

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

# **Adoption by same sex couples**

Claire Buxton      Kate Warner

ISSUES PAPER NO 4

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## How to respond to this issues paper

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained at the end of the paper. The questions are intended as a guide only – you may chose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. If you would like your views and/or the fact that you made a response to this paper to be kept confidential, simply say so, and the Institute will respect that wish.

Responses should be made in writing by 10 March 2003. If it is impracticable for you to make your response in writing please contact the Institute to make other arrangements.

Responses may be sent to the Institute by mail, fax or email.

address: Tasmania Law Reform Institute  
Private Bag 89,  
Hobart, TAS 7001

email: law.reform@utas.edu.au

fax: (03) 62267623

Inquires should be directed to Jenny Gawlik, on the above contacts, or by phoning (03) 62262069.

This issues paper is also available on the Institute's web page at:

[www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform)

or can be sent to you by mail or email.

## **Information on the Tasmania Law Reform Institute**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by The Law Society) and Terese Henning (appointed by the Council of the University).

To find out more about the Institute please visit our website:

[www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform)

## Background and terms of reference

In November 2002, the Attorney-General requested that the Institute undertake a law reform project on same sex adoptions. This followed considerable media discussion of this issue. At the Institute's board meeting on 18 November it was agreed that the project be undertaken. Formal terms of reference were given by the Attorney on 28 November and these were agreed to by the Board in the following terms:

1. *Whether the Adoption Act 1988, Section 20(1), should be amended:*
  - (a) *to remove the requirement that an order for the adoption of a child may only be made in favour of a man and a woman who are married to each other, and have been so married for not less than 3 years before the date on which the order is made; and*
  - (b) *to permit an order for adoption to be made in favour of any couple regardless of the gender of the partners making up the couple.*
2. *If so, whether any other qualifications for adopting couples should be included in the Act.*

On 17 December 2002 the Institute was requested to amend the second paragraph to the following:

2. *If so, whether any other qualifications for adopting couples, particularly the proven length of the stable relationship, should be included in the Act.*

# Executive Summary

## *Part 1: Introduction*

Adoption allows children whose parents cannot care for them to be placed within a family environment. Adoption is the legal process by which the legal parent-child relationship between the natural parents is severed and a new legal parent-child relationship between the adoptive parents and child is substituted. As a result of an adoption order the legal rights of the child are as if he or she had been born to the adoptive parents, and the legal rights that exist from birth with regard to the natural parents are removed. The welfare and interests of an adopted child are the paramount consideration in the adoption process.

The *Adoption Act*, 1988 (Tas) only contemplates adoption by a married man and woman who have been married for a period of not less than 3 years. In exceptional circumstances an adoption order may be made in favour of a single person. *Under the current Adoption Act* it is therefore legally impossible for an adoption order to be made in favour of a same sex couple.

Traditionally adoption provided an option for women with an unplanned pregnancy. However, changing societal attitudes to single motherhood have resulted in this option being utilised less frequently in recent years. As a result there has been a marked decline in the number of children placed for adoption in Australia since the early 1970s. This has led to a rise in inter country adoption.

### *Types of Adoption*

There are two basic categories of adoption:

1. Placement adoption – where the child and adoptive parents do not already know each other. This can be local placement or inter country placement.
2. ‘Known’ child adoption – where the child is adopted by someone known to them, usually a step-parent or relative.

### *Rates of Adoption*

There were 561 adoptions of children in Australia for the period 1 July 2001 to 30 June 2002. Placement adoptions comprised 71% (401) of the adoptions in 2001-02 and 29% (160) were ‘known’ child adoptions. The majority of adoptions (52%) were inter country placement adoptions. In Tasmania there were a total of 20 adoptions in the same period, of which 16 were inter country placement adoptions, two were local placement adoptions and two ‘known’ child adoptions.

### *Eligibility and Assessment*

If an individual or couple is seeking to adopt a child they will need to undergo rigorous tests and meet stringent criteria. The prospective adoptive parents must first demonstrate eligibility to adopt before assessment of the application will take place. Eligibility of a couple does not imply suitability to adopt. If applicants are eligible an assessment process takes place. This process usually takes six months to complete. The Manager of Adoptions will then review the assessment report and either approve or deny the application. If the applicant is successful they will be placed in a pool of potential adoptive parents for selection. Even if an applicant is placed in the pool of applicants there is no guarantee that they will be selected to have a child placed with them.

For a child to be legally available and placed for adoption the consent of certain people must be obtained. In addition to providing this consent, parents who are relinquishing their child for adoption can express their wishes regarding the characteristics of the adoptive family selected for the placement of the child.

## *Part 2: Same Sex Couples*

Same sex parenting through adoption is becoming a reality for lesbians and gay men in Australia, Europe, Canada and the United States of America. It is increasingly being recognised that emotional security,

stability and criteria assessing the best interests of the child are the ideal basis for decisions regarding adoption rather than criteria relating to sexual orientation and marital status.

It is widely acknowledged by the Family Court of Australia that sexual orientation is not in itself a criterion that negatively affects the quality of parenting; other criteria may be applied to ascertain what is in the best interests of the child.

Opposition to same sex parenting can be based on the perception that relationships between two women or two men function in a manner fundamentally different from heterosexual relationships. However a same sex relationship is no more likely to end in a breakdown than a heterosexual relationship and both exhibit similar strengths and weaknesses.

Another underlying objection to same sex parenting is the claim that lesbians and gay men are not fit to be parents. However, empirical evidence supports the conclusion that lesbians and gay men, in their capacity as parents, function similarly to heterosexual parents.

There is a common concern that children raised by same sex parents will exhibit more developmental problems than those raised in heterosexual families. Studies comparing children raised in lesbian or gay households with children raised in heterosexual households have found no discernible differences in personal and psychological development, self-esteem and peer relationships. Further, there is no evidence to suggest that adult children of lesbian and gays are likely to identify themselves as lesbian or gay. There is also no empirical evidence to suggest that having a lesbian or gay parent makes a child particularly vulnerable to sexual abuse.

Concern has also been expressed about the children of gay men and lesbians being more vulnerable to teasing and harassment due to the stigmatisation surrounding their parents' sexual orientation. Children may in fact be the victim of teasing as a result of their parents' sexual orientation. Despite this, evidence shows that these children's mental health was not adversely affected. Children raised by lesbian or gay parents learn to deal with perceptions that their family is different. Of importance is the fact that lesbian and gay parents are aware of the difficulties that a child may face, many themselves having grown up being "different".

Of the categories of adoption, 'known' child adoption is likely to be most relevant to same sex couples. A partner in a same sex relationship may seek to use the mechanism of 'known' child adoption to become the legal parent of his or her partners' children. In contrast, inter country adoptions are currently restricted by overseas countries to applicants who are married and thus same sex couples cannot currently seek to adopt a child from outside of Australia. The number of local babies available for adoption makes the possibility of a local placement adoption a remote possibility for most couples irrespective of their sexuality.

### ***Part 3: Length of the Relationship***

The terms of reference require consideration of whether there should be any additional qualifications for adopting couples included in the *Adoption Act* if same sex couples were to be made eligible to adopt. The *Adoption Act* section 20(1) requires that a couple be married and cohabiting for at least 3 years before an adoption order can be made in their favour. There is no compelling reason for the minimum length of 3 years to be extended. Every aspect of a couple's relationship comes under scrutiny in the assessment process of adoption. It must be kept in mind that the stability of the couple's relationship in addition to this initial 3-year period of commitment will always form part of the eligibility criteria. In addition only one Australian jurisdiction requires the relationship duration to be greater than 3 years and three require just 2 years.

### ***Part 4: Options for Reform***

Three options are considered in this paper:

1. Allow same sex couples to adopt in all circumstances; or
2. Allow same sex couples to adopt only in circumstances of 'known' child adoptions.
3. Change the qualifications for adopting couples by extending the length of the relationship for eligibility.

## Part 1

# Introduction

## The Current Law

Adoption is ‘a process by which society provides a substitute family for a child whose natural parents are unable or unwilling to care for the child.’<sup>1</sup>

There are two basic categories of adoption:

1. Placement adoption – where the child and adoptive parents do not already know each other. This can be local placement or inter country placement.
2. ‘Known’ child adoption – where the child is adopted by someone known to them, usually a step-parent or relative.

The *Adoption Act*, 1988 (Tas)<sup>2</sup> only contemplates placement adoption by a married man and woman who have been cohabiting for a period of not less than 3 years. In exceptional circumstances a placement adoption order may be made in favour of a single person.<sup>3</sup> Under the current *Adoption Act* it is therefore legally impossible for a placement adoption order to be made in favour of a same sex couple or a heterosexual couple who are unmarried. This paper is primarily concerned with the law in relation to same sex adoption. However, if the marriage prerequisite for adoption by a couple were to be removed, heterosexual unmarried couples would also be eligible to adopt. This change is relatively uncontroversial. Adoption legislation has been amended to allow adoption orders to be made in favour of de facto heterosexual couples in many Australian states.<sup>4</sup>

‘Known’ child adoption by same sex or de facto couples in a step parent type situation (eg one partner adopts the other partner’s child from a previous relationship or donor insemination) is not currently possible under the *Adoption Act* because this type of adoption is only allowed by the spouse of the child’s parent.<sup>5</sup>

However ‘known’ child adoption by same sex couples or de facto couples appears to be possible where one of the couple is a relative<sup>6</sup> of the child. Section 21 of the *Adoption Act* provides that if the court is satisfied of various matters it may make an order in favour of ‘...2 persons ... one of whom is a relative, of the child’. It is not known whether this was intended by the drafters of the Act or whether any such adoptions have yet occurred in Tasmania.

## History of Adoption

Adoption in Tasmania prior to 1920 was not governed by any legislative provisions and occurred through the practice of de facto adoption. Such de facto adoptions did not provide the family with legal custody of the child. Adoption was not possible at common law.

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<sup>1</sup> Royal Commission on Human Relationships, The Parliament of the Commonwealth of Australia, Final Report, 1978, vol 4, at 98.

<sup>2</sup> All subsequent references to the *Adoption Act* are to the *Adoption Act*, 1988 (Tas) unless otherwise stated.

<sup>3</sup> *Adoption Act*, s 20(4).

<sup>4</sup> *Adoption Act*, 1994 (WA) s 39(1)(d); *Adoption Act*, 1984 (Vic) s 11(1); *Adoption Act*, 1993 (ACT) s 18; *Adoption Act*, 1988 (SA) s 12; *Adoption Act*, 2000 (NSW) s 23.

<sup>5</sup> *Adoption Act*, s 20(6).

<sup>6</sup> *Adoption Act*, s 3 “relative”, in relation to a child means a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is on the whole blood or half-blood or by affinity and not withstanding that the relationship depends on the adoption of a person.

