Submission
No 226

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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Date received: 25/02/2009

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A joint centre of St Vincents & Mater Health and Australian Catholic University

Submission to Inquiry into adoption by same sex couples

This submission addresses terms of inquiry a. and e.

A Would adoption by same sex couples further the objects of the Adoption Act?

Object a: Best interests of child concerned, both in childhood and later life, is paramount consideration: Laws which facilitate adoption by same sex couples would not further the prime object of the Adoption Act, viz. *to treat as paramount in adoption law and practice the best interests of child concerned, both in childhood and later life.*

Children have rights. The most fundamental of these is the right to be born of natural biological origins, that is, to be born into, and raised within, a family made up of their natural biological parents (a mother and a father) and themselves. Laws which facilitate adoption by same sex couples undermine this fundamental right of, and thus best interests of, a child which, according to the Adoption Act, is to be treated as paramount.

Of course, in exceptional circumstances children are separated from their biological parents and adopted by other couples. It is the practice of adoption agencies to go to great lengths to place the to-be-adopted child in a family that comes close to the ideal circumstances: a mother and a father. Sometimes approximation of the ideal is not possible and exceptional arrangements are justified. But that exception should not be made the basis for a claim that, since non-ideal arrangements (ie ones that do not meet the child's right to be born of a (natural biological) father and a (natural biological mother) can be ethically and socially legitimate in a particular case, it is ethically and socially legitimate more generally.

The question is <u>not</u> whether same sex couples are able to raise children as well as others, whether they are able to love and care for them.

The question is not whether the law should restrict adoption according to the 'sexual orientation' of a couple.

The question is whether the law should move in a direction of undermining the child's right to be born of, and raised by, his or her (natural biological) mother and father.

It is important to note that the above consideration, that laws which facilitate adoption by same sex couples would undermine the best interests of the child, is not put forward as an empirical claim about how things are (with respect to parenting arrangements for children). It is an 'in principle' claim about how things ought to be (with respect to the parenting arrangements for children).

As for empirical evidence as to whether being brought up by a same sex couple is equivalent to being brought up by a mother and a father, specifically the child's natural biological parents: I understand that there is, as yet, no such evidence. I am not a social scientist or sociologist, so I do not know this area of research at first hand. But I understand that there are currently two limitations to the research in this area: (1) empirical data does not show that there is an equivalency for children between being raised by a mother and a father and being raised by a same sex couple and (2) the empirical data is infected by 'advocacy science': that is to say, studies are undertaken with a view to supporting a particular ideological position. In these circumstances, I submit, responsible legislators should institute a comprehensive study of what data there is before changing a law the prime object of which is the best interests of the child to be adopted.

Object b: to make it clear that adoption is to be regarded as a service for the child concerned. I understand that there is no evidence that adoption by same sex couples is a needed service for children. It is common knowledge that the number of families in Australia willing to adopt far outstrips the number of children available for adoption: (this is, no doubt, a part of the explanation for the increase in inter-country adoptions). If this is the case, then the question must be raised: why is the Parliament considering changing the law to allow adoption by same sex couples? It is hard to avoid the conclusion that what animates this proposed change is the desire of same-sex couples to be able to adopt children. If that is so, then the NSW Parliament will be responsible for changing the point of our adoption law from one which treats the welfare of the to-be-adopted child as paramount to one which treats the wishes of same sex couples as paramount.

Object c: to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage. If adoption by same sex couples is to be facilitated, the law should prohibit anyone from doing anything (in particular to the child's birth certificate) which hides or confuses the (natural biological) identity of the child who is adopted.

E If adoption by same sex couples will promote the welfare of children, then examine what legislative changes are required.

I submit that legalizing adoption by same sex couples will not promote the welfare of children. I realize, however, that others will have a different view as to the desirability of amending the Adoption Act for this purpose. Their view is likely to be founded on one or both of the following moral views.

(1) Some may believe that there is an equivalency for children in being brought up either by a mother and a father or by a same sex couple.

(2) Some may believe that adoption laws should respond to the desires of adults, in this case, the desires of same sex couples, as well as (or even rather than) serve the interests of children.

