

# STANDING COMMITTEE ON LAW AND JUSTICE

## INQUIRY INTO ADOPTION BY SAME SEX COUPLES

### REMAINING QUESTIONS FROM HEARING

Department of Community Services

## Current legal and administrative arrangements

### 1. In practice how does the *Adoption Act 2000* govern decision-making about individual children and families?

Section 8 of the *Adoption Act 2000* (the Act) sets out the principles to be applied by a person making decisions about the adoption of a child. The best interests of the child, both in childhood and later in life, must be the paramount consideration in decision-making about the adoption of a child [section 8(1)(a)].

Section 90 of the Act sets out a number of matters which the Court must consider prior to making an adoption order. Those matters include that the best interests of the child will be promoted by the adoption and that all necessary consents and processes such as in the case of inter-country adoption the requirements of the Hague Convention<sup>1</sup>, have been properly carried out.

In addition section 91 of the Act provides that the Supreme Court may not make an adoption order unless it has received a report in writing prepared by the Director-General, the principal officer of an adoption service provider or a contracted adoption assessor concerning the proposed adoption. This includes an assessment of how the best interests of the child are served by the adoption.

Sections 8(1) (a), 90 and 91 are set out at **Tab A**.

### 2. What supervision and support arrangements are in place to ensure the welfare of children post-adoption?

After the child has been placed with the prospective adoptive parents, post placement supervision is carried out by an adoption caseworker or contracted adoption assessor. This supports a report to the Court when the adoption order is sought about how the parents are meeting the needs of the child.

In order for the adopted child to know about his or her identity and cultural heritage, arrangements for ongoing exchange of information can be made between the

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<sup>1</sup> Convention on Protection of children and Co-operation in respect of Intercountry Adoption

parents, adoptive parents, the adoption service and the child (if age appropriate). This agreement becomes part of the Adoption Plan which is filed or registered at the Supreme Court and becomes binding on the parties to the plan (sections 46-51 *Adoption Act 2000*).

After an adoption order is made the adopted child is regarded in law as the child of the adoptive parents and the adoptive parents are regarded in law as the parents of the adopted child" [section 95 (2) (c) *Adoption Act 2000*] While there are no ongoing supervisory responsibilities for the Department or adoption service provider, a range of casework supports may be provided, if the adoptive family requests them.

For example, the adoption plan may include a role for the Department or adoption service provider in facilitating post adoption information exchange or contact between the adoptive parents and the child's birth parents, family members or other significant people.

Support may also be available to an adoptive family by providing financial assistance. A post adoption allowance may be provided to adoptive parents based on an assessment of need. Additionally, authorised carers who adopt a child or young person who has been in their care for a minimum of 2 years will retain an allowance equivalent to the statutory care allowance until the child turns 18 years of age.

The Department's Adoption Information Unit assists people affected by adoption obtain access to adoption information. It also provides referrals to other agencies such as the Post Adoption Resource Centre, which is funded by the Department.

**3. What Commonwealth laws interact with this regime at the present time? For example, could you explain the provisions within the *Family Law Act 1975* (Cth) for judges and federal magistrates to issue parenting orders?**

• ***Family Law Act 1975***

Under the *Family Law Act 1975* "any other person concerned with the care welfare or development of a child" may apply for parenting orders under Part VII of the Act.

**Family Law Act 1975 s65C**

**Who may apply for a parenting order?**

A parenting order in relation to a child may be applied for by: (a) either or both of the child's parents; or (b) the child; or (ba) a grandparent of the child; or (c) any other person concerned with the care, welfare or development of the child.

**Family Law Act 1975 s4**

**"child":** (a) in Part VII, includes an adopted child and a stillborn child; and (b) in Subdivision E of Division 6 of that Part, means a person who is under 18 (including a person who is an adopted child).

The same sex partner of the biological or adoptive parent (the parent) of a child can apply for parenting orders, pursuant to section 65C(c), outlining their day to day involvement with the child and their ongoing concern for the care, welfare and development of the child. The parent would be a party to these proceedings and under Rule 6.02 Family Law Rules 2004 the other biological parent and other

adoptive parent (if there were one) would be considered necessary parties to proceedings so generally these orders cannot be made by consent. There would need to be a hearing before the orders could be made even though the biological or adoptive parent and the same sex partner would be in agreement about the orders.

For many same-sex couples, this solution is only partially satisfactory because the orders are automatically discharged when the child turns 18. If, for example, an 18 year old is involved in a serious accident and requires his or her next of kin to consent to medical treatment, the non-legal parent would not be able to give that consent.

