

Submission
No 225

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

Organisation: Women's Legal Services NSW

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WOMEN'S LEGAL SERVICES NSW

Incorporating
Women's Legal Resources Centre
Domestic Violence Advocacy Service
Indigenous Women's Program
Walgett Family Violence Prevention Legal Service
Bourke/Brewarrina Family Violence Prevention Legal Service

17 February 2009

The Director
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director,

Inquiry into adoption by same sex couples

Thank you for the opportunity to make submissions to the Inquiry of the NSW Legislative Council's Standing Committee on Law and Justice into adoption by same sex couples.

In summary, WLS NSW unequivocally supports the amendment of NSW adoption laws to allow same sex couples to adopt.

WLS NSW is a community legal centre providing women with a range of free community legal services, including legal advice, information, and casework and legal education to women in NSW across a broad range of areas of law. Women's Legal Services NSW incorporates several programs:

- A generalist legal service, the Women's Legal Resource Centre,
- The Domestic Violence Advocacy Service,
- Family Violence Prevention Legal Services in Walgett and Bourke-Brewarrina; and
- An Indigenous Women's Program

General comments

WLS NSW welcomes the steps taken by the NSW government in the past year to remove discrimination towards people in same sex relationships from state legislation and submits that the extension of adoption to same sex couples is a necessary and logical next step.



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Recent amendments to the *Status of Children Act 1996* have extended legal recognition to many lesbian families. However, there still remain many families where a same sex co-parent cannot be legally recognised, while an opposite sex partner in the same circumstances would have legal avenues open to them.

Although adoption is no longer very common in NSW, with less than 500 local adoptions each year,¹ there are a many situations across all categories of adoption (including local adoption, 'known' child adoptions, and intercountry adoptions²) in which same sex couples and/or children living with them are treated unequally under the current legislation. Specific examples of situations include:

- Same sex couples who wish to jointly adopt a child (either local or intercountry adoption),
- Children who are already living with a biological parent who is in a de facto relationship with a same sex partner where it is in the best interests of the child for the step-parent to adopt,
- Children with only one legal parent such as:
 - those conceived through donor insemination by a woman not in a de facto relationship (single at the time, relationship not of sufficient duration, other parent who has died), or
 - children who were adopted by an individual, and
- Same sex couples who have care of a child, such as out-of-home care placements by the Department of Community Services.

Terms of Reference A: Furthering the Objectives of the *Adoption Act 2000*

Section 7 of the *Adoption Act 2000* ("the Act") sets out the objectives of the Act. WLS NSW submits that legislative amendments to enable adoption by same sex couples would further the following objectives of the Act:

- (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,
- (b) to make it clear that adoption is to be regarded as a service for the child concerned,
...
- (d) to recognise the changing nature of practices of adoption,
...
- (f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,

¹ Australian Institute of Health and Welfare (2009), *Adoptions Australia 2007–08*. Child welfare series No. 46. Cat. No. CWS 34. Canberra: AIHW.

² AIHW report at p 2

Emphasising the best interests of the child: s 7(a)

Firstly, it is never in a child's best interests to be subjected to discrimination. WLS NSW strongly believes all children have the right to be raised in a safe, stable and loving environment and this should always be the priority of legislation that involves decisions about a child's future.

Presently, many lesbians and gay men have children and also care for children who are not biologically related to them. WLS NSW submits that in many circumstances, such as those outlined above, it would be in the child's best interests to be adopted by a non-biological parent or by a same sex couple.

NSW Attorney-General John Hatzistergos enumerated some of the ways in which children would benefit from having a same sex parent legally recognised when commenting on the *Miscellaneous Acts Amendment (Same Sex Relationships) Bill 2008*:

"This will give children greater protections in, for example, an emergency health situation where a parent might be required to sign consent forms"³

Enabling co-parents and foster parents to adopt (in appropriate circumstances) regardless of gender will give children greater stability in medical and other emergencies as well as greater certainty and financial security should their parents separate.

Mr Hatzistergos also gave the following examples of how children will benefit from the amendments, all of which apply equally to the present discussion:

- Workers compensation and victim compensation payments where one or both parents are killed or injured.
- Inheritance of both of the parents' assets.
- Recognition of both parents by school authorities.
- Improving access to guardianship orders for elderly parents.

In some of the above examples, co-parents presently have the ability to obtain parental responsibility for a child under the *Family Law Act 1975 (Cth)*. WLS NSW notes that parental responsibility is not the same as being legally recognised as a parent of a child, with the permanent recognition, responsibilities and entitlements that being a parent confers.

Adoption is to be regarded as a service for the child: s 7(b)

WLS NSW submits that adoption by same sex couples should be viewed as a service for those children whose welfare would be promoted by adoption. Particularly those children who have been placed in long-term out-of-home care with a same sex couples, and those with one legal parent who are already living with a non-biological parent who is their primary carer.

Under the current legislation single people are permitted to adopt as a lone parent. Despite being in a stable de facto relationship, same sex couples wishing to adopt must choose who will be the child's parent and then still face the added hurdle of being chosen to adopt as an

³ Anti-Discrimination Board of NSW (2008), *Equal Time*, Summer 2008 Newsletter Number 74 at p

individual. WLS NSW submits that enabling adoption as a couple would mean that adopted children would benefit from the greater stability and security of having two legal parents rather than one. However, WLS NSW does not support any change to the current ability of individual people to adopt should they meet the eligibility criteria.

Since birth parents are involved in the selection of adoptive parents for their child, placement with a couple rather than an individual may increase the likelihood that same sex people are chosen since there is generally a preference that children have the stability of two parents.

