoption service to same-sex couples and people who do not identify with a specific sex or gender and also maintain their religious views at the same time.

Archbishop Denis Hart, Archbishop of Melbourne, said on 6 October 2015, in relation to this issue:

*The Catholic position on marriage and family holds that the well-being of the community and children are best served when they experience the love of both a mother and father in a safe, secure and stable relationship.*<sup>9</sup>

In real terms, a change to the current exemptions would mean that CatholicCare, a Catholic adoption agency in Melbourne which has been in operation for 80 years, is at grave risk of being unable to comply with its religious views and with relinquishing parents requests that their child receive an adoptive mother and father.

In its submission to the Department of Premier and Cabinet's *Review to permit adoption by same-sex couples under Victorian Law*, the Catholic Archdiocese of Melbourne expressed the following concerns:

*If same-sex adoption is introduced in Victoria, there is a risk that if CatholicCare declined to provide adoption services to persons on the grounds of their sexual orientation it would be found to have breached the Equal Opportunity Act 2010... In the absence of an appropriate amendment to the Equal Opportunity Act or the Adoption Act, it is possible that CatholicCare would be forced to cease providing adoption services as it could not do so without the risk of breaching the Equal Opportunity Act.*

Ultimately, the changes were not enacted into law and CatholicCare was not forced to make such a difficult decision. CatholicCare would face the same issue again if the exemptions were removed. In such a scenario, a Catholic provider would face hard choices. Consider that:

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<sup>9</sup> Benjamin Preiss, Richard Willingham. OCTOBER 6 2015 Catholic adoption agency wants exemption from same-sex laws. *The Age*. <http://www.theage.com.au/victoria/catholic-adoption-agency-wants-exemption-from-samesex-laws-20151006-gk2lip.html>



- a Catholic adoption provider would have to make a choice between breaking the law or closing its adoption service to all couples or abandoning its religious convictions.
- employees of adoption agencies with such religious convictions would face a similar choice of acting against their deeply held religious or conscientious beliefs or quitting their jobs.
- relinquishing parents would have no ability to have their religious or conscientious beliefs about the parenting of their child considered and implemented by an adoption agency.

Same-sex couples currently have full and equal access to adoption through the Department of Human Services. Same-sex couples, therefore, have choice in relation to adoption agencies and do not need to see a law change in order to access adoption services in Victoria.

**The exemptions in the Equal Opportunity Act that allow a religious body that provides adoption services to refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, ensure protection for the fundamental right to freedom of thought, conscience, religion and belief provided under *Victorian Charter of Human Rights and Responsibilities Act 2006* and international human rights instruments.**

**A change to these exemptions risks diminishing the fundamental human right to freedom of thought, conscience, religion and belief. Removing the exemptions would raise the civil and political right to freedom from discrimination to a status never envisaged by the international human rights framework and unbalance the structure of the framework.**

**The exemptions should remain.**

#### Discussion Paper Question 39 & 40

39 *How should an adopted person's identity be reflected on their birth certificate?*

40 *If a different form of birth certificate were available to adopted people, what legal status should it have?*

Birth certificates for children born into natural or biologically intact family structures reflect a unity between the legal as well as the genetic and gestational reality of a child's relationship with his or her parents.

In cases of adoption, sperm donation and surrogacy the traditional form of birth certificates may fail to accurately record the full detail and complex reality of a child's different legal, genetic, and gestational parenting.

Currently, birth certificates issued to adopted children name the adoptive parents as the child's only parents and do not mention the parents to whom the child was born. Failure to disclose to a person his or her origins can have significant impacts on a person's identity.

**ACL supports the introduction of an 'integrated birth certificate' that records both the natural and adoptive parents of an adopted person. These should be legal proof of identity of equal status to other birth certificates.**

Thank you for your consideration.

Yours sincerely,



**Daniel Flynn**  
**Victorian Director**  
**Australian Christian Lobby**