From 1 July 2009 the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws) 2008* will enable same sex parents who separate to apply for child support. This amendment covers children whose parents are in a same sex relationship and separate after 1 July 2009 but does not apply to those children whose parents separated prior to that date.

The Family Law Act also has a role to play in step parent adoptions. Section 60 G of the Act requires that step parents obtain leave to adopt the child of their spouse or de-facto partner. Following the changes made by *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, this includes same sex de-facto partners.

In order for leave to be granted section 60 G (2) requires that the adoption must be considered by the court to be in the best interests of the child.

If the court's consent is not given or applied for, and an adoption order is subsequently obtained, section 61E of the Family Law Act provides that the adoption order will not bring to an end any parental responsibility that existed before the adoption.

Section 111C of the Family Law Act also enacts the provisions of the Convention on Protection of Children and Co-operation in respect of Inter-country Adoption<sup>2</sup>. The terms of the Convention are incorporated through the Family Law (Hague Convention on Inter-country Adoption) Regulations 1998. These regulations govern the relationship between the Commonwealth and the States in relation inter-country adoption.

Neither the Regulations nor the Convention take a position with respect to adoption by same sex couples, however the Commonwealth has the lead role in negotiating particular arrangements with overseas countries. In intercountry adoption, the

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<sup>2</sup> [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69), website of the Hague Permanent Bureau accessed 25 March 2009

placement of children from overseas with an Australian couple is also dependent on the couple being able to meet any criteria that the overseas agency requires, including criteria relating to the couple's relationship. At the present time, none of the intercountry programmes which are active permit adoption by same sex couples.

- **Citizenship Act**

A non citizen child who is adopted by a citizen or permanent resident of Australia will automatically become a citizen.

**Australian Citizenship Act 2007 - Section 13**

**Citizenship by adoption**

A person is an Australian citizen if the person is: (a) adopted under a law in force in a State or Territory; and (b) adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at that time; and (c) present in Australia as a permanent resident at that time.

However a child who is adopted by an Australian citizen under the laws of an overseas country will not automatically become an Australian citizen and may not qualify for a visa to enter Australia.

### **Adoption by same sex couples**

- 4. The Committee is aware that adoption by same sex couples emerged as an issue during the Department of Community Services' 'Review of the Adoption Act' in 2006. Could you please provide an overview of the review process, the specific issues that arose in relation to adoption by same sex couples, and the conclusions reached in relation to this matter?**

The NSW Department of Community Services undertook a review of the *Adoption Act 2000* in 2006/07. The review involved extensive consultation, including the release of an issues paper for public comment in April 2006. A report on the review of the Act was tabled in Parliament in October 2006.

The review of the Act concluded that adoption by same sex couples is a complex and sensitive issue of significant public interest. A large number of submissions to the review addressed the issue of adoption by same sex couples. Views were expressed both for and against the option of enabling adoption by gay and lesbian couples.

Submissions opposed to adoptions by same sex couples argued that it is in the best interests of children placed for adoption to be raised in a family comprised of a mother and father. Submissions in favour of allowing gay and lesbian couples to adopt argued that the assessment of adoption applicants should focus on parenting capacity alone.

Submissions to the review both for and against adoption by same sex couples cited research and literature reviews to support their position. The report to Parliament noted the need to further examine the claims from both sides. The then Minister referred the issue, along with other sensitive and contentious issues in the Review, to the Ministerial Advisory Committee (a group of experts in child welfare law and practice) for further consideration and advice.

The Ministerial Advisory Committee provided its advice to the former Minister in July 2007. It stated that:

The Committee is strongly of the view that parenting capacity should be the only criteria applied to who can adopt and that adoption should be open to same-sex couples. The Committee considered the findings of various research papers on the issue and concluded that there is no concrete evidence to suggest that children raised in same-sex households are in any way disadvantaged compared to children raised in heterosexual households. Rather, available research suggests that whether or not it is in the best interests of a child to be parented by a gay or lesbian couple will depend not on the couple's sexuality, but on other attributes that affect parenting capacity, against which heterosexual couples must also be assessed.

**5. What do you consider to be the issues that would need to be weighed when considering the best interests of children in relation to the issue of adoption by same sex couples?**

Sections 7 and 8 *Adoption Act 2000* set out the objects of the Act and the principles to be applied in making decisions about the adoption of a child. Specifically, section 8(2) identifies the factors that guide decision-makers in determining the best interests of the child (**Tab A**).