Early adoption practices took place in an era when being an unmarried mother was frowned upon and medical doctors and clergyman arranged the private and generally secretive placement of children for adoption.<sup>7</sup> There was no recognition by the law of these private placements. During this era the primary concern of those involved in private adoptions was on the relinquishing parent and the adoptive parents rather than the child.<sup>8</sup> Secrecy was imperative because adoptive parents did not want to raise a child, if there was a chance the child would be returned to the birth family.<sup>9</sup>

The secrecy surrounding adoptions prior to the existence of adoption legislation continued during the early legislative period. Professional interests claimed that protection of the child's welfare and the interests of the adoptive parents would be protected through secrecy.<sup>10</sup> This emphasis on the adults involved in adoption rather than the child and the lack of protection for children came to be viewed as inadequate and led to the enactment of adoption legislation. Adoption is no longer regarded as a service for parents.

New Zealand was the first British colony to legislate for the adoption of children, enacting the *Adoption of Children Act*, 1881. Tasmania was the second Australian state to enact adoption legislation in 1920,<sup>11</sup> following Western Australia in 1896. The legislation provided that:

- The adopting parents would be deemed in law to be the parents of the child as if the child had been born to the adopting parents in lawful wedlock.
- The welfare and interests if the child would be promoted by the adoption.

Adoption of children is a legal process governed by State and Territory legislation<sup>12</sup> and falls outside of the legislative powers of the Commonwealth.<sup>13</sup> Attempts were made to create uniform adoption laws throughout Australia in the 1960s and resulted in the *Adoption of Children Ordinance*, 1965 in the Australian Capital Territory which was to serve as a model for all states.<sup>14</sup> Tasmania introduced the *Adoption of Children Act*, 1968 based on this model.

The attempt to achieve uniformity largely failed and in recent years the divergence between adoption legislation throughout Australia has become more pronounced. One of the more marked differences is the requirement regarding who may adopt children outside the traditional marriage relationship. However, the paramount principle in all the States and Territories has been the welfare and interests of the child.<sup>15</sup> Adoption remains first and foremost a service to the child rather than to prospective adoptive parents or natural parents.

Tasmanian adoption laws underwent further changes through the *Adoption Act*, 1988, which repealed the *Adoption of Children Act*, 1968 and made significant modifications to Tasmanian adoptions. The *Adoption Act*, 1988 governs adoptions in Tasmania today. This Act allows for openness in adoption, allowing greater exchange and access to adoption information,<sup>16</sup> and reflects the ideal that adoption should no longer be a secretive process. The *Adoption Act*, 1988 also severely restricts the circumstances in which a step-parent or relative adoption can take place.<sup>17</sup>

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<sup>7</sup> *Ibid*, at 4.

<sup>8</sup> *Ibid*.

<sup>9</sup> Gael Moffat (personal communication, 20/12/02), Department of Health and Human Services, Adoption and Information Service.

<sup>10</sup> P Boss "Adoption Australia: A Comparative Study of Australian Adoption Legislation and Policy" (1992) Published by the National Children's Bureau of Australia Inc.

<sup>11</sup> *Adoption of Children Act* (Tas) 1920.

<sup>12</sup> In Tasmania the *Adoption Act*, 1988.

<sup>13</sup> Section 51 (xxii) of the *Constitution of Australia*, 1901 (Cth), this section exhaustively sets out the power of the Commonwealth regarding family law, covering marriage, divorce and matrimonial causes and connected to this the residence and contact of children. Adoption therefore falls within the residual power of the States.

<sup>14</sup> H Finlay, R Bailey-Harris and M Otlowski (1997) *Family Law in Australia* 5th ed, Butterworths, at 487.

<sup>15</sup> *Adoption Act*, 1988 (Tas) s 8.

<sup>16</sup> M Otlowski, "The Changing Face of Adoption Law in Tasmania" (1989) 3 *Australian Journal of Family Law* 161-183.

<sup>17</sup> ss 20(6), (7) and 21.



## Purpose of Adoption

Adoption aims to operate in the best interests of the child, providing him or her with a stable family environment. It is the legal process by which the existing legal parent-child relationship is severed and substituted by a new legal parent-child relationship.<sup>18</sup> As a result of an adoption order the legal rights of the child are as if he or she had been born to the adoptive parents, and the legal rights that exist from birth with regard to the birth parents (for example inheritance and name) are removed.<sup>19</sup> The child is issued with a new birth certificate bearing the names of his or her adoptive parent(s) as the legal parent(s) and the new name of the child, where a change has occurred.<sup>20</sup>

The parent/child relationship dictates who has the authority to make decisions regarding the child's welfare, such as education and medical procedures and also has important ramifications in relation to inheritance. The central principle in adoption is that notionally a complete substitution takes place of the adoptive parents for the natural parents.<sup>21</sup> Who the legal parent of a child is also becomes important in the event of a relationship breakdown as it impacts upon the provision of child support and contact and residence of the child.

## Trends in Adoption

Adoption has traditionally been viewed as an option for women with an unplanned pregnancy<sup>22</sup> but changing societal attitudes have resulted in adoption being utilised with less frequency in recent years. The number of adoption orders fell substantially from the early 1970s, corresponding with the introduction of financial aid to single parents by the Whitlam Labor Government. In Australia there were 9,798 adoption orders in 1971-2 and only 561 in 2001-02.<sup>23</sup> In Tasmania there were 303 adoptions in 1971-72 and 20 adoptions in 2001-02.<sup>24</sup> Until the 1970s there was a high correlation between illegitimacy and adoption but modern social attitudes have significantly altered the framework in which the law of adoption operates.<sup>25</sup> Whilst the number of extra-nuptial births has increased in Australia, reaching 26% in 1994,<sup>26</sup> this has not been reflected in rates of adoption. On the contrary, there has been a marked decline in the number of children placed for adoption in Australia.

There are a variety of factors that have contributed to this overall fall in adoptions of children, including:<sup>27</sup>

- Effective birth control which has resulted in a decrease in the number of unplanned pregnancies;
- Changed community attitudes to single parenthood and the provision of income support for single parents; and
- The encouragement of step-parents to use arrangements other than adoption in the parenting of their spouses' children.

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<sup>18</sup> *Adoption Act*, (Tas) 1988 s 50.

<sup>19</sup> Australian Institute of Health and Welfare (AIHW) (2002) *Adoptions Australia 2001-02* AIHW cat. No. CWS 18, Child Welfare Series no. 30, Canberra: AIHW, at 1.

<sup>20</sup> *Ibid.*

<sup>21</sup> H Finlay, R Bailey-Harris and M Otłowski (1997) *Family Law in Australia* 5th ed, Butterworths, at 481.

<sup>22</sup> *Ibid* at 487.

<sup>23</sup> Australian Institute of Health and Welfare (AIHW) (2002) *Adoptions Australia 2001-02* AIHW cat. No. CWS 18, Child Welfare Series no. 30, Canberra: AIHW, at 4.

<sup>24</sup> *Ibid*, at 5.

<sup>25</sup> H Finlay, R Bailey-Harris and M Otłowski (1997) *Family Law in Australia* 5th ed, Butterworths, at 481.

<sup>26</sup> "Australian Social Trends 1996 – Family Formation: Trends in Fertility" Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/>

<sup>27</sup> These factors are taken from the Australian Institute of Health and Welfare (AIHW) (2002) *Adoptions Australia 2001-02* AIHW cat. No. CWS 18, Child Welfare Series no. 30, Canberra: AIHW, at 4 and H Finlay, R Bailey-Harris and M Otłowski (1997) *Family Law in Australia* 5th ed, Butterworths.

As a result of these factors there has been a decline in the number of Australian children available for adoption. Parents waiting to adopt now outnumber children available.

### ***Step-parent adoptions***

The greater incidence of divorce and re-marriage have also had an effect upon adoption.<sup>28</sup> This social phenomenon has resulted in an increased number of step-families and consequently efforts by step-parents to adopt their partners' children. Adoption severs all legal ties between a child and its natural parent. Given this dramatic effect on the relationship between child and biological parent, step-parent adoptions are now restricted by the *Adoption Act* to circumstances in which the court is satisfied that an adoption order is preferable to the alternatives of a guardianship or custody order.<sup>29</sup>

### ***Inter country adoptions***

As a result of the dramatic decline in the availability of Australian babies for adoption there has been a corresponding rise in inter country adoption. Adoption by Australian citizens can serve a useful social function in providing a family for children who may otherwise not receive adequate care. To avoid the potential for exploitation of these children the *Adoption Act* regulates inter country adoption.<sup>30</sup> The Hague Convention<sup>31</sup> on the *Protection of Children and Co-operation in Respect of Inter Country Adoption* establishes legally binding safeguards and procedures in countries of origin and countries of destination for children being adopted. The convention helps Australian parents wishing to adopt by establishing uniform procedures to be followed by the countries party to the convention whilst ensuring that the child's best interests are safeguarded.<sup>32</sup> Australia's ratification of the Hague Convention is in part the explanation for the increase in inter country adoptions in Australia since 1998.<sup>33</sup>

In addition to working with countries who have signed and ratified the Hague Convention, Tasmania also sends applications to China, which is not a party to the Hague Convention. This is possible because the Commonwealth Government has entered into a bi-lateral agreement with China to facilitate adoptions with that country.<sup>34</sup>

## **Adoption categories**

Children can be adopted by various people and in differing circumstances. The categorisation of adoptions reflects the type of adoption that has occurred. The official report, *Adoptions Australia 2001-02*, places adoptions into two categories:

1. placement adoptions, which are further divided into:
  - a) local placement adoptions
  - b) inter country placement adoptions
2. 'known' child adoptions

### ***Placement adoption***

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Adoption Act*, ss 20 and 21. Amendments to the *Family Law Act*, 1975 (Cth) in 1995 changed the term custody to residence; the *Adoption Act* does not yet reflect these amendments to terminology.

<sup>30</sup> *Adoption Act*, s 46.

<sup>31</sup> Entering into force 1 December 1998.

<sup>32</sup> Australian Institute of Health and Welfare (AIHW) (2002) *Adoptions Australia 2001-02* AIHW cat. No. CWS 18, Child Welfare Series no. 30, Canberra: AIHW, at 12.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Family Law (Bilateral Agreements – Inter Country Adoption) Regulations 1998*, Statutory Rules 1998 No. 248.

Children who fall into the category of placement adoption are children placed for adoption who have had no previous relationship with the adoptive parents. A local placement adoption occurs when the child is born in Australia or is a permanent resident before the adoption. An inter country adoption is an adoption of a child from a country other than Australia. Placement adoptions were categorised before 1998-99 as non-relative adoptions. The essential element of a placement adoption is that there is no prior existing relationship between the child and the adoptive parents.

