

Submission
No 223

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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NSW Government

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**LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE
INQUIRY INTO ADOPTION BY SAME SEX COUPLES**

NSW GOVERNMENT SUBMISSION

The Government supports the Committee's consideration of this issue. The following background information is provided to support the Committee's deliberations.

Current legislation and practice

Under s26 of the *Adoption Act 2000* (NSW) ("the Act"), an application for an adoption order may be made by one person or jointly by a couple. A couple is defined in the Dictionary to the Act to mean:

"a woman and a man who:
(a) are married, or
(b) have a de facto relationship."

As such, gay and lesbian couples are currently precluded from adopting children in NSW.

People in same sex relationships are also precluded from adopting the child of their same sex partner through a step-parent adoption. The definition of step-parent in the Dictionary to the Act includes that the adoptive applicant is married to or has had a de facto relationship of three years standing with the child's parent. De facto relationship is defined in the Dictionary to mean:

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

Gay men and lesbians can currently adopt as single people under the *Adoption Act 2000*. Following the making of an adoption order, the partner of the adoptive parent can seek consent orders for shared parental responsibility for the child in the Family Court. Further, it should be noted that existing laws do not prevent adoptive children from being placed with same sex parents – a child may be adopted by one person in a same sex couple, and then be placed with that couple. What is precluded under the current law is for *both* people in a same sex couple to be recognised as the legal parents of a child.

Under the *Children and Young Persons (Care and Protection) Act 1998* same sex couples can be approved as foster 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.

Australia currently has agreements with a number of countries permitting adoption of children from those countries by Australians. All the countries with which Australia currently has agreements have been explicit that they will not accept applications from gay and lesbian singles or couples. As a result, NSW is precluded from accepting applications for intercountry adoption from either same sex couples or gay and lesbian single people, irrespective of any changes to NSW adoption law.

Principles of the *Adoption Act 2000*: best interests of the child

The principles of the *Adoption Act 2000* provide that the best interests of the child, both in childhood and later in life, must be the paramount consideration (clause 8(1)(a)) in making a decision about the adoption of a child. The Act is clear in stating that adoption is a service for the child (section 8(1) (b)), and that no adult has the right to adopt a child (section 8(1)(c)).

In this regard, all applicants for adoption must be assessed against eligibility and suitability criteria that are considered to be determinative of the long term success of an adoption¹. These criteria include:

- having personal attributes and capacity to undertake the normal tasks of parenting, as well as specific tasks of adoptive parenting such as ensuring the child has opportunities to learn about their birth family and culture of origin;
- having appropriate age and fitness to have a reasonable expectation of retaining health and vigour to raise a child until adulthood;
- being a person of good repute (as evidenced by references, police records etc.);
- being able to provide a child with a safe, secure and beneficial physical environment;
- having the financial resources to enable adequate provision for a child's physical, educational, health and social needs.

In a review of the Act undertaken by the Department of Community Services in 2006/07, a large number of submissions addressed the issue of whether the adoption by same sex couples was consistent with the best interests of the child. Submissions to the review both for and against adoption by same sex couples cited research and literature reviews to support their position.

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 comprising 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 their parenting capacity alone, and that parents' sexual orientation did not have bearing on outcomes for the child.

A major review by the Victorian Law Reform Commission of Victorian Assisted Reproductive Therapy (ART) and adoption legislation extensively examined the available research on outcomes for children raised by same sex couples. The Commission found that "a person's marital status or sexuality are not factors that are considered by child welfare authorities or experts to be predictors of harm to children"², and stated that it was "unable to conclude that prohibiting same sex couples from adopting children is justified according to the principle of the best interests of the child"³.

¹ http://www.community.nsw.gov.au/parents_carers_and_families/fostering_and_adoption/adoption/want_to_adopt/eligibility_criteria.html

² Victorian Law Reform Commission, 2007, *Assisted Reproductive Technology and Adoption*, p. 174

³ *ibid.*, p. 107

Adoption by same sex couples in other jurisdictions

The following Australian jurisdictions allow same sex couples to adopt in some capacity.

Western Australia

Western Australia amended its *Adoption Act 1994* in 2002 to provide equality in the criteria for prospective parents for de facto couples, including those of the same sex⁴.

ACT

In 2004, the ACT amended its *Adoption Act 1993* to allow parents '...who, whether married or not, have lived together in a domestic partnership for three years; and who, in the opinion of the court, have demonstrated the stability of, and commitment to, that relationship'⁵.

Tasmania

In Tasmania, the *Adoption Act 1988* allows for the child of one partner to be adopted by the other, provided that the couple is in a 'significant relationship' as defined in the *Relationships Act 2003* (TAS); this requires the couple to obtain a 'deed of relationship' from the Registrar of Births, Deaths and Marriages⁶. This method of adoption is known as 'step-parent adoption' or 'second parent adoption'. A couple in a 'significant relationship' may also adopt a child if either person is a relative of the child⁷.