The 11 factors identified in section 8(2) are:

- any wishes expressed by the child
- the child's age, gender maturity and background
- the child's physical and emotional needs and cultural identity
- any disability
- any wishes of the birth parents
- the relationship of the child with other significant persons including parents siblings and relatives
- the attitude to parenthood of the proposed adoptive parents
- the relationship of the child to each of the proposed adoptive parents
- the suitability and capacity of each of the proposed adoptive parents
- the need to protect the child from harm and
- the alternatives to making an adoption order

These factors are very similar to the considerations set out in section 66C of the *Family Law Act 1975* [see **Tab A**] and are based on the rights set out in the United Nations Convention on the Rights of the Child to which Australia is a party.

All prospective adoptive parents are assessed against selection criteria that focus on adoptive parenting capacity and are considered to be determinative of the long term success of an adoption. It is the experience of practitioners that it is the adoptive parenting capacity of the person and not the family structure in which they live which is important in making decisions around the adoption of children.

**6. Does the Department have a view on whether adoption by same sex couples would promote the welfare of children, and are there any particular circumstances in which you consider this would be the case?**

The Department's priority in making all adoption decisions is the best interests of the child. The capacity of the adoptive applicants to meet the needs of the child having regard to their overall skills, experience and supports will be key considerations.

**7. What, if any, practical and legal issues have arisen in relation to the current law that in your view would be desirable to address?**

Current law does not enable a non-biological parent to adopt the biological or adopted children of her or his same-sex partner. The following practical and legal issues have become evident in recent years:

- **Inheritance**

The *Probate and Administration Act 1898* provides for the disposition of the property of a person who has died without making a will or whose will is invalid. Section 61B sets out the general scheme of what will happen under intestacy. Under that section the biological children of a same sex partner would not receive automatic entitlement to a share of a deceased partner's estate. Application could be made under the *Family Provision Act 1982* which incorporates the definition of 'child of the relationship' as set out in the *Property Relationship Act 1984* and which would include the children of a lesbian relationship but may not include adult children of a lesbian relationship. Children of a gay couple would not be covered at all because the definition is based on the *Status of Children Act 1996* which does not deal with the status of children with respect to the same sex partner of their biological father.

- **Parental responsibility**

The non biological parent in same sex couples has no parental responsibility for the biological children of their partner except in the limited case of children of lesbian couples who come under the deeming provisions of section 14 *Status of Children Act 1996*. From a practical point of view this poses a range of restrictions on the non biological parent in a same sex couple. These restrictions range from the life threatening to the inconvenient. For example the non biological parent would not be able to consent to medical treatment and on a more mundane level he or she would not be able to give permission for a school excursion.

In NSW the *Testator's Family Maintenance and Guardianship of Infants Act 1916* makes provision for the guardianship of infants in the event of the death of a parent and also provides for a parent to appoint guardians for their infant children. Under section 13 the surviving parent becomes the guardian of the infant child together with any other guardian who may have been appointed by the deceased parent under section 14 of the Act. In the event of the death of the biological parent, the non biological parent in a same sex couple would not automatically become the legal guardian of the child.

- **Continuing the relationship with the child in the event of the breakdown of the relationship with the same sex partner**

Section 65C *Family Law Act 1975* provides that “any other person concerned with the care, welfare or development of the child” may apply for a parenting order. This has enabled same sex partners separating from the biological parent of a child of the relationship to apply for parenting orders under the *Family Law Act 1965*. The provisions of Part VII as a whole are however, aimed at the biological parents of a child. Parent is not defined except to include the parents of adopted children. The term therefore necessarily excludes same sex partners unless they have adopted the child of their partner (which is possible in some Australian jurisdictions). For example the alternative dispute resolution provisions are aimed at parents. Section 63B “Parents are encouraged to reach agreement”; section 63C defines a parenting plan as an agreement made by the parents. Same sex parents are therefore deprived of the benefits of using the less adversarial provisions of the Act.

- **Child support**

From 1 July 2009 the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws) 2008* will enable same sex parents who separate to apply for child support. This amendment covers children whose parents are in a same sex relationship and separate after 1 July 2009 but does not apply to those children whose parents separated prior to that date.

## Adoption by gay and lesbian individuals

8. The Committee understands that at present in NSW a gay or lesbian individual may apply to adopt a child, but that if successful, their partner would not be recognised as the adopted child's parent.

- Does the Department have a view on the desirability of this provision in the context of this inquiry?

In its report, *Review of the Adoption of Children Act 1965 (NSW) – Report 81, 1997* the Law Reform Commission of NSW considered that the law should be flexible so as to maximise the range of choice of families for children who are in need of the long term security and stability afforded by adoption.