#### *'Known' child adoption*

A 'known' child adoption is an adoption of a child who has a pre-existing relationship with the adoptive parent(s) and who generally would not be available for adoption by anyone other than the adoptive parent(s). These adoptions include adoptions by step- parents, other relatives or carers. In these circumstances the prospective adoptive parents are seeking to adopt a particular child who is 'known' to them. These adoptions were previously categorised as relative adoptions.

## **Adoption rates<sup>35</sup>**

### *Nationally*

The decline in the number of children available for adoption in Australia and the general decline over the last 30 years in the number of adoption orders made has been noted above. There were 561 adoptions of children in Australia for the period 1 July 2001 to 30 June 2002. Placement adoptions comprised 71% (401) of the adoptions in 2001-02 and 29% (160) were 'known' child adoptions.

Of the 401 national placement adoptions, 73% (294) were inter county placement adoptions.

Of the 160 adoptions of 'known' children 64% (103) were by step parents wishing to incorporate children into the new family, 33% (52) were by carers<sup>36</sup> and 3% (5) by other relatives.

Whilst local placement adoptions have declined, inter country adoptions have been steadily increasing. Local placement adoptions are usually of children who are less than one year of age (83%) whereas only 30% of children adopted from another country are less than one year of age.

### *Tasmania*

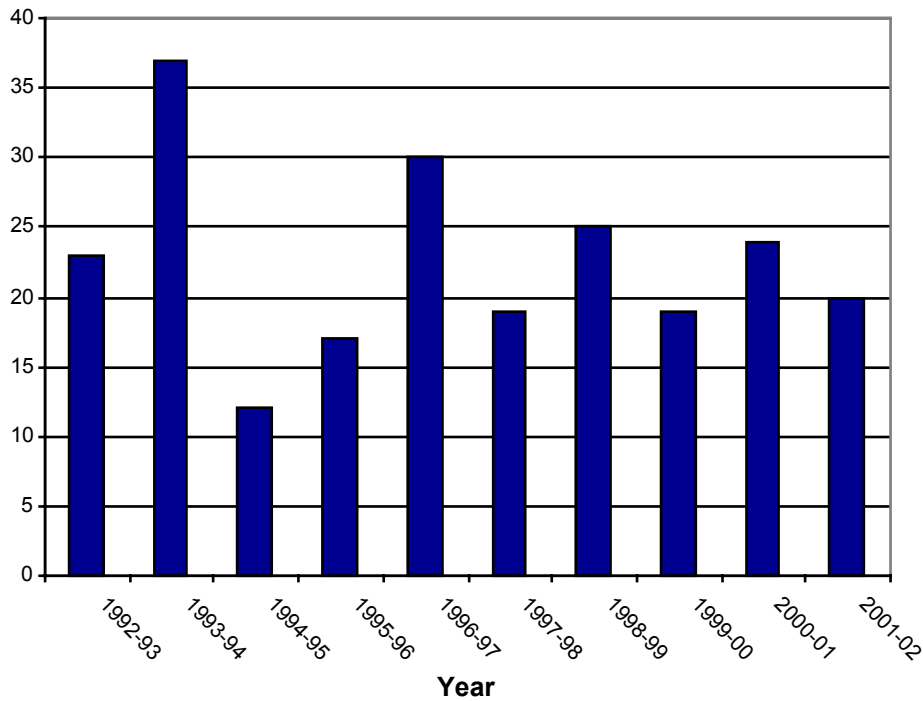
Adoptions in Tasmania for the period 2001-02 totalled 20. This is the second lowest number of adoptions in Australia, with the Northern Territory totalling 11.

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<sup>35</sup> Australian Institute of Health and Welfare (AIHW) (2002) *Adoptions Australia 2001-02* AIHW cat. No. CWS 18, Child Welfare Series no. 30, Canberra: AIHW.

<sup>36</sup> The AIHW *Adoptions Australia 2001-02* report defines a carer as including foster parents and other non-parents who have been caring for the child before adoption in Appendix 2.

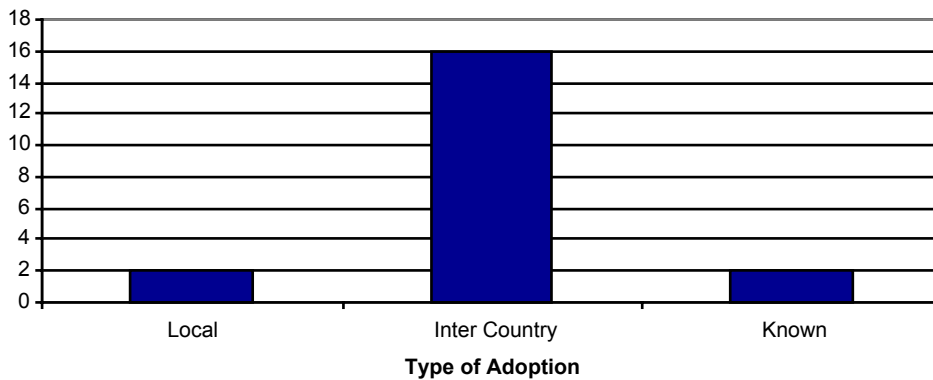
### Tasmanian Adoptions, 1992-93 to 2001-02



The average number of adoptions in Tasmania over the past 10 years is 22.6.

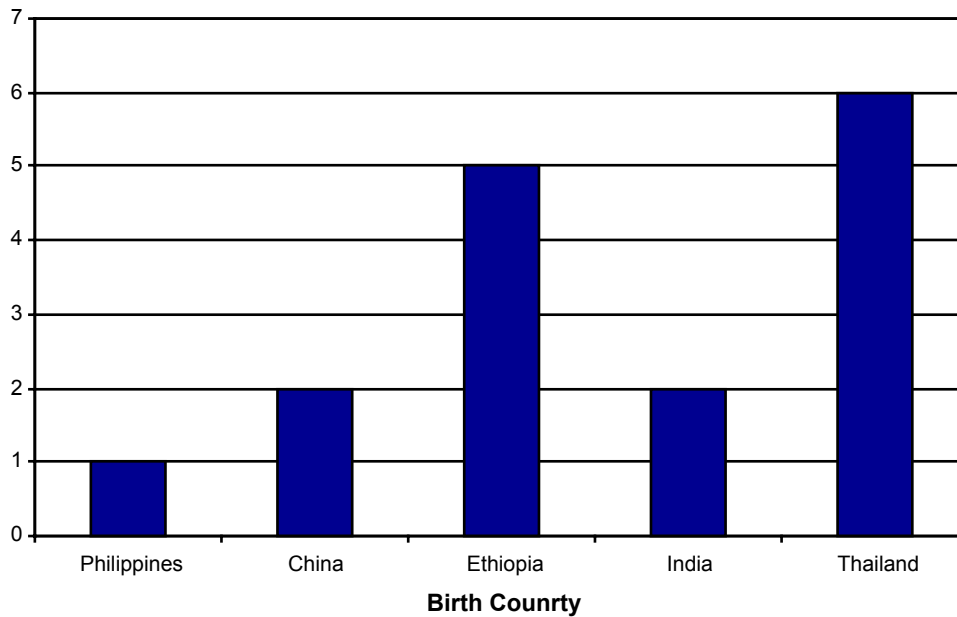
The 20 adoptions that occurred in Tasmania in 2001-02 can be broken down into the categories of local placement adoptions, inter country placement adoptions and ‘known’ child adoptions.

### Tasmanian Adoptions by Category



The 16 children who were adopted through inter-country adoption were born in 6 different countries.

### Inter Country Placement Adoptions 2001-02



The trend in Tasmanian adoptions is consistent with the national trend of a decline in local placement adoptions and ‘known’ adoptions and a rise in the number of inter country adoptions.

## The Adoption Process

No person has an automatic ‘right’ or entitlement to adopt a child. If an individual or couple is seeking to adopt a child they will need to undergo rigorous tests and meet stringent criteria. If amendments are made to the *Adoption Act* to permit adoption by same sex couples, it is assumed that the general process through which children are adopted will not be altered. The eligibility requirements and assessment procedures would apply equally to heterosexual and gay or lesbian applicants. As previously acknowledged, throughout the adoption application process the welfare and interests of the child are regarded at all times as the paramount consideration.<sup>37</sup>

The prospective adoptive parents must first demonstrate eligibility to adopt before assessment of the application can take place. Eligibility of a couple does not imply suitability to adopt. If applicants are eligible, an assessment process involving a number of interviews takes place. This process usually takes six months to complete. The Manager of Adoptions will then review the assessment report and either approve or deny the application. If the applicants are successful they will be placed in a pool of potential adoptive parents for selection. Even if an applicant couple is placed in the pool of applicants there is no guarantee that they will be selected to have a child placed with them. It is estimated that there are currently 70 people at various stages of the adoption process in Tasmania, ranging from couples awaiting allocation to an adoption worker or completing assessment to those who have been allocated children from overseas and are completing the immigration process.<sup>38</sup> Finally, any order for adoption is made by the Children’s Division of the Magistrate’s Court, which must be satisfied of various matters including that the welfare of the child will be promoted by the adoption.<sup>39</sup>

<sup>37</sup> *Adoption Act*, s 8.

<sup>38</sup> Gael Moffat (personal communication, 20/12/02), Department of Health and Human Services, Adoption and Information Service.

<sup>39</sup> *Adoption Act*, s 24(1)(d).

The eligibility and assessment processes are discussed in some detail below.

### ***Local placement adoptions***

#### *Birth Parents*

For a child to be legally available and placed for adoption the consent of certain people must be obtained unless the court has dispensed with the consent requirement.<sup>40</sup> In the majority of circumstances the consent of both biological parents is necessary. If the child is a non-citizen child the consent of the guardian of that child is necessary. Consent to the adoption of a child cannot occur until the child is 9 days old.<sup>41</sup>

In addition to providing this consent, parents who are relinquishing their child for adoption can express their wishes regarding characteristics of the adoptive family selected for the placement of the child. A non-exhaustive list of wishes may include matters such as religion, race and ethnic background. The birth parents have access to the non-identifying profiles of the families considered suitable to adopt their child.<sup>42</sup>

A non-identifying profile is prepared of a couple when they are placed in the pool of applicants awaiting the placement of children. This non-identifying profile of the prospective adoptive parents may include:

- family make-up
- where the applicants live (ie. country/city)
- life experiences
- occupation and education
- ideas in child raising
- age

#### *Initial Inquiry and Eligibility*

The first stage of adoption for prospective adoptive parents is an expression of interest, in writing, which is recorded on the Department of Health and Human Service (DHHS) provisional register. Prospective adoptive parents must then attend an information seminar regarding adoption before confirming their interest and providing documents to establish their eligibility for assessment.

