

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

REMAINING QUESTIONS FROM HEARING

Gay and Lesbian Rights Lobby

1. How common is adoption in the gay and lesbian community at present?

It is difficult to provide exact statistics but the 2006 ABS Census suggests that 4,386 children live in same-sex couple families in Australia (2007, unpublished). This figure is likely to be an underestimate of the total number of children with lesbian and gay parents, as it does not include non-resident children, adult children who have moved out of home or single-parent gay and lesbian households. However, these figures also include children who are conceived through assisted reproductive technology and in previous relationships, so cannot tell us how many of these children are adopted children (although it is likely to be few due to legal and other barriers). Same-sex couples are also able to – and currently do – foster children.

In Western Australia, adoption laws changed in 2002 and only one reported gay couple have adopted an unknown child; 5 years following legal reform in that state. This is because relinquishing parents are actively involved in the process of selecting and placing the child with the adoptive parents.

There are numerous decisions in the federal family courts granting parenting orders to lesbians and gay men (see for example, *Re Mark* (2003) 31 Fam LR 162; *Re J and M* (2004) 32 Fam LR 668 and *Re F and D* (2005) 33 Fam LR 568).

- 2.. Some submissions to the inquiry have argued that the case for adoption by same sex couples places the rights of the adult above the rights of the child, noting that the paramount objective of the *Adoption Act 2000* is the best interests of the child.

- What is your view of these suggestions?

It is clear that by actively contributing to a situation where you discriminate against a child's parents, you discriminate against their child – both directly and indirectly. For example, children with two same-sex parents, but who only have one parent legally recognised, cannot access the same inheritance protections as other children with both parents legally recognised. This is an example of direct disadvantage to a child. Similarly, children directly cannot benefit from protections like child support obligations on both parents, parental authority to consent to medical treatment bestowed on both parents, and so on.

But also, unlike other children, children in same-sex families are denied the social recognition of their families. This sends a powerful message about the validity of their lives and families.

- In your opinion, how would adoption by same sex couples further the objectives of the Act?

Allowing same-sex couples to adopt would further the objectives of the Act for the following reasons:

- It would give children currently living in same-sex families, who do not have legal recognition of their parents, a mechanism to formalise these relationships. This would provide the benefits and entitlements conferred by legal parentage throughout their childhood and into adulthood. Children would no longer be considered legal strangers to the people who have parented them all their lives.
 - In relation to unknown adoption, the GLRL believes that by removing a barrier to considering same-sex couples as a couple for the purposes of adoption eligibility – you focus the adoption inquiry squarely on the best interests of a child in each particular case. You remove the prejudice and judge people on their individual merits according to objective criteria. Same-sex couples will still have to individually satisfy the court of their ability to provide a stable and loving home to a child in every individual case.
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- In your view, how would adoption by same sex couples contribute to adoption as a service for the child?

See above. Removing discrimination adoption laws for same-sex couples is about giving children who are already in the care of same-sex parents the financial and emotional stability that comes with the legal recognition of their parents.

7. Some submissions to the inquiry have suggested that adoption by same sex couples would deny a child the right to either a mother or a father, and have cited evidence that this is potentially harmful to the child's development.

- What is your view of these suggestions?

Firstly, these suggestions simply ignore that fact that there are already children living in same-sex families. The law is denying a child with two same-sex parents the legal recognition of one of those parents. It is unjust to deny a child the entitlements and rights bestowed on other children simply because of the status of their parent's relationship.

All the credible research demonstrates that it is the love and care given to children, rather than the gender of a child's parents, that has by far the biggest impact on a child's social, intellectual, moral and emotional well-being. Our main submission gives a detailed response to the research on same-sex parenting. We would also urge you to read Professor Millbank's submission to the Committee for her detailed analysis of the available research.

- Some submissions have also voiced concern about an absence of evidence on the long term impact of parenting by male partners. Can you comment on this?

There is now a considerable body of work which shows that children do not suffer any detriments because of same-sex parenting. Again, we refer you to Professor Millbank's submission to the Committee for her detailed analysis of the available research.

- What are your views on the impact of gender on parenting, and correspondingly, on children?

In our main submission, we quote from the Australian Psychological Society's recent research review which states that it is family processes, rather than family structures (such as the number or gender of adults in the household) which contribute to welfare outcomes for children.

During the public hearings claims were made that men and women supposedly bring different things to parenting. Most of these comments appeared to take stereotypical views of gender differences, suggesting that fathers are involved in 'rougher' play with children, or even that fathers read to children in a different way to mothers. There are simply so many differences between *individual* men and *individual* women that making such general claims based on gender differences is entirely unhelpful for determining a particular person's capabilities as a parent or potential parent.