The Commission considered that:

any assessment should focus on the suitability of the applicants to promote the best interests of the child. It should ensure that unfair or unjustified assumptions are not made about the relevance of the applicants' sexual orientation or marital status to the applicants' suitability as adoptive parents. Rather, the assessment should focus on the ability of the applicants to meet the parenting needs of the particular child, or if unknown, the parenting needs of the types of children for which adoption is being considered.

In terms of marital status, it considered that:

marriage was neither a necessary or sufficient indicator that a couple have a stable relationship or that they have good parenting skills, or that only the traditional nuclear family is capable of serving the needs of children.

The Commission noted that the Australian community today has many different family forms. It recommended that the legislation should permit an adoption order to be made in favour of either a couple or a single person. This recommendation is reflected s26 *Adoption Act 2000*. Section 27(3) provides that the Court must not make an adoption order in favour of one person who is living with a spouse (including de-facto spouse) unless the person's spouse consents in writing to the application for the adoption order.

In assessing single applicants, the Department considers a number of factors including the applicant's family relationships and support networks and the income and financial resources of the applicant to ensure the applicant can adequately provide for a child's physical, educational, health and social needs until the child reaches adulthood.

The Department has found that single people, who meet the eligibility and assessment criteria, including those in a relationship, can make very successful adoptive parents.



- **The Committee understands that other Australian jurisdictions do not permit individuals in a couple-relationship to adopt. What is your view of this alternative?**

As outlined above, NSW legislation permits one person living with a spouse (including a de-facto spouse of at least 3 years standing) to adopt, provided the spouse consents [s27 (3)]. Circumstances have included, for example, where a couple having the care of a child are separated but not divorced; the person with the care of the child is considered suitable to proceed to adopt the child as a sole applicant and the spouse consents in writing to the application for the adoption order.

Victoria, Queensland and South Australia permit individuals in a couple-relationship to adopt under exceptional or special circumstances and in the case of step-parent adoptions. South Australia is similar to NSW requiring the written consent of the spouse. Victoria allows adoption by a single person when the de facto relationship is less than 2 years or if the couple is separated.

## **Foster care**

- 9. The Committee understands that same sex couples are currently able to, and some do, provide foster care.**

- **What observations can be made about the contributions of same sex couples as foster carers?**

All foster carers provide a critical and invaluable resource in caring for children who are unable to live safely with their parents.

Under the *Children and Young Persons (Care and Protection) Act 1998* same sex couples can be approved as authorised carers, as the Act is not gender specific. Additionally, any carer who has had care of a child for two years or more and has the permission of the birth parents can apply for sole parental responsibility in the Children's Court.

- **How many children are fostered by same sex couples at the present time?**

The Department does not have data on the number of children placed with same-sex foster parents.

- **Do you see any contradiction in the ability of same sex couples to foster children and their inability to adopt?**

While there has always been a large number of people (couples and individuals) wanting to adopt infants or very young children, there has not been a corresponding supply of people willing and suitable to foster and provide care for older children. As a result, people in same-sex relationships have been included in foster care programs and have demonstrated themselves as being very capable of providing sound parental care for children in need.

Additional sensitivities around adoption by same-sex couples may arise from the fact that adoption transfers legal rights and responsibilities from the birth parents to the adoptive parents. Foster care does not permanently sever the legal rights of the birth parents.

Currently, children in out-of-home care with heterosexual foster parents can benefit from the stability that comes from being adopted by their carers, where this is determined to be in the child's best interests. Extending adoptions to same-sex couples presents potential advantages for children placed with same sex foster parents. With amendments to the laws these children may find permanent, stable and loving homes with same sex adoptive parents.

- **At what point does the Department consider it desirable and/or practical for a child in foster care to be adopted?**

Children in out-of-home care have their case plans reviewed on an annual basis. Following an assessment that restoration is not a realistic possibility, an alternative permanent stable placement is identified. Permanency options include relative/kinship care, long term foster care, sole parental responsibility orders or adoption. Adoption can be considered for very young children, or for children who are older, and are well settled with a positive and functional foster family.

The appropriateness of adoption as a case plan for a child or young person in out-of-home care may be assessed at the time a care plan is submitted to the Children's Court. It may also be considered as part of the review of the placement pursuant to section 150 *Children and Young Persons (Care and Protection) Act 1998*.

