

## INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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# **Supplementary Submission**

on

## **Adoption by Same Sex Couples**

to the

### **Standing Committee on Law and Justice**

**Legislative Council**

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## 1. Introduction

This submission supplements the earlier submission from FamilyVoice Australia, dated 20 January 2009, to the Standing Committee on Law and Justice's inquiry into whether NSW adoption laws should be amended to allow same-sex couples to adopt.

The principal FamilyVoice submission recommends that *“no change be made to the law of adoption that would allow adoption by same-sex couples”* and *“that the provisions of the Adoption Act 2000 dealing with adoption by one person be amended to preclude adoption by one person if that person is married or in a de facto relationship, including a same-sex relationship.”*

After presenting the relevant evidence the submission concludes that *“Any decision to allow same-sex couples to adopt would be inconsistent with the best interest of the child continuing to be the paramount consideration.”*

Since making that submission the Minister for Community Services has clarified that the terms of reference of the inquiry include the impact of law reform on non-government organizations, particularly accredited adoption service providers. This supplementary submission is limited to addressing this aspect of adoption law reform

## 2. Adoption service providers

Chapter 3 of the Adoption Act 2000 provides for charitable or non-profit organisations to apply to the Director-General for accreditation as an adoption service provider that may provide adoption services specified by the Director-General.

Three charitable organisations are currently accredited to provide *“domestic adoption services for children, including those with special needs: the assessment of the suitability of a person or persons to adopt a child; any decision to place a child with a person or persons to adopt the child; and the transfer of the care of the child to the person or persons wishing to adopt the child.”* These organizations include organizations associated with particular Christian churches.

If the law on adoption were to be amended to permit same-sex couples to apply to adopt, it is likely that one or more of the charitable organisations currently accredited, and perhaps other organisations that may apply for accreditation in the future, may hold religious or other conscientiously-based views that adoption of a child by a same-sex couple was not in the best interest of the child.

It would be a tragedy if the expertise and service to the community – most importantly to children who may benefit from adoption – of such organisations was not able to be exercised because the changes to the law required adoption service providers to offer services to same-sex couples.

### 2.1 Overseas experience

Sadly in several overseas jurisdictions that have changed the law to permit same-sex couples to adopt religious-based adoption service providers have been forced to withdraw their involvement in adoption service provision.

### **2.1.1 United Kingdom**

In Britain a 20 month period to allow Catholic adoption agencies to comply with the Equality Act (Sexual Orientation) Regulations 2007 expired on 31 December 2008. The regulations included "adoption" as a service in which discrimination on the grounds of sexual orientation is unlawful. Some agencies have ceased to do adoption work. Others have cut their formal ties to the Catholic Church. Others are attempting to amend their constitutions to allow them to offer services only to married couples.

A 2007 report estimated that more than a quarter of the 300 placements made by Catholic agencies were with adopters from ethnic minority backgrounds. The report highlighted the low placement disruption rate (7%) of Catholic agencies compared with the rate among agencies generally (20%). This success was despite the fact that the Church agencies focused on finding homes for "hard-to-place" children. The Church also heavily subsidised the work, and the report cast doubt over whether there was capacity elsewhere if the agencies to close.

Charles Wookey, assistant general secretary of the Bishops Conference, has pointed out the wider implications in what has happened in Britain. "Religious-based charities do a great deal of good and often provide a valuable and distinctive contribution," he says. "Their religious faith inspires and motivates their work. It makes them go the extra mile and the outstanding track record of Catholic adoption agencies in finding loving adoptive homes for many so-called 'hard-to-place' children is a case in point. The reason those placements are so often successful is because of the agencies' commitment to family life as part of its religious ethos. If government seeks to deny charities the right to express their religious faith through their social action then the added value these agencies bring could be in jeopardy."<sup>1</sup>

### **2.1.2 Massachusetts**

In Massachusetts, Boston Catholic Charities had a reputation for skill in placing children with special needs. It was forced to cease offering adoption services in 2006 when laws were passed forbidding discrimination on the grounds of sexual orientation in the provision of services. The Governor Mitt Romney proposed legislation to give an exemption to religious organisations offering adoption services but the legislature declined to support such a bill.