Parents and children come in all shapes and sizes, and children interact with people with all different temperaments, interests, talents and abilities throughout their lives. Children have many role models; indeed, whole communities – uncles, aunts, grandparents, cousins, teachers, friends – contribute to the raising of a child. Children in same-sex families simply do not live in a single gender vacuum any more than a child who attends a girls-only or boys-only school.

The GLRL simply believes that individuals should be judged on their own merits without prejudicial or stereotypical understandings of sexuality or gender getting in the way of ascertaining who the best potential parents for a particular child are.

8. In NSW individuals are able to apply for adoption regardless of their sexuality or whether they are in a couple relationship. What are your views on this situation?

The GLRL believes people should be judged on their individual merits to provide a stable and loving home to a child and not automatically barred from consideration because of their sexuality or marital status.

It makes no logical sense to allow individual lesbians and gay men to apply for adoption, but not same-sex couples.

9. In your submission (p 14) you assert that adoption reform is particularly important for long-term foster carers. Can you elaborate on this point?

Currently, same-sex foster carers in the long term care of a child can be awarded long-term parental responsibility for a child. However, this order ceases to have effect once the child is 18. This means that these parents become legal strangers to the child once the child becomes an adult. Same-sex adoption would allow long term same-sex foster carers in such circumstances the opportunity to formalise their relationship with their children – thus conferring on children all the protections, entitlements and benefits of legal parentage.

- What contribution do same sex couples make to foster care in NSW?

It is difficult to ascertain the numbers of same-sex couples who are foster carers in NSW, but several foster care agencies have recruited carers from the gay and lesbian community for many years.

Gay and lesbian foster carers make a significant contribution to children's welfare in a time where there is a critical shortage of foster carers.

- Would you like to comment on same sex couples' ability to foster and their inability to adopt under NSW legislation?

Inconsistency in the law creates confusion. Some same-sex couples who may be interested in fostering a child may be discouraged from doing so because they believe same-sex couples are not eligible to foster, when in fact they are. This confusion comes about because adoption law says same-sex couples are ineligible, and to many people, this message of discrimination translates across all laws related to parenting.

The point should also be made that if the Government believes that gay and lesbian parents are suitable for foster parenting, then it makes no sense to deny them the ability to adopt.

10. It has been suggested that it is not in the best interests of children to be adopted into gay and lesbian families because they are likely to face difficulties arising from prejudicial attitudes at school and in the community. Would you like to comment on this concern?

The solution to homophobic harassment is to address the prejudice, stereotypes and ignorance which fuel such attitudes, not to bar certain minorities from having children.

We should not condone bullying in any form, let alone bullying inspired by ignorance or hate.

11. Some submissions to this inquiry have suggested that current adoption laws perpetuate prejudicial social attitudes towards gay and lesbian parents and adversely affect children living in same sex parent families by denying them legal and social recognition. Can you comment on this view?

We agree. Discrimination in adoption law stigmatises lesbians and gay men as posing potential 'risks' to children. In fact, many lesbians and gay men make extremely significant contributions as parents, educators, carers and workers who contribute to the welfare of children in NSW. Discrimination in adoption law is an insult to their significant and profound contribution.

12. Some submissions to the inquiry have suggested that homosexual relationships are less stable and long term than heterosexual ones, and less characterised by faithfulness of partners. They have suggested that this can lead to family arrangements, for example when parents re-partner, which are disruptive and confusing to the child. What is your response to these suggestions?

Such generalisations about a whole class of people are again completely unhelpful for ascertaining which persons will make the best parents for a child. Some heterosexual families are also prone to family breakdowns and relationship conflict and it would be equally unhelpful to exclude all heterosexual couples as a result of the circumstances of some.

Opening eligibility to as wide a pool of potential parents as possible does not give any person the right to adopt – it simply allows a greater number of people the opportunity to be considered. All couples and individuals should be judged on their particular circumstances and whether they can provide a loving, suitable and stable home to a child. Such an analysis of their capability as potential parents should not be made on the basis of stereotypes or judgements made about the class of persons they belong to.

Indeed, if *any* relationship is unstable or not long term the couple would be unlikely to be eligible to adopt.

13. In your submission (pp 22-27) you provide an overview of adoption legislation in Australian states and territories. The Committee understands that adoption by same sex couples is currently legal in Western Australia, the ACT and Tasmania.

- In your view do any of these jurisdictions provide a valuable model for NSW legislation and policy?

Adoption models around Australia have many similarities, with the exception that the ACT and WA definition of couple is gender neutral – thus permitting same-sex couples to be considered for adoption eligibility. Therefore, a gender neutral definition of ‘de facto relationship’, ‘spouse’, and ‘couple’ – as highlighted in our main submission would achieve the effect of WA’s and ACT’s reforms.