Adoption may be appropriate:

- when the parents request adoption or agree with a plan that includes adoption and have received counselling pursuant to section 63 *Adoption Act 2000*
- when the child or young person is of an age to express a wish to be adopted and adoption is seen to be in the child or young person's best interests
- when restoration to the parents or placement with the extended family has been explored and excluded as a realistic option,
- where serious concerns for the welfare of the child or young person, (for example due to past experiences of deprivation, abuse, trauma or multiple placements) outweigh all other considerations including the wishes of the parent
- when the child or young person has a high level of special needs, the parents do not wish to care for the child or young person, and the child or young person would benefit from the commitment of adoptive parents into adulthood

- o where the carers are demonstrating a capacity to parent the child or young person independently of DoCS, and are requesting that adoption be considered for the child or young person.

## **The wellbeing of children**

### **10. What is your understanding of the most important factors in a family environment that promote the wellbeing of children, both in the short and longer term?**

International adoption literature<sup>3</sup> indicates there are a number of factors associated with outcomes for adopted children. Older age for adoptive parents and stability of the parents' partnership confer strength to the family. The marital status of the family appears increasingly irrelevant to the capacity of the family to provide nurturing care.

There is no clear association between education and placement stability or satisfaction, however higher levels of education may have detrimental effects if they create unrealistic expectations for children. It has been found that cross-racial placements in the USA (particularly with Caucasian parents) may lead to greater reported behavioural problems.

Flexible relaxed parenting styles and the ability of the parents to distance themselves emotionally from the child's behaviour are associated with positive outcomes for children. The family's ability to advocate on the child's behalf, their use of professional services and involvement in support networks are also positive for the child.

Better outcomes for children are also associated with adoptive families who demonstrate commitment to the child, including beyond the age of 18 years, and where the child responds with a sense of security and belonging in the family. Better outcomes are also associated with adoptive parents who are able to communicate empathically with the child about the adoption, have compassion and respect for the child's biological parents, support the child's identity with both their biological and adoptive families and ensure the child is connected to their community.

### **11. Please explain the process for how children for adoption and fostering are allocated between DoCS and the non-government agencies providing foster care and adoption services.**

Referral processes are in place when parents or children request or need adoption or foster care services.

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<sup>3</sup> Dr Jenni Rice, "Building Futures- Adoption to Permanent Care: What does the research tell us?", Forum on "Emerging Australian Practice- Growing Permanent Care from Adoption", Department of Community Services, NSW, 27 June 2008

## **Adoption**

When a parent wishes to consider placing their child for adoption, they can choose which service they wish to contact to receive further information to pursue the adoption. The parent may be referred by a community or hospital social worker to the Department's Adoption and Permanent Care Services or to a non-government adoption service provider, such as Anglicare, Barnardos or Centacare.

As discussed under Question 9, adoption may also be an appropriate permanent option for a child or young person in out-of-home care.

## **Foster care**

A child's entry to out of home care can be through:

- a request from a parent to a non-government out-of-home care service, the Department or DADHC, for a voluntary care placement for their child/ren.
- making a temporary care arrangement (usually between the Department and a parent); or
- a decision by a Manager at a Community Services Centre of the Department that a child is at serious risk of harm, followed by a determination of the Children's Court that a child or young person is in need of care and protection, and then the application for (and making by the Court) of a care order.

If a child or young person enters out of home care, he/she may be placed with an authorised carer from a non-government out of home care service or from DoCS. Both DoCS and non-government services have authorised carers who provide emergency, respite and long term foster care as needed.

Whether the child or young person is placed with a carer from the Department or an agency, foster carer depends on the availability of carers and the needs of the child at any one time.

**12. The Committee understands that following the DoCS Review of the *Adoption Act 2000*, the Ministerial Reference Group gave advice to the Minister in respect of whether same sex couples should be allowed to adopt. Are you able to inform the Committee of the Reference Group's advice and recommendations?**

See response to question 4 above.

**13. The Committee is aware of the recent case in which the Administrative Decisions Tribunal ruled that Wesley Mission had discriminated against a gay couple seeking to provide foster care, and understands that this decision may have been based on the legal status of Wesley Mission as an organisation. Could you please verify and explain whether section 56 of the *Anti-Discrimination Act 1977* would provide sufficient grounds for exemption for religious-based accredited adoption agencies such as Anglicare and CatholicCare, were the *Adoption Act 2000* amended to allow adoption by same sex couples.**

Exemptions to the *Anti-Discrimination Act 1977*, (the Act), can be made pursuant to sections 126 and 126A (Tab C).