Legal commentator Matthew Clark observes:

"The debate over a religious exemption wrongly focuses on whether homosexuals should be able to adopt from all agencies in the state, regardless of a particular agency's beliefs or founding principles. Safely couched in the language of antidiscrimination and equality, opponents of an exemption mask the unsettling truth that pursuing equality at any cost betrays the very purpose of adoption to serve and protect the welfare of children. Denying a religious exemption to agencies providing services for needy children only serves to further the rights of a small group of potential adoptive parents rather than the best interests of children needing adoption.

"Without an exemption for religious agencies, Massachusetts risks damaging the very purpose of the antidiscrimination provisions in adoption laws: protecting a child's best interests. While safeguarding its commitment to unequivocal equality, Massachusetts forces religious groups to choose between accepting the state's morality and acting in accordance with their own religious principles. It is unlikely that adoption laws will influence churches and their parishioners to reevaluate long-held tenets of their faith. More likely, the laws will drive organizations like Catholic Charities out of service and only polarize parties on both sides of the gay-rights issue. Unfortunately, while there are several agencies other than Catholic Charities willing to provide adoptions to homosexuals, there is one less agency to share the burden of finding families for the thousands of needy children in Massachusetts. Ultimately, in the name of equality, Massachusetts has set aside the interests of needy children and contravened the very purpose of its adoption laws."<sup>2</sup>

### 3. The case for an exemption

Both the best interest of children and the fundamental right to freedom of religion point to the need for an explicit provision ensuring that religious-based charitable or non-profit organisations cannot be refused accreditation as adoption service providers solely because they decline to offer adoption services to same-sex couples.

This would require an amendment to the Adoption Act 2000:

*Insert new section 14 (2A):*

*(2A) The Director-General must not take into account in determining an application a policy of the organisation to decline to provide services to same-sex couples.*

### 4. The Wesley Mission case

The decision by the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) against Wesley Mission in a case dealing with the application of two homosexual men to act as foster parents raises grave concerns about the interpretation of the religious exception in the NSW Anti-Discrimination Act 1977.<sup>3</sup>

The Tribunal's findings that (a) the "religion" of the Wesley Mission was "Christianity" and (b) that "Christianity" has no doctrine that "'monogamous heterosexual partnership within marriage' is both the 'norm and ideal'" are extraordinary.<sup>4</sup>

Effectively the Tribunal is setting itself up as an authority on religious beliefs. There was no doubt that those persons engaged in the work of the Wesley Mission had a shared religious belief that precluded accepting a homosexual couple as foster carers. The Tribunal ruthlessly tramples on the religious freedom of these believers by purporting to know better than the persons themselves (a) what their religion is and (b) what its doctrines are.

Unless the Tribunal's decision is overturned by a higher court the decision means that Wesley Mission has been denied freedom of religion.

This case has implications for religious-based adoption service providers if the law on adoption is changed to permit same-sex couples to apply to adopt.

The Anti-Discrimination Act 1997 should be amended by adding to Section 4 the following definition:

*"services" does not include the provision of services in relation to adoption or foster care.*

### 5. Conclusion

As argued in our principal submission it is not in the best interest of children to change the law to allow same-sex couples to apply to adopt children.

If, despite the best interests of children, the law is changed then the resulting harms should be limited by amending the Adoption Act 2000 and the Anti-Discrimination Act 1997 to ensure that religious-based charitable and non-profit organisations are able to continue to provide adoption services.

## 6. Endnotes

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1. Philpott, T., "Catholic adoption agencies adjust to gay rights regulations"; <http://www.communitycare.co.uk/Articles/2009/01/21/110466/how-catholic-adoption-agencies-are-coping-with-gay-rights-regulations.html>
2. Clark, M., "The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services", *University of Suffolk Law Review*, Vol. 41 (2008), p 871-897; [http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/Clark\\_Note\\_Final.pdf](http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/Clark_Note_Final.pdf)
3. *Anti-Discrimination Act 1977 (NSW)*, s 56.
4. *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*, at 119, 126-128.