Prospective adoptive parents must meet certain requirements before an assessment of suitability to adopt a child can occur. Section 20 of the *Adoption Act* and regulation 14 of the *Adoption Regulations*, 1992 determine the eligibility for adoption. Section 20(1) requires:

- A marriage
- Between a man and woman
- For at least 3 years (s 20(2) allows this 3-year period to include a period in which a man and woman resided together in a stable continuous de facto relationship immediately prior to their marriage)

Thus, de facto and same sex couples are currently ineligible to be adoptive parents. A single person can adopt in exceptional circumstances (ss 20(4) and (5)), usually where the child has special needs, is an older child or there is an existing relationship between the child and the applicant.<sup>43</sup> Adoption by a single person is rare in practice.<sup>44</sup>

Regulation 14 creates certain requirements before an applicant will be accepted for assessment, these are:

- (a) In the case of joint applicants they are husband and wife in a bona fide domestic relationship for a continuous period of not less than 3 years;

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<sup>40</sup> *Adoption Act*, s 29.

<sup>41</sup> *Adoption Act*, s 36(2); Tasmanian Department of Health and Human Services *Adoption in Tasmania: Questions & Answers*, May 2000, at 3.

<sup>42</sup> Tasmanian Department of Health and Human Services *Adoption in Tasmania: Questions & Answers*, May 2000.

<sup>43</sup> P Boss (1992) "Adoption Australia: A Comparative Study of Australian Adoption Legislation and Policy" Published by the National Children's Bureau of Australia Inc. at 6.

<sup>44</sup> Gael Moffat (personal communication, 20/12/02), Department of Health and Human Services, Adoption and Information Service.

- (b) .....<sup>45</sup>
- (c) That the applicants are resident or domiciled in Australia for not less than 2 years at the time of application;
- (d) That the applicants are resident in Tasmania;
- (e) That at least one of the applicants is an Australian citizen;
- (f) That the applicants are in good physical and mental health and it is reasonable to expect that the health will be maintained throughout the period of the child's legal and social dependency;
- (g) That neither applicant has been sentenced to a term of imprisonment for a criminal conviction within a period of 5 years preceding the application;
- (h) That neither applicant has been sentenced to a term of imprisonment of 5 years or more at any time;
- (i) That neither applicant has been convicted of an offence against a child;
- (j) That neither applicant is undertaking treatment for infertility;
- (k) That in the case of a female applicant, that the applicant is not pregnant.

Internal guidelines provide that a prospective adoptive parent must be no more than 40 years older than the adopted child for applicants who do not have a child in their care and 45 years for applicants who have one or more children in their care.<sup>46</sup> Thus a 41-year-old applicant who is childless can only be approved for the adoption of a child who is aged 12 months or older.

If the applicants meet the eligibility criteria in regulation 14 and section 20 they may then be entered on the register for assessment of suitability to adopt a child.

#### *Assessment*

Eligible applicants must undergo an assessment process to determine the suitability of the prospective adoptive parents and to prepare the applicants for the challenges associated with bringing up an adopted child. The assessment of adoptive parents takes place through a number of interviews and discussions at both the applicants' home and departmental offices. Some of these interviews are conducted with both applicants and some separately. An adoption worker conducts these interviews. This worker will either be an employee of the DHHS Adoption and Information Service or a contracted social worker. The adoption worker discusses the application and requires detailed information about the applicants and their family circumstances.

The adoption worker prepares an assessment report and makes a recommendation concerning the suitability of the applicants. This report is comprehensive and covers many aspects of the applicants' life.<sup>47</sup> The assessment process of applicants is usually completed approximately six months after they have been allocated to an adoption worker.

The assessment report is significant because:

- it is used in the selection of the most suitable adoptive family for a particular child;
- it is used to prepare a non-identifying family profile that may then be considered by the birth mother in the selection of an adoptive family; and
- it is the basis of the report submitted to the court when an application for adoption is made.

The adoption worker's assessment report will include information such as:<sup>48</sup>

- references
- family background
- family circumstances
- health
- personality and way of life

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<sup>45</sup> The *Adoption Amendment Regulations*, 1993 No 82, regulation 7, omitted paragraph (b) of regulation 14 in 1993. Prior to this amendment an applicant could be no more than 45 years old.

<sup>46</sup> DHHS Adoption and Information Service, 'Guidelines for Applicants' at 11.

<sup>47</sup> *Ibid*, at 6.

<sup>48</sup> *Ibid*, at 7-9.

- financial situation
- religious affiliation
- social and cultural issues
- personal relationships
- motive for adoption
- ability to have biological children
- parenting experience and expectations
- identity issues
- parenting resources
- child desired

Section 24(1)(a) of the *Adoption Act* requires that the court have evidence that the applicants satisfy the prescribed legal requirements relating to approval. The assessment report provides a substantial part of the required evidence.

When the assessment report is completed it is forwarded to the Manager of Adoptions at the DHHS who makes a decision about the applicants' suitability to adopt. The Manager may seek further information about the applicants or seek advice from the Assessment Review Panel before making a decision. The Assessment Review Panel consists of people with particular expertise and advises the Manager of Adoptions. It is not an appeal body.<sup>49</sup> Applicants are notified of the Manager's decision to approve or refuse approval. If approval to adopt a child is given, certain terms are attached to this. These terms include the age range of the child, and the country of origin of the child (where applicable) and of course are subject to the applicants' circumstances remaining satisfactory. Approval remains current for 2 years, this being the time frame in which a child can be placed with the prospective parents. Approval of an application does not guarantee the placement of a child and it is impossible to predict how long a family may have to wait before a child is offered.

### ***Inter country adoptions***

Inter country adoption involves the entry into Australia of children from another country for the purposes of adoption.<sup>50</sup> These adoptions are strictly controlled in Tasmania by the *Adoption Act*. In addition to this there must be a suitable central agency in the overseas country to administer the program in accordance with standards acceptable to Australia.

The cost of inter country adoption falls on the adopting parents. This includes fees charged by the State and the cost of the child's immigration.<sup>51</sup> The process for an inter country adoption is similar to that of a local placement adoption with the additional steps of:

- the preparation of documents to be sent overseas with the assessment report;
- acceptance by the overseas authority;
- once a child is allocated, the applicants must commence immigration proceedings; and
- travel to collect child.

The process for inter country adoption also depends on the country from which the adoption is made and there are slight variations between countries. Tasmania currently sends applicants' files for consideration for adoption to the following countries, however not all of these countries are currently accepting applications:<sup>52</sup>

- China
- Ethiopia

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<sup>49</sup> *Ibid*, at 10.

<sup>50</sup> P Boss (1992) "Adoption Australia: A Comparative Study of Australian Adoption Legislation and Policy" Published by the National Children's Bureau of Australia Inc. at 13.

<sup>51</sup> *Ibid*, at 15.

<sup>52</sup> Handout from the DHHS stating what countries children can be adopted from and additional information, current as at December 2002.



- Hong Kong<sup>53</sup>
- India
- Korea (South)
- Philippines
- Romania
- Sri Lanka
- Thailand

Inter country adoptions provide applicants with more hurdles than do local placement adoptions, as applicants must satisfy both the requirements of the Tasmanian legislative scheme and the additional criteria of the country to which they are applying.

### ***‘Known’ child adoptions***

The majority of ‘known’ child adoptions are by step-parents with the aim of providing the child with a clear legal position and status within the new family arrangement. Step-parent adoptions made in favour of a spouse of a natural parent may be made under s 20(6). However, the court will not make such an order unless it is satisfied that:

- a custody or guardianship order would not make adequate provision for the welfare and interests of the child (s 20(7)(a));
- an order for adoption would better serve the welfare and interests of the child (s 20(7)(b)); and
- special circumstances warrant the making of an adoption order (s 20(7)(c)).

Section 21 of the *Adoption Act* creates the same three requirements as above when considering carer and relative adoptions.

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<sup>53</sup> China and Hong Kong are treated separately for the purposes of adoption.

## Part 2

# Same Sex Couples

### *Introduction*

The *Adoption Act* places a two-fold barrier to adoption by same sex couples. First, s 20(1) requires that an adoption order, in the case of joint applicants, be made in favour of a man and woman who are married to each other. Thus a same sex couple cannot currently adopt a child. Secondly, in ‘known’ child adoptions, the *Adoption Act* s 20(6) only allows adoptions to be made in favour of the spouse of a natural parent. A spouse does not include a same sex partner. Therefore partners in same sex relationships are prevented from adopting their partner’s child. However it would appear to be possible for a same sex couple to adopt a child who is a relative of either one of the couple.<sup>54</sup>

The *Adoption Act* presently uses criteria of marriage and gender making some couples ineligible to adopt. Proponents of adoption by same sex couples argue that rather than focusing on this criterion, the needs and welfare of a child would be better served by criteria which address the suitability of the parent.<sup>55</sup> And moreover, that in the interests of providing certainty and security to the children of same sex couples, both adults should be able to be given legal status as parents.

It can be also be argued that extending the eligibility requirements of adoption to lesbians and gay men will not be giving them special rights, rather it would provide them with “equal protection to which they are entitled by virtue of their essential humanity.”<sup>56</sup>

The issue of adoption by same sex couples gives rise to questions about the suitability of lesbian and gay parents for adoption. A number of assumptions commonly underlie opposition to such adoptions. However attitudes are changing. Many countries now allow adoption by same sex couples. Changing attitudes are also reflected in the approach of the Family Court of Australia to parenting by lesbian and gay parents. Part 2 of this paper reviews the position of overseas countries in relation to same sex adoptions and the approach of the Family Court to lesbian and gay parenting. The empirical research which examines issues in relation to same sex parenting is then surveyed.

## Adoption Laws Domestically and Overseas

Same sex parenting through adoption is becoming a reality for lesbians and gay men in Australia and internationally. It is increasingly being recognised that emotional security, stability and criteria assessing the best interests of the child are the ideal basis for decisions regarding adoption rather than marriage and sexual orientation.

The first Australian state to allow adoption by same sex couples was Western Australia, through its introduction of the *Acts Amendment (Lesbian and Gay Law Reform) Act*, 2002. This Act removes discriminatory provisions against same sex couples from a range of legislation. In particular the *Acts Amendment (Lesbian and Gay Law Reform) Act*, 2002 amends the *Adoption Act*, 1994 (WA) to allow same

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<sup>54</sup> See discussion at 10.

<sup>55</sup> Lesbian and Gay law Reform – Report of the Ministerial Committee June 2001 Western Australia, at 99.