Adoption by same sex couples is also permitted in a number of international jurisdictions.

Canada

Adoption by same sex couples is legal in 11 of 13 provinces in Canada. Additionally, Alberta allows step-parent adoption⁸. The source of the legalisation of adoption by same sex couples was a number of court cases challenging the definition of 'spouse' that occurred in the late 1990s.

Two cases in particular shaped the current state of adoption legislation in Canada. *M. v. H.* in 1999 was a landmark decision by the Canadian Supreme Court that found the exclusion of same sex couples from the definition of spouse in the Ontario *Family Law Act 1990* was unconstitutional under the *Canadian Charter of Rights and Freedoms*, which states that every individual has the right to equal benefit and equal protection from the law⁹. In the second case, also in 1999, the Court found that the definition of 'step-parent' in Alberta legislation such as the *Child Welfare Act 1984* necessarily includes same sex couples.

United Kingdom

The adoption of children in the United Kingdom is currently governed by the *Adoption and Children Act 2002* (UK), which allows unmarried couples (including those of the same sex) to adopt. One of the key issues raised in the passage of the Act was the need to increase the pool of potential adoptive parents. Under the Act, a couple is defined as 'two people living as partners in an enduring family relationship'.

⁴ *Adoption Act 1994* (WA), s 39

⁵ *Adoption Act 1993* (ACT), s 18(1)(b) and (c)

⁶ *Relationships Act 2003* (TAS), s 11

⁷ *Adoption Act 1988* (TAS), s 20(1) and (2A)

⁸ Parliamentary Research and Information Service (Canada) (2007): *Current Issue Review: Sexual Orientation and Legal Rights*

⁹ 1999 CanLII 686 (S.C.C.)

From 2000 to 2004, the number of children adopted rose by 37 percent to 3700. However, the number of children waiting for adoption for 12 months or more (81 percent) remained constant¹⁰.

Law reform in NSW relating to adoption

In 1997, the Law Reform Commission conducted a review of the *Adoption of Children Act 1965* and the *Adoption Information Act 1990*, considering in particular the criteria for selecting adoptive parents in light of changing cultural attitudes towards families. The resulting recommendations supported new legislation to improve the openness of adoption and bring adoption law in line with prevailing attitudes and existing child law. In particular, the commission recommended that the guiding principle of future adoptions be the best interests of the child. The report also recommended allowing any couple who have cohabited for at least three years to adopt.

The *Adoption Act 2000* was passed in response to this review, enshrining the principle that the best interests of the child should be paramount in the adoption process. In addition, the *Act* endeavoured 'to recognise the changing nature of practices of adoption' and encourage openness in the process.

Following the 2006/07 review of the *Adoption Act 2000*, the *Adoption Amendment Act 2008* was introduced. The amendments aim to further simplify and increase the transparency of the adoption process. In particular, the amendments seek to increase the engagement of Indigenous people in the adoption process by allowing greater participation of Indigenous agencies. The amendments do not address the issue of adoption by same sex couples.

Non-government providers of adoption services

Apart from the Department of Community Services itself, three non-government service providers, Anglicare, Centacare and Barnardos, also provide adoption services in NSW, and are accredited and funded by the Department of Community Services to do so. Currently, non-government accredited adoption service providers are permitted to apply the gazetted eligibility and assessment criteria in a way that reflects their organisation's values and beliefs, provided the Director-General of the Department of Community Services is advised of any additional criteria. For example, the Catholic Church based agency Centacare accepts adoption applications from married couples only.

The *Adoption Regulation 2003* will be amended in early 2009 to include new assessment criteria for prospective adoptive parents. The new assessment criteria, arising from the review of the *Adoption Act 2000*, are less prescriptive and provide a greater focus on factors that influence parenting capacity. Under the amendments, accredited adoption service providers will continue to be able to apply additional assessment criteria, provided the Director-General is notified.

¹⁰ Dey, Ian (2005): *Adapting Adoption*, International Journal of Law, Policy and the Family 19:3, pp. 289-309

Legislative changes required to allow adoption by same sex couples in NSW

If it is determined that adoption by same sex couples should be permitted in NSW, the definition of 'couple' and 'de facto' in the Dictionary of the *Adoption Act 2000* would require amendment.

The BDMR Act contains provisions regarding the registration of adoptions, and the issue of birth certificates to adopted persons. The initial view of the Attorney General's Department and the Registrar of Births Deaths and Marriages is that no changes to this Act would be required to register adoptions by same sex couples, provided they occurred in the same way as adoptions by different sex couples.

As noted above, the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* made amendments to the BDMR Act to enable both women in a same sex relationship to be recognised on a child's birth certificate (in donor situations). Further changes to the BDMR Act may be needed to accommodate the inclusion of two male (adoptive) parents on a birth certificate.