Section 126 permits the President to grant, renew, vary or revoke an exemption from the Act in respect of a person, class of persons, an activity, class of activity or any other specified matter or circumstance. An application must be made in writing to the President and the President must make a determination within 60 days of the application being lodged. An exemption may be granted for a maximum of 10 years.

Clause 5 Anti-Discrimination Regulation 2004 states that the President is to consider the following matters in deciding whether or not to grant an exemption pursuant to s126:

- (a) whether the proposed exemption is appropriate or reasonable,
- (b) whether the proposed exemption is necessary,
- (c) whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought,
- (d) whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption,
- (e) the public, business, social or other community impact of the granting of the proposed exemption,
- (f) any conditions or limitations to be contained in the proposed exemption

Section 126A(2) permits the Minister to certify a program or activity to be a special needs program or activity if satisfied that its purpose is promotion of access for members of a group of persons affected by unlawful discrimination to meet special needs or promote equal or improved access.

Exemptions may be granted in relation to the grounds of:

- o Sex
- o Race
- o Marital status
- o Disability
- o Age
- o Homosexuality
- o Age
- o Transgender
- o Carer's responsibilities (employment only)

Exemptions may be granted in relation to the areas of:

- o Employment
- o Education
- o Provision of Goods and Services
- o Rental Accommodation
- o Membership of a Registered Club

Exemptions are only likely to be granted where the principles of anti-discrimination and promoting equal opportunity are being upheld. They are usually granted where the purpose is for helping redress past discrimination through positive discrimination.

Section 56 of the Act sets out an exemption for religious bodies. The matter of *OV and anor v QZ and anor (No.2)* [2008] NSWADT 115 is currently pending appeal. It is listed for 20 April 2009.

In that matter the ADT found that the decision by Wesley Dalmar to refuse applications by a couple to be foster carers based on the fact that they were homosexual was unlawful discrimination. The ADT found that

- o Wesley Mission is a body established to propagate the Christian faith (at paragraph 79)
- o the act of authorising a person to be an 'authorised carer' did not constitute an appointment within the meaning of s56(c) (at paragraph 85)
- o the respondents failed to establish that the nominated doctrine, "monogamous heterosexual partnership in marriage" is a doctrine of either the religion of Christianity or the religion of the Uniting Church (at paragraph 131)
- o it could not be said that the prohibition against homosexual foster carers is necessary to avoid injury to the religious susceptibilities of the adherents of the religion of the Uniting Church (at paragraph 143)
- o the complaint of discrimination on the ground of homosexuality was substantiated.

In the case of inter-country adoption there is support in the case law that the Commonwealth Antidiscrimination Act does not apply outside Australia [*Brannigan v Commonwealth of Australia* [2000] FCA 1591 (10 November 2000)] and a fortiori State anti discrimination legislation would also not apply extraterritorially.

The operative issue would appear to be the level of connection with the jurisdiction in which the Acts of discrimination occurred [*Clarke v Oceania Judo Union* [2007] FMCA 292 (13 March 2007)]. In the case of inter-country adoption there would be a high level of connectedness with the overseas jurisdiction as the decision would be made in relation to a national of that country by a organisation located in that country either by a government organisation or an organisation supported by the government. It is most likely therefore that there would be insufficient connectedness with NSW for the anti discrimination legislation to apply to decisions about inter-country adoption.

## FURTHER QUESTIONS

1. Rod Best, Director, Department of Legal Services, Department of Community Services:

On page 7 of the transcript you say:

“Because there are broad general criteria in the Adoption Act there would be no difficulty in a faith-based organisation being able to apply the adoption criteria and not work with same-sex couples. So they can fall within the exemption of the Anti-Discrimination Act.”

**In light of the Wesley Mission Case involving foster carers, how can you assert that church/ faith based organisations and their agencies have certainty with respect to exemption protection under the *Anti-Discrimination Act*? Does not the Wesley Mission Case create at least some doubt about the robustness of the exemption provision in the *Anti-Discrimination Act*?**

The case referred to is *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*. The case remains under appeal and the appeal is listed for hearing on 20 April 2009.

The case concerned an application by a homosexual couple to become foster carers with Wesley Dalmar Child and Family Care operated by Wesley Mission. The couple's application was refused on the basis of their sexual orientation. The tribunal found that

There can be no argument in our view that the offending conduct constitutes unlawful discrimination on the ground of homosexuality.

[*OV and anor v QZ and anor (No.2) [2008] NSWADT 115* at paragraph 27]

The tribunal then proceeded to examine whether section 56 *Anti-Discrimination Act 1977*, the religious exemption, applied to render the discrimination lawful under the Act.