<sup>56</sup> The Hon Justice Alastair Nicholson, Chief Justice of the Family Court of Australia “The Changing Concept of Family: The Significance of Recognition and Protection” (1996) 3(3) *Murdoch University Electronic Journal of Law* at para 18.

sex couples to adopt in accordance with criteria that assess the suitability of couples and individuals to be parents, regardless of sexual orientation.<sup>57</sup>

The Western Australian Ministerial Committee commented that “decisions of courts in Australia and overseas indicate that their consideration of the best interests of the child when determining issues related to custody and adoptions are not influenced by sexual orientation of the couple...”.<sup>58</sup> As a result sexual orientation in Western Australia is no longer regarded as a criterion that affects the quality of parenting. The Ministerial Committee concluded “that criteria such as emotional security and stability, criteria that are used to assess effectively the best interests of the child should be the basis for decisions regarding adoption”.<sup>59</sup>

There has been widespread recognition of gay and lesbian partnerships by countries in Europe that give same sex couples the same rights, benefits and obligations as a married couple.<sup>60</sup> The following countries allow adults in same sex couples to adopt their partner’s child:

- Denmark
- Norway
- Sweden
- Iceland
- Finland
- The Netherlands
- United Kingdom

The *Adoption and Children Act*, 2002 (UK) extends the definition of a couple to include two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.<sup>61</sup> The effect of this is that same sex couples are now eligible to adopt in the United Kingdom. The position is the same in The Netherlands. Nine states in the USA have allowed openly gay or lesbian individuals and couples to adopt.<sup>62</sup>

Second-parent adoption has become increasingly common in the US.<sup>63</sup> These adoptions occur in situations where one parent has conceived a child through donor insemination, resulting in the child having only one legal parent.<sup>64</sup> A second-parent adoption leaves the parental rights of the birth mother intact whilst creating a second legally recognised parent, inevitably the natural parent’s partner. There are 31 states that have recognised lesbian and gay second-parent adoption.<sup>65</sup> The New York Court of Appeal decision in *Re Jacob and Dana*<sup>66</sup> was the first case to allow the unmarried partner (regardless of sexual orientation) of a child’s biological mother who is raising the child with the biological parent to become the child’s second parent by means of adoption. Shortly after, in the New Jersey Superior Court Appellate Division, Pressler J in *Re Adoption by HNR*<sup>67</sup> granted an adoption order to the lesbian co-parent to give her a formal declaration of parental rights and to assure the continuity of custodial and financial rights and responsibilities characteristic of the parental relationship.

In Canada adoption legislation has come under challenge on the basis that it infringes the *Canadian Charter of Human Rights and Freedoms 1982* by discriminating on the basis of sexual orientation.<sup>68</sup> Four lesbian

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<sup>57</sup> Lesbian and Gay law Reform – Report of the Ministerial Committee June 2001 Western Australia, at 103.

<sup>58</sup> Lesbian and Gay law Reform – Report of the Ministerial Committee June 2001 Western Australia, at 100.

<sup>59</sup> *Ibid* at 103.

<sup>60</sup> International Lesbian and Gay Association – World Legal Survey <http://www.ilga.org/>

<sup>61</sup> *Adoption and Children Act*, 2002 (UK) s 144(4).

<sup>62</sup> “Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents (4/00)” National Adoption Information Clearinghouse, USA Department of Health and Human Services: [http://www.calib.com/naic/pubs/f\\_gay.cfm](http://www.calib.com/naic/pubs/f_gay.cfm)

<sup>63</sup> *Ibid*.

<sup>64</sup> This is also the legal situation in Tasmania: *Status of Children Act*, 1974 (Tas) s 10C(2).

<sup>65</sup> Lambda Legal Defense and Education Fund (1997) ‘Lesbian and Gay Parenting: A Fact Sheet’ New York: NY: Lambda, Legal Defense and Education Fund.

<sup>66</sup> 22, F.L.Rtr 1003 (1995).

<sup>67</sup> 22 F.L.Rtr 1028 (1995).

<sup>68</sup> T Canny “Same Sex Adoption: The Situation in Canada and Australia”, Department of the Parliamentary Library, Research Note 29 1999-2000, 11 April 2000, <http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn29.htm>

couples brought the case of *Re K* under the Charter.<sup>69</sup> The central issue for Judge Nevins concerned whether the couples should be permitted to apply to jointly adopt the children that each was already parenting. The barrier to joint adoption was found to be discriminatory and the definition of spouse in the *Child and Family Services Act 1990* (Ontario) was modified to include same sex couples. In *Re K* Judge Nevins then had to consider the substantive adoption applications according to the child's best interests. In doing so Judge Nevins was presented with evidence concerning the ability of lesbians and gay men to parent from highly regarded experts in the fields of sociology, psychology and psychiatry.<sup>70</sup> His Honour could find no rational basis for the negative stereotypical beliefs relating to mental health and relationship stability of lesbian and gay parents and of the psychological profiles of their children<sup>71</sup> and concluded from the available evidence that:

there is no cogent evidence that homosexual couples are unable to provide the very type of family environment that the legislation attempts to foster, protect and encourage, at least to the same extent as "traditional" families parented by heterosexual couples.<sup>72</sup>

Legislative amendments and decisions by the courts in Canada allow same sex couples to jointly adopt in five of the fourteen Canadian provinces and territories.

In the judgment of *Re A*<sup>73</sup> in the Alberta Court of Queens Bench, Martin J held that a same sex couple may constitute a family able to perform the same functions as traditional families and that the overriding consideration should be the applicants' relationship with the child.<sup>74</sup> The case concerned an application by a lesbian couple to become the legal parents of a child they had raised since birth. Martin J stated that the legislation should look to the suitability of the parents, rather than sexual orientation.<sup>75</sup>

The legislative amendments and various court rulings outlined above do not mean that same sex couples are automatically granted adoption rights. The best interests of the children involved in same sex applicants remain paramount, as in other applications. The majority of the same sex adoption applications that have been granted internationally are what would be considered in Tasmania as 'known' child adoptions, with one parent adopting the child of their partner, usually a child that they have raised together since birth. This allows both parents to be legally recognised as a parent of the adoptive children.

## The family law experience

The Family Court of Australia has frequently had to address the question of gay or lesbian parenting in the context of disputes relating to residence and contact orders for children. The Family Court has consistently held that the sexual orientation of a parent is simply one factor to be taken into account and is not of itself a disqualifying factor. The nature of a parent's sexual relationship will be relevant to the courts proceedings only to the extent that it affects parenting abilities or the welfare of a child in a particular case.<sup>76</sup>

The leading Australian family law case involving a lesbian mother was decided some 20 years ago. In *In the Marriage of L and L*<sup>77</sup> Baker J granted custody (as it was then called) of the four children of the marriage to the wife, who was living in a lesbian relationship. The wife's sexual preference was a matter of concern for

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<sup>69</sup> (1995) 15 RFL (4<sup>th</sup>) 129.

<sup>70</sup> The Hon Justice Nicholson, Chief Justice of the Family Court of Australia "The Changing Concept of Family: The Significance of Recognition and Protection" (1996) 3(3) *Murdoch University Electronic Journal of Law* at para 65.

<sup>71</sup> *Ibid.*, at 9.

<sup>72</sup> *Re K* (1995) 15 RFL (4<sup>th</sup>) 129 at 161.

<sup>73</sup> [1999] AJ No. 1349.

<sup>74</sup> T Canny "Same Sex Adoption: The Situation in Canada and Australia", Department of the Parliamentary Library, Research Note 29 1999-2000, 11 April 2000, <http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn29.htm>

<sup>75</sup> *Ibid.*

<sup>76</sup> *Re K* (1994) FLC 92-461 at 80,774.

<sup>77</sup> (1983) FLC 91-353.

Baker J yet he held “I am firmly of the view that her proclivity in this regard is not and cannot be, *per se*, a disqualifying factor against her”.<sup>78</sup> There has been some criticism of Baker J’s approach, as rather than dealing with the case solely on the quality of care each parent could provide, he set out eight factors<sup>79</sup> which a court should take into account when assessing a gay or lesbian parent’s application. It was held by Baker J that the wife clearly had the capacity to fulfil the children’s needs and she would provide them with balanced sex education and would not encourage the children to become homosexual.

The checklist proposed by his honour in *In the Marriage of L and L* was applied by Hannon J in the more recent case of *Doyle and Doyle*,<sup>80</sup> where it was acknowledged that the list was not exhaustive although it “provided an extremely handy checklist”.<sup>81</sup> The Family Court has consistently held that homosexuality is relevant only if it affects the parenting abilities or the welfare of the child. Hannon J stated:

The approach that homosexuality *per se* disqualified a parent from having custody of a child has never been accepted in the determination of custody applications under the *Family Law Act*.<sup>82</sup>

Whilst the Family Court in *In the Marriage of L and L* and *Doyle and Doyle* did not use the parent’s sexuality to presume they would be unsuitable parents, it has been argued that the application of the checklist contains unfounded assumptions about gay and lesbian adults as parents. According to the Chief Justice of the Family Court of Australia, the checklist used by Baker J begins from:

an improper footing because such an *a priori* list of factors seems to presume that such differences may be expected when the applicant is a gay man or lesbian as against a heterosexual parent.<sup>83</sup>

To require a lesbian or gay applicant for residence under the *Family Law Act*, 1975 (Cth) to come under greater scrutiny and suspicion due to their sexuality implies that their sexuality has consequences for their children and parenting ability. Such assumptions are unfounded and have been discredited.<sup>84</sup>

The first recognition of lesbian co-parents by Australian Courts was the landmark decision of *W v G*.<sup>85</sup> This case arose when two women separated after eight years together in the course of which they raised two small children. The plaintiff (referred to as Wendy) had given birth to the children through donor insemination and was seeking compensation towards the cost of maintaining the children from the defendant (referred to as Grace) on the basis that Grace had always indicated she intended to help raise the children. The New South Wales Supreme Court upheld Wendy’s claim against Grace, awarding a lump sum payment of child support of \$150,000 on the basis of the doctrine of promissory estoppel.<sup>86</sup>

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<sup>78</sup> (1983) FLC 91-353 at 78,366.

<sup>79</sup> These factors are:

1. Whether children raised by their homosexual parent may themselves become homosexual, or whether such an event is likely.
2. Whether the child of a homosexual parent could be stigmatised by peer groups, particularly if the parent is known in the community as homosexual.
3. Whether a homosexual parent would show the same love and responsibility as a heterosexual parent.
4. Whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters.
5. Whether or not children should be aware of their parent’s sexual preferences.
6. Whether children need a parent of the same sex to model upon.
7. Whether children need both a male and female parent figure.
8. The attitude of the homosexual parent to religion, particularly if the doctrines, tenets and beliefs of the parties’ church are opposed to homosexuality.

<sup>80</sup> (1992) FLC 92-286.

<sup>81</sup> (1992) FLC 92-286, at 79,122.

<sup>82</sup> (1992) FLC 92-286, at 79,122.