In circumstances of such moral disagreement, the Parliament should not legislate to compel conformity with a particular moral view of the social point of adoption. Rather it should strengthen tolerance of a diversity of views on this controversial matter by building into any legislative change which permits adoption by same sex couples the right of agencies not to facilitate adoption by same sex couples. I am not an expert on the necessary law reform, but I understand that tolerance of diversity would require a reform of the Anti-Discrimination Act.

There are various reasons, some good and some bad, why adoption agencies may choose not to facilitate adoption by same sex couples. Two good reasons are as follows:

(a) They may be committed to the view, as a matter of secular, humanistic, reason-based ethics, that children have a right to be brought up by a mother and a father, ideally their own natural biological mother and father and that, for the sake of their wellbeing, adoption should come as close to that standard as possible.

(b) They may be part of a religious tradition whose teachings include the view that being brought up in the context of a committed loving relationship between a man and a

woman best promotes the welfare and development of children and thus that arrangements for adoption should come as close to that standard as possible.

I therefore submit that if legislation is passed which legalizes adoption by same sex couples, Parliament should enact robust provisions which secure respect for conscientious objection, without disadvantage, for individuals and institutions who do not find themselves able to facilitate adoption by same sex couples.

There are two reasons why the entitlement to conscientious refusal should be preserved and enhanced.

(1) In the context of cultural and social diversity which characterizes modern developed societies, it is simply not possible for professionals (in this case, social workers and providers of adoption services) to avoid working in areas in which problems of conscience may arise for them: such problems can arise in any area of professional work.[1]

(2) As the great philosopher of modern liberal theory, John Stuart Mill, pointed out in *On Liberty*, it is socially useful for a liberal society to preserve and promote a tolerance of a diversity of views on controversial matters. He explained what is wrong with censorship, from the point of view of liberalism, in the following way: a censored opinion might be true; even if it is literally false, a censored opinion might contain part of the truth; even if it is wholly false, a censored opinion would prevent true opinions from becoming dogma; and as a dogma, an unchallenged opinion will lose its meaning. To compel

[1] A recent example, from the profession of medicine, illustrates this point. A Sydney psychiatrist has been reported as arguing that that doctors have a duty either to amputate a perfectly healthy limb of a patient who is suffering from 'Body Integrity Identity Disorder' (BIID) – a patient who mistakenly thinks that the limb is diseased - or to refer that patient to a more willing doctor: *'Despite all argument above, many doctors will still find themselves unable to agree that the amputation of a healthy limb is ethically sound, even if all the caveats outlined are met. As is the case in termination of pregnancy, dissenting doctors should be under no obligation to proceed with an amputation in these circumstances, but are under an obligation to refer the patient to another doctor whom they believe might proceed with the amputation if all the caveats are met...'. Ryan, C. Neuroethics, Nov 4; Uni of Sydney, Nov 6, as cited in Bioedge, 14.11.08* This new example of illiberalism - the idea that a professional may legitimately be compelled to become an accomplice in something to which he or she has a conscientious objection, either by providing that service herself or by referring the patient to someone she knows will be ready to do the procedure in question - makes it clear once again how important it is that the Parliament supports the entitlement to conscientious refusal, without disadvantage, on the part of individuals and institutions.

individuals and institutions either to act against their own sense of right and wrong, in this case, to facilitate adoption by same sex couples, or to cease to provide adoption services, would be a form of practical censorship which the Parliament of a truly liberal society has powerful reason to avoid.

In this context I bring to your attention the following compromise recommended, jointly, in a recent issue of the *New York Times*, by a well known supporter and an well known opposer of same-sex marriage. They jointly say of their proposed compromise:

> "... It would work like this: Congress would bestow the status of federal civil unions on same-sex marriages and civil unions granted at the state level, thereby conferring upon them most or all of the federal benefits and rights of marriage. But there would be a condition: Washington would recognize only those unions licensed in states with robust religious-conscience exceptions, which provide that religious organizations need not recognize same-sex unions against their will. The federal government would also enact religious-conscience protections of its own. All of these changes would be enacted in the same bill..." David Blankenhorn and Jonathan Rauch: A Reconciliation on Gay Marriage, *New York Times,* 22nd February 2009

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25.2.09