

Submission
No 175

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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The Director
Legislative Council
Parliament House
Macquarie St
Sydney NSW 2000

**By email: lawandjustice@parliament.nsw.gov.au
merrin.thompson@parliament.nsw.gov.au**

Dear Sir/Madam,

RE: Submission to the Inquiry into Adoption by Same Sex Couples

Thank you for the opportunity to make a submission to the Inquiry into Adoption by Same Sex Couples.

Inner City Legal Centre (ICLC) is a community legal centre based in Kings Cross in inner Sydney. We receive funding under the Community Legal Centres funding program to provide free legal services and advocate for law and policy reform. Our legal services include information and referral, advice, representation and community legal education.

In addition to providing general community legal services to people in the inner city area, we also specialise in providing legal information, advice and representation to members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) communities across NSW. For many years, we have run a Gay and Lesbian Legal Advice Service on Wednesday

evenings using volunteer solicitors recruited for this role. We also work closely with a range of LGBTI organisations.

A substantial proportion of our gay and lesbian clients seek advice about legal issues relating to parenting. In March 2009, we will be launching the third, updated edition of our online publication Talking Turkey: A Legal Guide for Lesbian Mothers, Gay Fathers and Sperm Donors in NSW.

We make the following submissions in relation to this Inquiry:

Ascertaining whether adoption by same sex couples would further the objectives of the Adoption Act 2000

We note the objectives of the *Adoption Act 2000 (NSW)* (hereafter 'the Act'), in particular the following sections:

(a) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice

We believe that extending adoption to same sex couples will ensure that the best interests of the child are protected. This would include situations where:

- children who are already being cared for by a biological parent and a step-parent, who may be able to have their family recognized by the law, provided the other natural parent consents to the adoption;
- same sex couples who are able to provide a loving family to an unknown child will have this opportunity, broadening the range of couples available to adopt.

The available research indicates that children raised by same sex couples developmentally do as well as children raised by opposite sex couples. We note that there have been a number of studies in recent years that have examined the impacts on children growing up with two same sex parents.¹ A literature review prepared for the Australian Psychological Society concluded:

¹ Phillip Duffey 'Is there any rational basis for the existence of barriers against same-sex parenting? An analysis of Australian adoption and family law' in Gay & Lesbian Issues and Psychology Review (Vol. 3 No. 2, 2007).

- Ruth Mc Nair Outcomes for Children Born of ART in a Diverse Range of Families (Victorian Law Reform Commission Occasional Paper), 2004.

"The research indicates that parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families."²

The fact that a couple is involved in a same sex relationship is not indicative of the type of parenting they will provide. Given all the process involved in adoption, prospective parents will be carefully scrutinized by an adoption agency, and undergo same processes as opposite sex couples, ensuring that a suitable family for a child is found.

(f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements

The Human Rights and Equal Opportunity Commission discussed the human rights issues involved in the lack of legal recognition for same sex parenting:

"...the reality is that same-sex families do exist. And the Inquiry does not accept that one set of parents should have to struggle harder than another set of parents to protect the best interests of their child, purely on the basis of sexuality. Laws that perpetuate such inequities are unjust and should be changed. They are also contrary to international human rights law."³

We note Article 2 on the Convention on the Rights of the Child:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

- Fiona MacCallum & Susan Golombok 'Children raised in fatherless families from infancy: A follow-up of children of lesbian and single heterosexual mothers at early adolescence' Journal of Child Psychology and Psychiatry (Vol. 45 No. 8, 2004).

- Susan Golombok, Clare Murray et al, 'Social versus biological parenting: family functioning and the socioemotional development of children conceived by egg or sperm donation' Journal of Child Psychology and Psychiatry (Vol. 40 No. 4, 1999).

² Short, Riggs et al Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review prepared for the Australian Psychological Society (August 2007) at p. 25.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

We believe that extending adoption to same sex couples will ensure equal treatment of children, regardless of the sexuality or gender of their parents. In our view, the words 'social origin' and 'other status' captures same sex couples. We are of the view that children of same sex couples who don't have the benefit of presumptions of parentage under Section 60H of the *Family Law Act 1975 (Cth)* are at a disadvantage, because that family does not have the opportunity to be recognized by the law, and the non-biological parent will not have opportunity of having parental responsibility conferred on her.

Examples of this disadvantage includes a situation where a woman has a child from an opposite sex relationship, and the father does not have any involvement in the child's life or has passed away. If this woman forms a relationship with another woman, the new partner is not able to exercise the responsibilities of parenthood, including giving consent to major medical procedures and being involved in decision-making over schooling. The new partner is acting in the role of parent, and the child forms an attachment to her and treats her as a parent. On the breakdown of this relationship, the birth mother is not able to seek child support from her ex-partner, putting the child at a disadvantage and effectively violating Australia's obligations under the Convention.

The experience in other Australian and overseas jurisdictions that allow the adoption of children by same sex couples

We note that same sex couples have had equal access to adoption in Western Australia since 2002 and in the ACT since 2004. We also note that Commonwealth Law does not explicitly prohibit adoption by same sex couples.

Whether there is scope within the existing programs (local and international) for same sex couples to be able to adopt

³ Human Rights and Equal Opportunity Commission Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (HREOC, May 2007), p. 89.

It should be noted that the Act does not prevent a single gay or lesbian person from adopting a child. They are subject to the same processes and requirements of a single heterosexual person to adopt a child.