<sup>83</sup> The Hon Justice Alastair Nicholson, Chief Justice of the Family Court of Australia “The Changing Concept of Family: The Significance of Recognition and Protection” (1996) 3(3) *Murdoch University Electronic Journal of Law* at para 61.

<sup>84</sup> See the section of this paper headed Lesbian and Gay Parenting Research – Are Lesbians and Gay Men suitable parents? at 32.

<sup>85</sup> (1996) 20 Fam LR 49.

<sup>86</sup> J Millbank “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Law* (1998) 12 *Australian Journal of Family* 99-139.

## Lesbian and Gay Parenting Research

There has been a plethora of social science research conducted over the past 25 years examining lesbian and gay parenting and matters related to this. These studies focus on the effect of a parent's sexual orientation on the development of children.

The first study conducted on the effect of a parent's sexual orientation on the children they raise was published in 1978.<sup>87</sup> A body of work has now emerged in the USA and UK with increasing sample sizes and methodological rigour.<sup>88</sup> The studies take various forms. They are conducted over varying time frames, examine and compare diverse family structures and consider distinct aspects of the child's life and personality. One consistent aspect of the findings of these studies is that children that are raised in lesbian or gay households do not exhibit any important differences from children raised in heterosexual households.

There have been some unique methodological challenges presented to researchers conducting studies regarding children's development when raised by lesbian or gay parents. These challenges have not been resolved in every study and no individual study is immune from criticism based on matters such as sampling and statistical power.<sup>89</sup> It is, however, the consistency of findings from these studies that is significant.<sup>90</sup>

### *Are lesbian and gay relationships more unstable than heterosexual relationships?*

When assessing a couple's suitability to adopt, the stability their relationship is examined. There is a perception that relationships between two women or two men function in a manner fundamentally different from heterosexual relationships, and specifically that lesbians and gay men are not committed to long-term relationships. Research focusing on the long-term relationships of same sex couples reveals that large numbers of lesbians and gay men live with long-term partners and that these relationships function in ways similar to those of heterosexual couples.<sup>91</sup>

Same sex couples suffer similar problems and breakdowns as those encountered by heterosexual couples; overall relationship satisfaction and quality are similar across all couple types.<sup>92</sup> A same sex relationship is no more likely to end in a breakdown than a heterosexual relationship and both exhibit similar strengths and weaknesses. Same sex couples are comprised of individuals who are capable of expressing the same emotions as those in heterosexual couples. As the Chief Justice of the Family Court has asserted, "[g]ay men and lesbians possess and express the most human of qualities – love and commitment through relationships".<sup>93</sup> The fact that same sex couples cannot legally marry does not mean that these individuals are not as committed to the relationship and its success as their heterosexual counterparts who marry.

### *Are lesbians and gay men suitable parents?*

The underlying objection to same sex parenting is the claim that lesbians and gay men are not fit to be parents. However, the evidence is that sexual orientation is not in itself indicative of bad parenting.<sup>94</sup> There is

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<sup>87</sup> R Green "Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents" (1978) 135 *American Journal of Psychiatry* 692.

<sup>88</sup> J Millbank "Meet the parents: A review of the Research on Lesbian and Gay Families" Prepared for *The Gay & Lesbian Rights Lobby (NSW) Inc* January 2002, at 37.

<sup>89</sup> C J Patterson *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

<sup>90</sup> M S Wald (1999) "Same Sex Couples: Marriage, Families, and Children" Stanford Law School.

<sup>91</sup> *Ibid.*

<sup>92</sup> Dr J Gottman & Dr. R Levenson (2001) "Gay and Lesbian Couples Research: A case of similarities of same sex and cross sex couples, differences between gay and lesbian couples" The Gottman Institute, <http://www.gottman.com/research/projects/gaylesbian/index>

<sup>93</sup> The Hon Justice Alastair Nicholson, Chief Justice of the Family Court of Australia "The Changing Concept of Family: The Significance of Recognition and Protection" (1996) 3(3) *Murdoch University Electronic Journal of Law* at para 6.

<sup>94</sup> C J Patterson *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

no basis upon which to assume that lesbian mothers and gay fathers are different from heterosexual parents in parenting skills. Sexual orientation “is no basis upon which to make assumptions about the quality of an individual’s relationship or the parenting capacities of a person”.<sup>95</sup>

Lesbians and gay men have children in a variety of circumstances. Some children may be conceived in the context of a heterosexual relationship before one of the parents “comes out”. This parent may then acquire a same sex partner who may develop a step-parent relationship with the children (if the parent is the resident parent). Alternatively, lesbian and gay adults may form intimate relationships and then seek to have children within this context. The desire for children is a basic human instinct. Lesbian and gay adults become parents for many of the same reasons as heterosexual adults.<sup>96</sup>

There is no empirical foundation for the belief that lesbian and gay adults are not fit to parent.<sup>97</sup> Research comparing lesbian with heterosexual mothers has not found any marked differences in self-esteem, psychological adjustment or attitudes toward child rearing.<sup>98</sup> There is no evidence suggesting that lesbian mothers are less maternal than their heterosexual counterparts. The American Academy of Paediatrics in reviewing the body of scientific literature<sup>99</sup> found that “lesbian mothers strongly endorse child centred attitudes and commitment to their maternal roles<sup>100</sup> and have been shown to be more concerned with providing male role models for their children than are divorced heterosexual mothers”.<sup>101</sup>

Research on gay fathers also demonstrates that there is no basis for the belief that they are unfit to parent.<sup>102</sup> The empirical evidence concerning gay fathers shows that they demonstrate substantial capacity for nurturance and investment in their paternal role and do not differ from heterosexual fathers in providing appropriate recreation, encouraging autonomy<sup>103</sup> or dealing with normal parenting problems.<sup>104</sup> In some studies gay fathers compared to their heterosexual counterparts fare better in adhering to disciplinary guidelines, providing guidance, assisting in the development of cognitive skills and involvement in their children’s activities.<sup>105</sup>

The evidence supports the conclusion that lesbians and gay men, in their capacity to be parents, function similarly to heterosexual parents. There are greater similarities between lesbian and gay parents and heterosexual parents than differences in parenting styles and attitudes. “They are highly committed parents, who, in the case of children conceived by artificial insemination, or who were adopted, went to great lengths to have the child. These children are all wanted”.<sup>106</sup>

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<sup>95</sup> The Hon Justice Alastair Nicholson, Chief Justice of the Family Court of Australia “The Changing Concept of Family: The Significance of Recognition and Protection (1996) 3(3) *Murdoch University Electronic Journal of Law* at para 58.

<sup>96</sup> E C Perrin and the Committee on Psychosocial Aspects of Child and Family Health, “Technical Report: Co-parent or Second Parent Adoption by Same Sex Parents” (2002) 109 *Policy Statement* American Academy of Paediatrics, 341-344 <http://www.aap.org/policy/020008t.html>

<sup>97</sup> C J Patterson *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

<sup>98</sup> D K Flaks, I Ficher, F Masterpasqua and G Joseph “Lesbians Choosing Motherhood – A comparative study of lesbian and heterosexual parents and their children” (1995) 31 *Developmental Psychology*, 105-144; R Green, J B Mandel, M E Hotvedt, J Gray and L Smith “Lesbian Mother’s and Their Children: A comparison with solo parent heterosexual mothers and their children” (1986) 15 *Archives of Sexual Behaviour* 167-184.

<sup>99</sup> E C Perrin and the Committee on Psychosocial Aspects of Child and Family Health, “Technical Report: Co-parent or Second Parent Adoption by Same Sex Parents” (2002) 109 *Policy Statement* American Academy of Paediatrics, 341-344.

<sup>100</sup> S Golombok, A Spencer and M Rutter “Children in lesbian and single-parents households: Psychosexual and psychiatric appraisal” (1983) 24 *Journal of Child Psychology and Psychiatry* 551-572; J A Miller, R B Jacobsen, J J Bigner “The Child’s Home Environment For Lesbians vs. Heterosexual Mothers: A Neglected area of research” (1981) 7 *Journal of Homosexuality* 49-56.

<sup>101</sup> M B Harris and P H Turner “Gay and Lesbian Parents” (1985) 12 *Journal of Homosexuality* 101-113; M Kirkpatrick, C Smith and R Roy “Lesbian Mothers and Their Children: A comparative study. (1981) 51 *American Journal of Orthopsychiatry* 545-551.

<sup>102</sup> C J Patterson (1995) *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

<sup>103</sup> P H Turner, L Scadden and M B Harris, “Parenting in gay and lesbian families” (1990) 1 *Journal of Gay and Lesbian Psychotherapy* 55-66.

<sup>104</sup> M B Harris and P H Turner “Gay and Lesbian Parents” (1985) 12 *Journal of Homosexuality* 101-113.

<sup>105</sup> J J Bigner and R B Jacobsen “Adult Responses to Child Behaviour and Attitudes Toward Fathering: gay and nongay fathers” (1992) 23 *Journal of Homosexuality* 99-112.

<sup>106</sup> M S Wald “Same Sex Couples: Marriage, Families, and Children” (1999) Stanford Law School.

### ***Will the child's development suffer if raised in a same sex family?***

There is a common concern that children raised by same sex parents will exhibit more developmental problems than those raised in heterosexual families. Studies of personal development among children of lesbian and gay parents have assessed a broad array of characteristics, concluding that children of gay or lesbian parents are no different than their counterparts raised by heterosexual parents.<sup>107</sup>

Studies in the UK and the USA found that the children of divorced lesbian mothers and divorced heterosexual mothers do not exhibit differences in gender role or identity, psychiatric state, levels of self-esteem and quality of friendships, popularity, sociability or social acceptance.<sup>108</sup> Empirical evidence also shows that children born to and raised by lesbian couples develop normally. The social competence and prevalence of behavioural difficulties of these children has been found to be comparable with population norms.<sup>109</sup> Children born to lesbian mothers do not experience detrimental effects in their development, "there were no significant differences in child adjustment as a function of parental sexual orientation or the number of parents in the home".<sup>110</sup> There have been a limited number of studies conducted comparing the children of gay and heterosexual fathers.<sup>111</sup>

Family interaction rather than family structure has been found to more powerfully affect a child's development. Factors such as parenting stress and conflict, factors which are unrelated to family structure, are the determining factors in indicating children's dysfunction.<sup>112</sup> Children are "better adjusted when their parents report greater relationship satisfaction, higher levels of love, and lower inter-parental conflict regardless of their parents' sexual orientation".<sup>113</sup> If a child experiences functional interaction with his or her parents and their family environment is free from personal distress their development will occur normally. This applies equally to children of lesbian and gay families and heterosexual families.