The argument turned on whether conduct was either:

- (i) an act or practice that conformed with the doctrine of the relevant body's religion or,
- (ii) necessary to avoid injury to the religious susceptibilities of the adherents of the religion the body was established to propagate

[*Anti-Discrimination Act 1977*, section 56]

The respondents failed to establish that the Uniting Church has an agreed doctrine in relation to homosexuality. In answering the question, Is the purported doctrine a doctrine of the religion of the Uniting Church? The tribunal found:

It is common ground that the Uniting Church Assembly, the national governing council of the Uniting Church, has not made a formal pronouncement deciding the question of what stance to take doctrinally in relation to homosexuality and homosexuals within the Church. The question has been raised most acutely in relation to the ordination of clergy. In 2003, the Assembly passed a resolution, which affirmed that it was for local presbyteries to consider applicants for ordination and to take into account various criteria, include sexual orientation. It seems that some presbyteries take the view that Christian scriptures and theology prohibit the appointment of homosexuals to the clergy whereas other presbyteries think that there is no scriptural prohibition on homosexual clergy.

It is also agreed that only the Assembly can pronounce doctrine on behalf of the Uniting Church as a whole and that a constituent body of the Church, such as the Wesley Mission, does not have authority to declare doctrine on behalf of the Uniting Church.

[*OV and anor v QZ and anor (No.2) [2008] NSWADT 115* at paragraphs 129 and 130]

For this reason the Tribunal found that

...we are not persuaded that the nominated doctrine is a doctrine of the 'religion of the Uniting Church.

[*OV and anor v QZ and anor (No.2) [2008] NSWADT 115* at paragraph 132]

The case demonstrates that the exemptions set out in section 56 *Anti-Discrimination Act 1977* will not apply to matters about which a particular faith does not have an established doctrine and conversely where such a doctrine can be established the protection will apply.

## **2. Rod Best, Director, Department of Legal Services, Department of Community Services:**

**On page 12 of the transcript you indicated that new regulations for the *Adoption Act* were being drafted. Please provide details of the instructions given to Parliamentary Counsel with respect to the drafting of the regulation? Please provide specific details of the timeline for the drafting of the regulations.**

The *Adoption Regulation 2003* will be amended twice during 2009. The first amendments flow from the provisions in the *Adoption Amendment Act 2008* that commenced on 1 January 2009. The Regulations will then be amended for a second time to reflect the provisions of the *Adoption Amendment Act 2008* commencing on 1 January 2010. The first amendments to the *Adoption Regulation 2003* will be proclaimed in early 2009.

On 8 July 2008 Cabinet made a number of decisions in relation to Adoption. One of these decisions concerned the eligibility and assessment criteria to be applied to prospective adoptive parents.



The decision provided that the eligibility and assessment criteria for adoptive parents should be less prescriptive and focus on factors that affect parenting capacity and that the criteria should be included in the Adoption Regulation 2003 rather than the Government Gazette.

In accordance with that decision instructions were given to the Office of Parliamentary Counsel to draft regulations.

The model adopted was that used in Victoria with small modifications to accommodate the provisions of the *NSW Adoption Act 2000*. The Victorian Regulation, the proposed amendment to the NSW Adoption Regulation 2003 the initial instructions to the drafters are at **Tab D**.

The amendments to the Regulations have been circulated to Barnardos, Centacare and Anglicare for comment. None of these organisations has raised any concerns in relation to the proposed changes in the eligibility criteria.

## Standing Committee on Law and Justice Inquiry into Adoption by Same Sex Couples

*Questions arising from the evidence given by Roderick Charles Best, Director, Department of Community Services and Mary Frances Griffin, Director, Adoption and Permanent Care Services, Department of Community Services on 24 February 2009*

- 4 CHAIR: Would you take on notice to send us details of the religious exemption process in relation to the antidiscrimination law for New South Wales?  
[Transcript p8]

Answer:

Please see the answer to question 13.

- 2 The Hon. JOHN AJAKA: Are you able to tell me how many of those 125 adoptions were by a couple and how many were by a single person?  
Ms GRIFFIN: No, I could not. I could give you that information, but I could not give it to you off the top of my head.

