

**1. In your opinion, would adoption by same sex couples further the objectives of the *Adoption Act 2000*?**

- **How do you interpret the principle in the Act that the best interests of the child be the paramount consideration in decisions about adoption?**

One of the objectives of the *Adoption Act 2000* is that the best interests of the child must be the paramount consideration in adoption law and practice. This reflects the treaty to which Australia is a party, the United Nations Conventions on the Right of a Child (CROC). The determination of what is in the 'best interests' of the child has been sometimes claimed by opposing sides in debate as the basis and justification for their arguments. Justice Brennan commented upon the difficulty in defining what is the 'best interests' of a child, in Marion's case:

'the best interests approach offers no hierarchy of values which might guide the exercise of a discretionary power... **in the absence of legal rules or a hierarchy of values**, the best interests approach depends upon the value system of the decision-maker'<sup>1</sup>

Rather than apply one's own values in determining the 'best interests' of a child, the NCYLC submits that guidance should be drawn from CROC and that a holistic approach be taken in the interpretation of 'best interests'.

This could be assisted by a more explicit legislative endorsement of CROC within the Adoption Act. However in any event this holistic approach is more consistent with developing an understanding of the most appropriate use of the Convention <sup>2</sup> and with the relevant general principles of international law.

The following Articles set out several of those principles:

"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." (Article 8.1)

"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." (Article 18.1)

The current state of the law does not recognise a child's right to two legal parents of the same sex. In so doing, a child already living with two parents of the same sex, is denied the right to recognition of the family relations that form part of his or her identity (as required by Article 8.1).

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<sup>1</sup> *Department of Health and Community Services v JWB* (1992) 175 CLR 218 (High Court of Australia) 271.

<sup>2</sup> J Tobin "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs" (2006) 14 *The International Journal of Children's Rights* 275 at 279.

In addition the relationship between the child and his or her 'parent *de facto*' is not legally recognised so that the parent is able to take upon the common responsibilities for the upbringing and development of the child (as required by with Article 18.1).

In their 2009 article, Tobin and McNair acknowledge that the notion that the terms 'parents' or 'family' are broader than a mother and a father 'presents a challenge to the established and dominant expectations held by many within society as to legitimate family structures'.<sup>3</sup> However, their review of the application of the United Nations Convention on the Rights of the Child to the issue of adoption by same-sex couples reaches a different conclusion to those expectations.

They note that the Convention does not state that 'parents' refers to a mother and a father. Furthermore, "sexual orientation [of parents] appears to be an irrelevant consideration which would appear to be consistent with the [United Nations Committee on the Rights of the Child]'s view that the notion of family, and by implication, parents, is a flexible one that must respond to and accommodate the reality of changing social relationships."<sup>4</sup>

Tobin and McNair also cite Article 2 of CROC, which provides that not only shall the State respect and ensure the rights set forth in the Convention without discrimination of any kind, but that the state shall take all appropriate measures to ensure that the child is protected against all forms of discrimination on the basis of the status, activities, expressed opinions or beliefs of the child's parents.<sup>5</sup>

We would argue (as do Tobin and McNair in their article) that the State has an obligation to ensure its legislation does not unfairly discriminate against a child living in a family arrangement where parenting is provided by two persons of the same sex.

The discriminatory aspects of the current NSW law include:

- if the *de facto* parent dies *intestate* the child is unable to lodge a claim as an adopted child of the parent;
- the *de facto* parent is not authorised to make medical or legal decisions on behalf of the child; and
- if the legally recognised parent dies, the *de facto* parent is not able to immediately assume the role of legal guardian.

**2. Some inquiry participants have voiced a concern that arguments for adoption by same sex couples place the rights of the parent(s) above those of the child. What is your view of this suggestion?**

A careful application of the principles of the Convention should address this concern.

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<sup>3</sup> J Tobin "Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child impose an obligation on States to allow gay and lesbian couples to adopt?" (2009) *International Journal of Law, Policy and the Family* 23(1) pp 110-131 at 113

<sup>4</sup> J Tobin "Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child impose an obligation on States to allow gay and lesbian couples to adopt?" (2009) *International Journal of Law, Policy and the Family* 23(1) pp 110-131 at 113

<sup>5</sup> J Tobin "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs" (2006) 14 *The International Journal of Children's Rights* 275 at 286.