In summary, "the belief that children of gay and lesbian parents suffer deficits in personal development has no empirical foundation".<sup>114</sup> No discernable differences have been found between children with lesbian and gay parents and children with heterosexual parents in relation to their personal and psychological development, self-esteem or their relationships with their peers.<sup>115</sup>

### ***Will the child grow up to be a lesbian or gay man?***

One objection to allowing lesbians and gay men to adopt is based on the belief that the child will grow up to be a lesbian or gay man. In studies that have focused on the adult children of lesbian and gay men compared with children of similarly situated heterosexual parents there was no difference in the proportion of those children who identified themselves as lesbian or gay.<sup>116</sup>

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<sup>107</sup> C J Patterson *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

<sup>108</sup> UK: F Tasker and S Golombok "Children Raised by Lesbian Mothers: The empirical evidence" (1991) 21 *Family Law* 184. USA: C Patterson "Children of Lesbian and Gay Parents" (1992) 63 *Child Development* 1025.

<sup>109</sup> D K Flaks, I Ficher, F Masterpasqua and G Joseph "Lesbians Choosing Motherhood – A comparative study of lesbian and heterosexual parents and their children" (1995) 31 *Developmental Psychology* 105-144.

<sup>110</sup> R Chan, B Raboy and C Patterson "Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers" (1998) 69 *Child Development* 443, at 448.

<sup>111</sup> J Millbank "Meet the parents: A review of the Research on Lesbian and Gay Families" Prepared for *The Gay & Lesbian Rights Lobby (NSW) Inc* January 2002, at 44.

<sup>112</sup> *Ibid*; E C Perrin and the Committee on Psychosocial Aspects of Child and Family Health, "Technical Report: Co-parent or Second Parent Adoption by Same Sex Parents" (2002) 109 *Policy Statement* American Academy of Paediatrics, 341-344.

<sup>113</sup> E C Perrin and the Committee on Psychosocial Aspects of Child and Family Health, "Technical Report: Co-parent or Second Parent Adoption by Same Sex Parents" (2002) 109 *Policy Statement* American Academy of Paediatrics, 341-344.

<sup>114</sup> C J Patterson *Lesbian and Gay Parenting* APA (American Psychological Association) Public Interest Directorate <http://www.apa.org/pi/parent.html>

<sup>115</sup> M Allen and N Burrell "Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research" (1996) 32 *Journal of Homosexuality* 19.

<sup>116</sup> J Millbank "Meet the Parents: A review of the Research on Lesbian and Gay Families" Prepared for *The Gay & Lesbian Rights Lobby (NSW) Inc* January 2002, at 41; J M Bailey, D Bobrow, M Wolfe and S Mikach "Sexual Orientation of Adult Sons of Gay Fathers" (1995) 31 *Developmental*



It is apparent that an objection on the basis of the potential sexual orientation of the child raised in a lesbian or gay household is unfounded. Further, it can be argued that there is prejudice implicit in the assumption that if a child grows up to be a lesbian or a gay man that this is a misfortune. This is offensive to lesbian and gay people. It is also important to recognise that heterosexual parenting does not ensure that children will be heterosexual. As one researcher commented, "It may appear facile, but nevertheless is accurate, to state that nearly all homosexuals had heterosexual parents".<sup>117</sup>

### ***Is the child more likely to be sexually abused?***

Another fallacy that underlies objections to lesbian and gay adoption is that the child is at greater risk of being sexually abused if his or her parents are lesbian or gay. No empirical evidence supports this proposition. In reality, "most perpetrators of child abuse identify as heterosexual men and their victims are predominantly female".<sup>118</sup>

Having a lesbian or gay parent does not make a child particularly vulnerable to sexual abuse. In fact "a child's risk of being molested by his or her relative's heterosexual partner is over one hundred times greater than by someone who might be identifiable as being homosexual".<sup>119</sup>

### ***Will the child be teased as a result of prejudice against homosexuality?***

Concern has also been expressed about the children of gay men and lesbians being more vulnerable to teasing and harassment due to the stigmatisation surrounding their parent's sexual orientation. One UK study found that the children of lesbian mothers were no more likely than children of heterosexual mothers to be teased or ostracised.<sup>120</sup> A study conducted in the USA found that although children raised in a gay or lesbian household do report teasing because of their parents' sexual orientation, their self-esteem levels were the same as those of children of heterosexual parents.<sup>121</sup> Nor is there any evidence that the mental health of children raised in a lesbian or gay household is adversely affected by teasing.<sup>122</sup> Children raised by lesbian or gay parents learn to deal with perceptions that their family is "different" in the same way that children living in other minority families such as religious or racial minorities learn to cope with community stigma based on their family's differences.<sup>123</sup>

Of importance is the acknowledgment that lesbian and gay parents are aware of the difficulties that a child may face, many themselves having grown up being "different" and therefore dealing with prejudice all their lives. If gay and lesbian parents are open and positive about their sexual identity their children will also adopt an accepting and positive attitude toward their family identity.<sup>124</sup> Lesbian and gay parents will be well positioned to address any teasing their child may face. In addition to this it must be remembered that:

very few children grow up without encountering some form of taunting... Learning to cope with such things is part of growing up and any attempt to shield children from the realities of life is to embark on a very dangerous course.<sup>125</sup>

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*Psychology* 124-129; F L Tasker and S Golombok "Growing Up in a Lesbian Family: Effects in Child Development" New York, NY: Guilford Press (1997).

<sup>117</sup> R Green, J B Mandel, M E Hotvedt, J Gray and L Smith "Lesbian Mother's and Their Children: A comparison with solo parent heterosexual mothers and their children" (1986) 15 *Archives of Sexual Behaviour* 167-184, at 181.

<sup>118</sup> W Morgan and K Walker "Rejecting (In)tolerance: Tolerance and Homosex" (1995) 20 *Melbourne University Law Review* 214.

<sup>119</sup> J Carole "Are Children at Risk for Sexual Abuse by Homosexuals?" (1994) 94(1) *Paediatric*.

<sup>120</sup> F Tasker and S Golombok "Do Parents Influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families" (1996) 32 *Developmental Psychology* 3.

<sup>121</sup> S L Huggins "A Comparative Study of self-esteem of adolescent children of divorced lesbian mothers and divorced heterosexual mothers" (1989) 18 *Journal of Homosexuality* 123-135.

<sup>122</sup> M S Wald, "Same Sex Couples: Marriage, Families, and Children" (1999) Stanford Law School.

<sup>123</sup> *Ibid.*

<sup>124</sup> F Tasker and S Golombok *Growing Up on a Lesbian Family*, Guilford Press, New York (1997).

<sup>125</sup> *Jarman v Lloyd & Ors* (1982) 8 Fam L.R. 878, Wotten J at 891.

Some would also argue that it is wrong to focus on the potential of children to be teased by their peers as a negative factor in considering gay and lesbian adoption. Rather, it is asserted, the emphasis should be on altering community perceptions and addressing peoples' prejudices. In any event the evidence does not suggest that the potential for teasing justifies continuing to outlaw same sex adoptions.

## Issues of adoption specific to same sex couples

If the *Adoption Act*, 1988 is amended to allow same sex couples eligibility to adopt, the applications of lesbians and gay men will most likely be very limited in number. However, not all types of adoption will be available to same sex couples.

### *Inter country adoption*

Same sex couples are currently unable to adopt children through inter country adoption. Adopting a child from a foreign country requires the disclosure of a parent's sexual orientation. None of the countries that Tasmania has an adoption agreement with currently accept applications from lesbian or gay applicants. It is a requirement that applicants be a legally married couple although currently just three countries allow single parent applicants.<sup>126</sup>

### *'Known' child adoption'*

This category of adoption has the greatest potential for use by same sex couples. It could be used by lesbian couples who conceive a child during their relationship (eg by artificial or donor insemination) as well as by couples in step parent type situations (say with a child from a previous relationship). As has been discussed, it appears to be already possible for same sex couples to adopt a child who is a relative of one of the couple.<sup>127</sup>

Lesbians are increasingly having babies through donor insemination, usually with a known donor; these donors are predominately gay men.<sup>128</sup> More often than not, known donors have contact with the child.<sup>129</sup> It is unclear whether lesbians can access donor insemination services in Tasmania as it is not explicitly covered by statute.<sup>130</sup> Despite this, lesbian couples may resort to conceiving children through intercourse or by the use of donor sperm administered at home in circumstances that are lacking the concern for health and safety that exists when conducted through a medical procedure.

Clearly same sex couples are raising children. It is arguably in the best interests of the child for the law to acknowledge and cater for this reality.

If a married woman, with her husband's consent becomes pregnant through a fertilisation procedure using donor sperm, the husband is treated for the purposes of law as the father of the child.<sup>131</sup> The man who has donated sperm used in a successful fertilisation procedure is not regarded at law as the father.<sup>132</sup> These presumptions concerning parentage are important. A child who is conceived through donor insemination in the context of a heterosexual marital relationship has two legal parents, whereas a child born to a lesbian

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<sup>126</sup> DHHS inter country adoption handout December 2002.

<sup>127</sup> *Adoption Act*, s 21; see discussion at page 10 of this paper.

<sup>128</sup> J Millbank "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" (1998) 12 *Australian Journal of Family Law*

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* at 117-119.

<sup>131</sup> *Status of Children Act*, 1974 (Tas) s 10C(1).

<sup>132</sup> *Status of Children Act*, 1974 (Tas) s 10C(2).

couple has only one parent, the biological mother. The donor male is not regarded as a parent. It is likely that a known sperm donor, even where insemination was not conducted through established medical procedures, will not be considered as the father.<sup>133</sup>

A co-parent of the birth mother has no legal relationship with the child. This situation may be addressed through a parenting order, which the Family Court of Australia can make in favour of parents and “any other person concerned with the care, welfare or development of the child”.<sup>134</sup> This would allow for a mother and co-mother to apply jointly for parenting orders, establishing a legal relationship between a co-mother and her child.<sup>135</sup> A parenting order, if granted, does not confer the status of legal parent. For this reason, adoption may be preferable to a co-parenting order.

The legal recognition of the relationship between a co-parent and child is important in areas such as:<sup>136</sup>

- inheritance;
- child support;
- contact and residence; and
- parental authority (education, medical care, etc)

There is a real possibility that children born to lesbian couples will at some stage in their lives require their co-parents to be their legal parent for a variety of purposes. In the New York Court of Appeals case, *Re Jacob and Dana*<sup>137</sup> Kaye CJ emphasised that what is important is:

the emotional security of knowing that in the event of the biological parents death or disability, the other parent will have presumptive custody, and the children’s relationship with their parents, siblings and other relatives will continue should the parents separate.