Answer:

In 2007/08, of the 125 children whose adoption orders were arranged by the Department, 121 children were adopted by a couple and 4 were adopted by a single person. Following are the details of adoption orders made in each program:

- 15 children had orders made for their adoption in the local adoption program. All were adopted by a couple and none by a single person.
- 22 children were adopted by their foster carers. 21 of these children were adopted by a couple and 1 child was adopted by a single person.
- 10 children were adopted by their step parents and 3 by relatives. All were adopted by a couple and none by a single person.
- 73 children were adopted via the intercountry adoption program. 70 children were adopted by a couple and 3 children were adopted by a single person.
- 2 children were special case adoptions. Both children were adopted by a couple and none by a single person.

- 3 The Hon. JOHN AJAKA: ...Are you able to tell me how many people are currently on an adoption waiting list, if there is such a thing? Again, could you split that into couples and single people?

Answer:

Each year the Department has a significant number of people expressing interest in adopting a child through the local and intercountry adoption programs. Currently:

- There are 239 expressions of interest lodged with the local adoption program. Of these, 229 expressions of interest are from couples and 10 expressions of interest are from single persons.
- There are 378 expressions of interest lodged with the intercountry adoption program. Of these, 347 expressions of interest are from couples and 31 expressions of interest are from single persons.

Following the lodgement of an application to adopt and an assessment, the applicant(s) may be approved and will then wait to be placed with a child for the purposes of adoption. Currently:

- There are 31 couples approved to adopt within the local adoption program who are available to be matched with a child placed for adoption. There are no single applicants waiting to be placed with a child in the local adoption program.
- There are 402 applications that have been approved to adopt and have had their files sent overseas waiting to be matched with a child placed for adoption with an overseas program. Of these, 349 are from couples and 53 are from single applicants.

- 4 CHAIR: ... If you have some specific information on the judgements from the United States based on permanency planning legislation, we would be grateful for that to be taken on notice.

[Transcript p18]

Answer:

Please see **Tab E**

- 5 ....we would be grateful for the assessment tools you utilise in the processes of determining the suitability of individuals to adopt and foster. Many of our questions were based around that specific issue. Hopefully you have some neat criteria that would assist us.

[Transcript p18]

Answer:

Assessment tools used by the Department in determining the suitability of individuals to adopt and foster a child are attached. **For the reasons outlined below, these documents are provided to the Committee in confidence. It is requested that these documents not be publicly released.** The tools are :

1. *Adoption Assessment Reports* – this tool is used by contracted adoption assessors in the assessment of a prospective adoptive applicant for both the local and intercountry adoption programs.
2. *Assessment of Child, Family and Carers for Adoption or Sole Parental Responsibility Orders* –this tool is used to assess the suitability of an authorised carer to adopt or have the sole parental responsibility of a child currently in their care. This assessment tool differs from the tool used in the local and intercountry adoption programs.
3. *DoCS Carer Assessment – Manual for Assessors*

*Adoption Assessment Reports* and *Assessment of Child, Family and Carers for Adoption or Sole Parental Responsibility Orders* (“adoption assessment tools”) are not available publicly as they are guidelines for an assessor to structure his/her interaction with applicants to assess their suitability to adopt. The tools are used to assist the assessor form a decision against the selection and assessment criteria around the suitability of the applicant to adopt. There is a risk that if the tools were available to prospective applicants this could create unnecessary anxiety and an expectation that the assessor would cover every area and question in the guidelines, which is not the case. Providing applicants with the assessment tool could also lead to applicants being less frank and open in their responses to the assessor’s questioning. This could undermine the reliability of the assessment and selection process and would not be in the best interests of those children to be placed for adoption.

General information to assist prospective adoptive parents about the assessment process used in both the local and intercountry adoption programs is provided in training and information about the selection and assessment criteria is available on the Department’s website.

The adoption assessment tools are currently under review to align them with the new criteria for assessment of applicants that will be included in the Adoption Regulation 2003. The new criteria are less prescriptive than the existing gazetted criteria, with a greater focus on factors that influence parenting capacity. The tools are also being updated in light of current research about the factors that produce good outcomes for children.

Assessment of foster carers involves determining the capacity of the applicant to manage the day to day care responsibility for the child or young person. There is an expectation that the Department will continue its involvement through both case management and decision making in certain aspects. For similar reasons as to those outlined above, it is requested that the carer assessment tool, *DoCS Carer Assessment – Manual for Assessors*, not be made available to the public.

The Department has recognised that the assessment of carers and prospective adoptive parents could be better aligned to achieve greater efficiency and seamlessness for carers interested in adopting a child and

prospective adoptive parents interested in fostering. The Department is currently working on developing a joint process for the training and assessment of foster carers and adoptive parents to enable dual authorisation of a particular applicant for both functions. It is noted that dual authorisation would not be possible for same-sex couples because they are ineligible to adopt.