In addition, providing the opportunity for the child affected to express his or her views in the decision-making process would meet the requirements of the Convention for participation in decisions affecting the child – and mitigate against the risk of placing too much weight on the views of the parents.

**3. Are there any particular circumstances where you consider adoption by same sex couples as particularly desirable, for example where the couple are related to the child or have fostered the child over a lengthy period and/or where the child wishes to be adopted by the couple?**

The NCYLC submits that these are particular circumstances where adoption by same sex couples is likely to be particularly desirable.

**4. What do you understand to be most important factors in a family environment that promote the wellbeing of children, both in the short and longer term?**

The NCYLC is probably not the most appropriate body to address this question as we are not experts in child development and the relevant social sciences.

The preamble to the Convention recognises that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

The Australian Research Alliance for Children and Young People (in collaboration with UNICEF Australia) published in 2008 “The Report Card on the Well-Being of Young Australians”. The Report Card’s measures drew on the work of the UNICEF Innocenti Research Centre and its 2007 Report “Child Poverty in Perspective: An Overview of Child Well Being in Rich Countries”. The eight domains used by the ARACY Report Card are material well-being; health and safety; educational well-being; relationships; behaviours and risks; subjective well-being; participation and environment.

This ongoing work could provide assistance in measuring wellbeing now and in the future. The Report Card notes

“Caring, quality family relationships have a significant and lasting effect on a child’s development and social and emotional well-being. ... Stable and secure family relationships also protect children from stress, illness and hazards.”<sup>6</sup>

The Report Card was able to use indicators to measure family relationships, sense of belonging and social capital.

It acknowledged that family structure could not be presented in the Report

“because there were no standardised, comparable indicators for family structure at this point in time”<sup>7</sup>

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<sup>6</sup> The Australian Research Alliance for Children and Young People (in collaboration with UNICEF Australia) “The Report Card on the Well-Being of Young Australians” 2008, page 28.

<sup>7</sup> The Australian Research Alliance for Children and Young People (in collaboration with UNICEF Australia) published in 2008 “The Report Card on the Well-Being of Young Australians”, page 81

**5. One submission has pointed to the stipulation, in Article 20(3) of the Convention on the Rights of the Child, that due consideration be paid to the desirability of continuity in a child's upbringing and their ethnic and cultural background, suggesting that there may be grounds for overseas biological parents to choose whether their child is adopted by a heterosexual or same sex couple. Have you any comment on this suggestion?**

A child rights framework used for assessing all the relevant considerations in adoption decisions would suggest that ethnic and cultural background are relevant considerations.

Article 20 (3) refers to these considerations in the context of encouraging consideration of a range of options for substitute care including foster placement, Islamic kafala, adoption and institutional care. As adoption represents a more permanent option of care in an ongoing family environment, these issues would be considered in the context of the available opportunities. This consideration should also consider how the opportunities will provide a loving, caring, stable and secure family environment that offers material well-being, health, safety, education and supportive relationships.

The issue of whether a preference for a heterosexual couple as parents is a relevant characteristic of ethnic or cultural background may be contested.

It would be arbitrary and inconsistent with the broad process of consideration to allow the preference of the biological parents to be used to exclude particular opportunities without also giving weight to the other considerations raised by the Convention.

**6. 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”?**

Currently the *Adoption Act* provides for the adoption of a child by a single adult (s 27 Adoption Act 2000), as it does for two adults (s 28 Adoption Act 2000) but does not make provision for the adoption of a child by more than two adults.

The NCYLC submits that the legislation should provide for a flexible, rather than a restrictive, approach. Such an approach may well recognise families where more than two adults play the role of parents, and the legislation should acknowledge that responsibility. However, the ‘best interests’ of the child must remain paramount. The NCYLC recognises that the practical reality that the legal recognition of more than two parents may not be in the best interests of the child in many circumstances, as parenting decisions will be more difficult to reach. A determination that adoption by more than two adults is in the best interest of a particular child may require additional evidence that the decision making process used by more than two adults as parents is assured and does not contribute to inappropriate conflict in the family environment.