For an adoption to be made in Tasmania, the welfare and interest of the child must be paramount. It can be argued that this objective is advanced “by allowing the two adults who actually function as the child’s parents to become the child’s legal parents”.<sup>138</sup>

### ***Local placement adoption***

If same sex couples are provided with eligibility to adopt there would be no legal barrier to adoption of local children placed for adoption. However, if the relinquishing parents have access to the profile of the prospective adoptive parents and/or can express their wishes regarding where the child is placed, it may be very rare for gay or lesbian couples to in fact have a child placed with them.

Local placement adoption may have appeal for male gay couples who cannot give birth to their own children. However it may also be the preferred option for a lesbian couple. If the legal barrier to eligibility for placement adoption by same sex couples is removed, the question arises whether the non-identifying profile should specify whether the couple is heterosexual, lesbian or gay. According to the Manager of Adoptions, this factor would be a relevant factor under the heading “family makeup” and the birth parents would be entitled to indicate a preference in relation to this.<sup>139</sup> An even-handed and non-discriminatory approach to adoption suggests that heterosexuality or otherwise should not be a factor in the non-identifying profile disclosed to the birth parents. However, if birth parents can specify religion, race and ethnic background, it can be argued that they should also be able to specify a preference in relation to sexuality.

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<sup>133</sup> *Re B and J* (1996) FLC 92-716.

<sup>134</sup> *Family Law Act*, 1975 (Cth) ss 64C and 65C.

<sup>135</sup> J Millbank “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” (1998) 12 *Australian Journal of Family Law* 120.

<sup>136</sup> J Millbank “And then...the brides changed nappies – Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise” Gay & Lesbian Rights Lobby (NSW) 2002, at 5.

<sup>137</sup> 22 FLRtr 1003 (1995).

<sup>138</sup> F Bates “Is the Tide Truly Turning? – Gays, Lesbians, Adoption and Custody” E Law – (1996) 3(3) *Murdoch University Electronic Journal of Law*.

<sup>139</sup> Gael Moffat (personal communication 20/12/2002), Department of Health and Human Services, Adoption and Information Service.

## Part 3:

# Additional Qualifications: Length of the Relationship

### *Current Law*

The agreed terms of reference require consideration of whether, in the event of the abolition of marriage and gender qualifications for adoption, there should be any additional legal qualifications for adopting couples, particularly qualifications relating to the proven length of the stable relationship. The discussion on this point is confined to length of the relationship as no additional qualifications seem appropriate. The *Adoption Act*, s 20(1) requires that a couple be married for at least 3 years before an adoption order can be made in their favour. However a de facto relationship of up to 2 years may be counted towards this three-year period. There have been suggestions that the time period be extended, no doubt to demonstrate the couple's commitment to one another and their raising of a child.

### *Maintaining the 3 year period*

There are a number of arguments against extending the period.

First, every aspect of a couple's relationship comes under scrutiny in the assessment process of adoption. It must be kept in mind that the stability of the couple's relationship in addition to this initial 3-year period of commitment will always form part of the eligibility criteria when assessing that couple's capacity to provide a nurturing family home.<sup>140</sup> The quality of a couple's relationship is of more importance than its length when considering a couple's suitability to adopt. As far as marriage goes, 10.7 years is the median length of a marriage ending in divorce.<sup>141</sup> This suggests that even a 10 year relationship is far from a guarantee of a life-long relationship.

Secondly, extending the length of time a couple must be in a relationship before becoming eligible to adopt has implications in view of changing societal trends surrounding marriage. Both brides and grooms are older now than they were in the 1960s and 1970s. In 1993 the median age of brides was 26 years and grooms 29 years.<sup>142</sup> In addition to this women are starting their child bearing later. In 1994 women aged between 25-34 accounted for 63% of births in Australia and peak fertility was among 29-year-old women.<sup>143</sup> Age has an effect upon a women's ability to become pregnant as fertility decreases with age.<sup>144</sup> In addition, fertility treatments are less successful in older women and miscarriage becomes increasingly common with age.<sup>145</sup> If people marry later and seek to have children later the likelihood of success in becoming pregnant is diminished. The upshot of this is that people are exploring the possibility of adoption at a later stage in their lives than previously was the case. Increasing the length of the relationship required may have the effect of making applicants ineligible to adopt due to their age. Couples who might be committed and loving parents face the possibility that they will not be able to adopt. Existing guidelines require a prospective parent to be no more than 40 years older than the first child they adopt if they do not already have a child in their care.

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<sup>140</sup> Gael Moffat (personal communication 20/12/2002), Department of Health and Human Services, Adoption and Information Service.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> "Australian Social Trends 1996 – Family Formation: Trends in Fertility" Australian Bureau of Statistics <http://www.abs.gov.au/ausstats>

<sup>144</sup> Infertility Articles – "Age and Fertility" The Australian Infertility Support Group, <http://nor.com.au/community/asig/index.html> The article can be found under the heading of literature.

<sup>145</sup> *Ibid.*

Thirdly, a 3-year period is regarded by those expert in adoption assessments as adequate for the purpose of assessing the stability and quality of the relationship.<sup>146</sup> Any further period would cause unnecessary distress to hopeful applicants.

Finally, a survey of Australian legislation demonstrates that a three-year period is the standard length of a relationship required for eligibility to adopt. Couples must demonstrate a relationship of 3 years duration before adopting in New South Wales, Western Australia, and the Australian Capital Territory.<sup>147</sup> Victoria, Queensland and the Northern Territory require a relationship of not less than 2 years.<sup>148</sup> South Australia requires that a couple cohabit in a marriage relationship for a continuous period of at least 5 years.<sup>149</sup>

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<sup>146</sup> Gael Moffat (personal communication 20/12/2002), Department of Health and Human Services, Adoption and Information Service.

<sup>147</sup> *Adoption Act*, 2000 (NSW) s 28; *Adoption Act*, 1994 (WA) s 39; *Adoption Act*, 1993 (ACT) s 18.

<sup>148</sup> *Adoption Act*, 1984 (Vic) s 11; *Adoption of Children Regulation*, 1999 (Qld) reg 7; *Adoption of Children Act*, 1995 (NT) s 13.

<sup>149</sup> *Adoption Act*, 1988 (SA) s 12.

## Part 4

# Options for Reform

The options considered for amending the *Adoption Act*, 1988 are:

1. To amend s 20 of the *Adoption Act* to make same sex couples eligible to adopt generally; or
2. To amend the *Adoption Act* to allow same sex couples to adopt in the ‘known’ child category only.
3. To change the qualifications for adopting couples by extending the length of the relationship for eligibility.

### ***Option 1***

Allowing same sex couples to adopt in the same circumstances as heterosexual couples has occurred in Western Australia. Amendments to the *Adoption Act*, 1994 (WA) made by the *Acts Amendment (Lesbian and Gay Law Reform) Act*, 2002 have facilitated adoptions by same sex couples with no restrictions as to the type of adoption order that may be made. The UK, The Netherlands and some US jurisdictions also permit same sex adoptions. In the light of the evidence reviewed in Part 2 that gay and lesbian couples do not differ from heterosexual parents in terms of relationship stability or parenting ability and that there is no evidence that children raised by gay and lesbian couples are adversely affected, it can be argued that continuing to deny same sex couples the ability to adopt is unjustified, unfair and discriminatory.

For Tasmania to allow same sex couples to adopt certain amendments are required.

The *Adoption Act*, 1988 (Tas), s 20 provides:

- (1) An order for the adoption of a child may be made in favour of a man and a woman who are married to each other and have been so married for not less than 3 years before the date on which the order is made.
- (2) The period of 3 years referred to in subsection (1) may include a period during which a man and a woman resided together in a stable continuous *de facto* relationship immediately before their marriage.

The words “man and a woman who are married to each other” would have to be omitted from s 20(1). This could then be replaced with the words “a married couple, or two people (whether of different sexes or the same sex) living as partners”. This approach is based on the *Adoption and Children Act*, 2002 (UK) s 114(4). Consequential amendments would be required to other provisions in the Act and Regulations including s 21(2). As previously noted, the suggested amendment to s 20(1) will have the effect of allowing an unmarried heterosexual couple to adopt, as is the case in most other states.<sup>150</sup>

If this option were adopted a further issue to consider is whether the non-identifying profile of the adopting parents should specify whether the couple is heterosexual, gay or lesbian and whether the birth parents can express their preference in relation to this matter.<sup>151</sup>

### ***Option 2***

An alternative would be to allow same sex couples to adopt in circumstances referred to as ‘known’ child adoptions. This would allow children who have been conceived through donor insemination in a lesbian

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<sup>150</sup> *Adoption Act*, 1994 (WA) s 39(1)(d); *Adoption Act*, 1984 (Vic) s 11(1); *Adoption Act*, 1993 (ACT) s 18; *Adoption Act*, 1988 (SA) s 12; *Adoption Act*, 2000 (NSW) s 23.

<sup>151</sup> See discussion at 39.

relationship to have two legal parents. In addition it would allow same sex couples to adopt children who are in their care, such as their partner's children. Adoption by same sex couples in these circumstances is allowed in many European countries and many states in the USA (referred to as second-parent adoptions).

The *Adoption Act*, 1988, s 20 makes the following provisions in relation to known child adoptions:

- (6) Subject to subsection (7), an adoption order may be made in favour of the spouse of a natural parent, or of an adoptive parent, of the child concerned.

This option would require amendments to be made to s 20(6), (7), (8) as reference is made to 'spouse' which means a marital partner, thus excluding same sex couples.

Because Option 2 is more restrictive and does not apply to placement adoptions, it may be more acceptable to some members of the community. While it does not have the attraction of eliminating discrimination against lesbian and gay couples it does retain the advantage of promoting the financial and emotional security of children raised by lesbian and gay couples by allowing the two adults who are functioning as the child's parents to become that child's legal parents.

### ***Option 3***

There seems no compelling reason why the length of the relationship required in Tasmanian should be extended. The relationship length is no guarantee of its long-term stability and to extend the duration of the relationship required by the *Adoption Act* may have the effect of denying people the capacity to apply to adopt. Only one state in Australia has a period longer than 3 years, four have 3 years and three have 2 years.

# Questions

*These questions may be a useful guide in responding to this issues paper.  
Please explain the reasons for your views as fully as possible*

1.
  - (a) Should the *Adoption Act* s 20(1) be amended to permit an order for adoption to be made in favour of any couple regardless of the gender of the partners making up the couple?
  - (b) If so, should the non-identifying profile of adopting parents specify the sexuality of the couple and should the birth parents be able to express a preference about the sexuality of the adopting parents?
  - (c) If not, should the *Adoption Act* s 20(6) be amended to allow 'known' child adoption orders to be made in favour of any couple regardless of the gender of the partners making up the couple?
2. Should the length of the relationship for eligibility for adoption be changed?
3. Should any other qualifications for adopting couples be included in the Act?