In addition, the Tasmanian *Adoption Act 1988* allows for ‘second parent adoption’ – that is, the adoption of the child of a partner (s 20(2A)). This allows the court to make an adoption order in favour of a person who is in registered ‘significant relationship’ (the Tasmanian terminology for ‘de facto relationship’) if

- (a) the other party to the relationship is the natural or adoptive parent of the child proposed to be adopted; or
- (b) either party to the relationship is a relative of the child proposed to be adopted.

Our main submission has examples of where second parent adoption may be useful.

- The Committee has been advised that very few adoptions by same sex couples have occurred in these jurisdictions to date, despite being legal. Are you able to comment on why this might be the case?

The main reasons for the few adoptions by same-sex couples in permitting jurisdictions in Australia may include:

- A lack of knowledge of the law reforms. Same-sex couples often do not know that discrimination has been removed many years after reforms have in fact been passed. This is why currently, the GLRL is conducting a community education campaign about the recent reforms at a federal level, which removed over 80 pieces of discriminatory legislation.
- In Tasmania, you have to register your relationship first to access legal rights in adoption (*Adoption Act 1988* (Tas), s 20(1))
- WA and the ACT are less populated states/territories.
- Unlike other countries, Australia recognises most same-sex parents through automatic parentage presumptions which mitigate the need for many same-sex parents to apply for adoption orders to be recognised as parents. However, adoption is still required for some same-sex parents who cannot benefit from the parentage presumptions (e.g. see section 14(1A) in the *Status of Children Act 1996* (NSW)).

Further questions by Greg Donnelly

1. Do you believe that the current exemption provision in the *Anti-Discrimination Act* that may afford protection to church/faith based organisations and their agencies should be deleted from the Act?

The GLRL believes that the question of the religious exemption under the *Anti-Discrimination Act* is outside the terms of reference for the current inquiry. However, we do not support allowing any organisation which provides social services to the public on behalf of the government (i.e. tax pay funded services) the right to discriminate.

We do not believe the provision of secular government-funded services is an issue relating to the freedom of religion, which the International Covenant on Civil and Political Rights (ICCPR) clearly says must be balanced with the fundamental rights and freedoms of others (art 18(3)). The right to equality before the law (art 26) and to be treated without discrimination (art 2) are two fundamental human rights that clearly fall within this built-in balancing mechanism.

2. Do you believe that children (persons less than 18 years of age), living in a same-sex parental arrangement, should have a legal right to be informed about their biological heritage?

The *Assisted Reproductive Technology Act* establishes a donor registry giving all children born through assisted reproductive technology (ART) a mechanism by which to access information about their biological heritage. The Adoption Act also facilitates opportunities for birth families to maintain relationships with adopted children. Children living in same-sex families should be treated as any other child under such schemes.

3. Do you believe that children (persons less than 18 years of age), living in a same-sex parental arrangement, should have a legal right to spend time with the biological parent who does not reside with the same-sex couple?

We do not believe decisions relating to care and time with children should be determined in reference to the rights of parents, but rather the best interests of children. This is clearly established in the *Family Law Act 1975* (Cth) which gives the Family Court the power to make orders that the child spend time with their parents or other people who have an interest in their care and welfare. This includes significant relationships children may have with known donors, surrogate mothers etc. We support the Family Court's powers to make orders in the best interests of children as the paramount consideration.

In our consultation with lesbian and gay parents, it emerged that many same-sex parents are in fact very open with their children about their biological heritage. In fact, some lesbian mothers wished to list their donor's name on their child's birth certificate. However, the current birth certificate regulations do not allow parents who wish to acknowledge the names of known donors on their child's birth certificate from doing so. We believe there would be nothing lost from allowing parents the option of naming a donor's name on the birth certificate. This would not raise any legal presumptions as to parentage.

4. Given the variety of parenting arrangements that exist, why not amend the *Adoption Act* to provide for the adoption of children by one, two or more than two adults, subject to meeting the "paramountcy principle"?

The GLRL is aware that there are a variety of family structures throughout both the heterosexual and gay and lesbian communities. However the vast majority of children in our community are being reared by two parents. Due to the discrimination inherent in the *Adoption Act*, very often only one of those parents is legally recognised, and their children are subsequently disadvantaged.

Our organisation is based on principles of equality. All we are asking for is the extension of the *Adoption Act* as it currently stands to recognise the reality of same-sex couples who are parents. Whether a further inquiry is warranted at a later date to investigate whether the *Adoption Act* should recognise more than two legal parents in both heterosexual and gay and lesbian parenting arrangements is a matter that we would leave to the Committee.