WLS NSW notes that the Department of Community Services has policies that prioritise permanency planning for children who do not have a realistic chance of returning to their parents' care in a reasonable time frame, including adoption.⁴ Same sex couples are actively recruited as foster carers, however, unlike opposite sex couples who are foster carers, adoption is not an option even where it may be in the child's best interests.

Recognising the changing nature of practices of adoption: s 7(d)

WLS NSW submits that the practices of adoption should change along with the recent legislative moves towards greater equality and legal recognition. One of the objects of the Act is to recognise the changing nature of practices of adoption, and given the significant law amendments to both state and federal legislation removing discrimination against people in same sex relationships, WLS NSW submits that it is appropriate that the Act is also amended.

Terms of Reference B: Australian and overseas experience

Currently, several other Australian states recognise same-sex families and allow adoption as a couple. Same sex couples are treated equally in both Western Australia⁵ and the Australian Capital Territory⁶. In Tasmania same-sex couples are able to adopt a partner's child.⁷

Amongst OECD countries an increasing number of countries now allow same sex couples to adopt children jointly, including many countries in the European Union⁸ and in the United States of America⁹ and Canada¹⁰.

WLS NSW notes that in the United States the Human Rights Campaign initiative *All Children – All Families* assists adoption and foster care agencies to implement policy and practice with the aim of making the agencies welcoming to prospective Lesbian, Gay, Bisexual, Transgender and Intersex ("LGBTI") parents. The program also educates LGBTI people about opportunities to become foster or adoptive parents to waiting children.

⁴ NSW Department of Community Services, *Permanency Planning Policy*, Current as of 25 July 2007, available from http://www.community.nsw.gov.au/for_agencies_that_work_with_us/policies_and_procedures.html?s=402224656

⁵ Adoption Act 1994 (WA)

⁶ Adoption Act 1993 (ACT)

⁷ Adoption Act 1988 (TAS)

⁸ According to the European Region of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) website at <http://www.ilga-europe.org/Europe/Issues/Parenting> the following European countries allow same sex couples to adopt: United Kingdom, Sweden, Spain, Netherlands, Denmark, Iceland and Belgium.

⁹ According to the Human Rights Campaign (a United States Non-Governmental Organisation) "twenty-two states and the District of Columbia have granted adoptions to gay and lesbian individuals as well as same-sex couples": http://www.hrc.org/issues/parenting/adoptions/adoption_laws.asp

¹⁰ M. C. Hurley (2007) *Sexual Orientation and Legal Rights* 92-1E, Library of Parliament, Canada: <http://www.parl.gc.ca/information/library/PRBpubs/921-e.htm>

Recommendation 1 that steps are taken ensure that adoption service-providers' practices are not influenced by prejudice or preconceptions but rather are welcoming for all prospective adoptive parents, regardless of their gender identity or sexual orientation.

Terms of Reference D: implications of adoption by same sex couples

The present process that prospective adoptive parents must go through is, and should be, an exacting one. The objects of the Act emphasise that adoption is a service for the child and that the paramount consideration in adoption law and practice must be the best interests of the child concerned (ss 7(a) and (b)).

Before being allowed to adopt a child prospective parents must satisfy decision makers that the principles set out in s 8 of the Act have been met. Meeting the eligibility criteria together and other legal requirements should be sufficient to ensure that children are placed with appropriate adoptive parents and that their best interests are paramount.

In addition to removing legal barriers that detrimentally affect children with LGBTI parents, WLS NSW notes that removing discrimination in the law is likely help decrease any problems faced by children with LGBTI parents. Legal recognition promotes equality and will send a positive message to those who still hold prejudiced opinions.

Legal discrimination has an impact on the daily lives of thousands of LGBTI Australians and research shows that "... legislative discrimination is a major contributor to the high levels of social discrimination and stigmatisation that still exist toward same-sex couples."¹¹

WLS NSW notes that a significant amount of research into the wellbeing of children with lesbian and gay parents has been undertaken, which demonstrates that the mere fact of a child having a LGBTI parent does not disadvantage a child. The NSW Gay And Lesbian Rights Lobby (GLRL) published a review of research on Lesbian and Gay Families entitled *Meet The Parents* in January 2002.¹² This report shows that:

"Over the past 25 year a considerable body of credible social science research on lesbian and gay parents and their children has built up. It shows convincingly that lesbian and gay parents are 'like' heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment."

Terms of Reference E: legislative changes required

WLS NSW supports the recommendations of the GLRL contained in their report on parenting rights.¹³

Recommendation 2 WLS NSW recommends that the definitions of 'couple', 'de facto relationship' and 'spouse' be amended to be gender neutral.

¹¹ Gay and Lesbian Rights Lobby (NSW) Inc. (2007), *All Love is Equal Isn't It? Consultation Report*, Sydney: GLRL
¹² J Millbank (2002), *Meet The Parents - A Review of the Research on Lesbian and Gay Families*, Report for the Gay and Lesbian Rights Lobby (NSW), Sydney: GLRL

¹³ J Millbank (2003) *And Then... The Brides Changed Nappies* Report of the NSW Gay and Lesbian Rights Lobby

This amendment would allow gay and lesbian parents to adopt under the current provisions relating to adoption by step-parents.

Recommendation 3 Change the Adoption Act to include a new provision for co-parent adoption where there is only one legal parent.

This will allow gay and lesbian co-parents to adopt with a presumption in favour of adoption.

If you wish to discuss any of the comments in this submission, please do not hesitate to contact Janet Loughman or Mari Vagg on 02 9749 7700.

Yours faithfully,

Women's Legal Services NSW



**Janet Loughman
Principal Solicitor**