The Act currently prevents same sex couples from adopting a child as a couple. It also prevents step-parent adoption for same sex couples. The following definitions in the Act discriminate against same sex couples. Presently, the definition of 'couple' in the Act is 'a man and a woman who':

- (a) are married, or*
- (b) have a de facto relationship.*

The definition of 'spouse' in the Act is:

- (a) a person to whom the person is married, or*
- (b) a person of the opposite sex with whom the person has a de facto relationship of at least 3 years' duration.*

The definition of 'de facto relationship' in the Act is:

'the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another.'

The definition of 'step-parent' in the Act is another person who:

- (a) is not a birth parent or adoptive parent of the particular person, and*
- (b) is married to the particular person's birth parent or adoptive parent or has had a de facto relationship of 3 or more years duration with the birth parent or adoptive parent.*

These definitions explicitly exclude same sex couples from being in a 'de facto relationship', for the purposes of the Act. Section 28 of the Act requires that an opposite sex couple may adopt a child, and Section 30 of the Act discusses step-parent adoption, also requiring an opposite sex couple. This means that there is no scope for same sex couples to adopt a child under NSW law.

The Federal Attorney General's Department has responsibility for coordination of intercountry adoptions. However, intercountry adoptions are administered by the State and Territory authorities, being the Department of Community Services in NSW. As NSW law does not allow same sex couples to adopt, they are unable to adopt a child from another country.

For same sex couples who are caring for a child, there are a couple of different options for obtaining parental responsibility. This can be achieved through obtaining parenting orders under the *Family Law Act 1975 (Cth)*, which give the couple parental responsibility for the child. While parenting orders will confer parental responsibility on the couple, these orders expire when the child turns 18, and do not have the symbolic status of being a legal parent. They can also be varied by the court upon an application, which creates greater uncertainty for the child in having their family recognized.

There is nothing preventing same sex couples in NSW from having short-term responsibility for a child, by fostering a child pursuant to a care order. However, this is only a temporary option. A couple may create a family with a child they have fostered, but are not able to adopt this child. In practice, same sex couples can experience discrimination when applying through foster care agencies.⁴

Examining the implications of adoption by same sex couples for children

NSW and Federal laws have progressed over the years to recognize same sex couples and their children. In 2008, the NSW Parliament amended the *Status of Children Act 1996* and the *Births Deaths and Marriages Registration Act 1995*, to allow for lesbian parents to be recognized on a child's birth certificate.

In 2008, Federal Parliament passed laws that recognized same sex couples as being in a de facto relationship, and provided equality in a range of areas, including Social Security, taxation, Medicare and Aged Care. As part of this law reform, Section 60H of the *Family Law Act 1975 (Cth)* was amended to recognize same sex couples as parents of children conceived by donor insemination. These amendments cured a vacuum in the law and conferred the status of legal parent on the co-mother of a child.

Before these changes, many same sex couples sought parenting orders to enable both parents to have parental responsibility for the child. These orders provided a legal

⁴ See *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*

document which could be shown to schools or hospitals to prove that a person had parental responsibility for a child. The disadvantage of this process was that it could be costly, take a number of months to complete, would depend on the decision of an individual Judge or Registrar and expires when the child turns 18 years old.

At the moment, the Standing Committee of Attorneys General is reviewing the issue of surrogacy. Many have argued in these reviews that surrogacy should be equally accessible to opposite sex and same sex couples.

We note that the NSW Law Reform Commission recommended that adoption be available to same sex couples in 1997.⁵ Same sex couples are already able to become foster carers under NSW law. Allowing them to adopt a child for whom they have been caring for many years will provide a greater degree of stability to these families.

Similarly, some families are composed of a biological parent and a step-parent caring for children, and would like the step-parent to be able to adopt the child for whom they are an emotional and social parent although not a legal parent. This can affect lesbian families in particular, where the birth mother may have conceived a child through donor insemination and later entered a relationship with a same sex partner. A new female partner is currently not able to adopt this child, although a new male partner could adopt this child in NSW.

Adoption for same sex couples, and step-parent adoption for same sex couples are one of the last areas under NSW law where there is discrimination on the basis of sexuality. The restrictions on adoption are inconsistent with other Australian law. Amendments to the Act to allow same sex couples to adopt will ensure that a child is placed with the parents who are most suitable, regardless of the sexuality of the parents.

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

In order to enable same sex couples to adopt under the Act, there would need to be three simple changes to definitions in the Dictionary. We recommend that the definitions be changed as follows:

1. Couple means two people who:

⁵ NSW Law Reform Commission Review of the Adoption of Children Act 1965 (NSW) (Report 81, 1997).

- (a) are married, or
- (b) have a de facto relationship.

2. De facto relationship:

'the relationship between two adult persons who live together as a couple on a bona fide domestic basis although not married to one another or related by family.'

3. Spouse of a person means:

- (a) a person to whom the person is married, or
- (b) a person with whom the person has a de facto relationship of at least 3 years' duration.

We submit that these changes will enable same sex couples to be able to adopt under the Act, and remove the current restrictions. We note that the definition of 'de facto relationship' under the Act is now the only place in NSW law that does not include same sex couples. It should be noted that these changes would bring the Act into line with the current definitions of 'de facto relationship' under NSW and Commonwealth law.

Should you require any further information, please contact Inner City Legal Centre on 9332 1966.

Thank you for your attention to this matter.

Yours faithfully,



Yasmin Hunter

Solicitor

Inner City Legal Centre