

Submission
No 215

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

Organisation: National Children's & Youth Law Centre
Name: Mr James McDougall
Position: Director
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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000
Fax: (02) 9230 3416

Dear Sir / Madam

Inquiry into adoption by same-sex couples — submission

The National Children's and Youth Law Centre thanks the Standing Committee on Law and Justice for the opportunity to contribute to its Inquiry into adoption by same-sex couples ("Inquiry") through this written submission. We have considered the impact of adoption by same-sex couples from a child rights perspective.

Our submission to the Inquiry is attached.

Yours sincerely

James McDougall
Director

National Children's & Youth Law Centre
Phone +61 (0)2 9385 9588
Fax +61 (0)2 9385 9589
Mobile +61 (0)419 243 179
Email director@ncylc.org.au
Website www.ncylc.org.au

Submission

Adoption by Same-Sex Couples in NSW

February 2009

James McDougall, Director
National Children's and Youth Law Centre

1.0 National Children's and Youth Law Centre

The National Children's and Youth Law Centre ("NCYLC") is a Community Legal Centre dedicated to the promotion and protection of the rights and interests of Australia's children and young people. It was established in 1993 with the support of the University of New South Wales, the University of Sydney, the Public Interest Advocacy Centre and the (then) Australian Youth Foundation. Since its inception in 1993, the NCYLC has made over 180 submissions on a range of issues affecting children and young people and has responded to more than 150,000 enquiries by children and young people throughout Australia.

2.0 Overview of Our Submission

The NCYLC offers a child rights based approach to the issue of whether NSW adoption laws should be amended to allow adoption by same-sex couples (the "Inquiry").

- 2.1 Our submission focuses on the best interests of the child and considers the impact of adoption by same-sex couples on child development and the legal family. A brief comparative analysis of same-sex adoption laws in other Australian jurisdictions and countries with similar socio-political environments is also provided.
- 2.2 Noting the Inquiry's terms of reference, our submission speaks primarily to the objects of the *Adoption Act 2000* (NSW) ("Act"), including the need to ensure that the best interests of the child is the paramount concern in adoption law and practice and that adoption law and practice complies with Australia's obligations under treaties and other international agreements (most notably, the United Nations Convention on the Rights of the Child ("CROC")).
- 2.3 In summary, we conclude that the current adoption laws in NSW fall short of viewing the child's best interests as paramount, and fail to accord the basic social and legal rights enshrined in CROC to children living in same-sex families.



- 2.4 We recommend that the Act be amended to recognise and include same-sex couples as eligible to adopt children. By changing the definitions of "couple" and "de facto relationship" in the Act to include same-sex couples the objects of the Act will be more readily met as the best interests of the child can be considered rather than the sexuality of the applicants.

3.0 The Objects of the *Adoption Act 2000* (NSW)

The Act restricts adoption by couples to those whose relationship consists of a partnership between a man and a woman (either married or in a de facto relationship). This excludes same-sex couples from the adoption process and means that if a person in a same-sex relationship wants to adopt they must do so as a single person. It also excludes the homosexual partner of a birth parent from adopting their partner's child, in a step-parent capacity. A child's interests can be better met through the care of two parents. However, if one of these parents is not legally recognised, not only can the child's interests suffer, but the child's right to family is also undermined.

- 3.1 According to the 2001 Census, children were living with more than 5% of gay male couples and more than 19% of lesbian couples. Children live in same-sex families. It is in the interests of children for the law to recognise and cater for this reality.
- 3.2 We propose that reform to adoption laws in New South Wales should be evaluated against the existing objects of the Act. Objects (a), and (f) of the Act are particularly relevant to assessing the arguments for and against adoption by same-sex couples. Under Object (a), the best interests of the child concerned must be the **paramount** consideration in adoption law and practice. Under Object (f), adoption law and practice should comply with Australia's obligations under treaties and other international agreements.
- 3.3 Reform of the current NSW adoption laws to allow same-sex couple adoption will help realise both objects of the Act.

4.0 A Child's Experience of Family

CROC provides a universally accepted rights-based framework for assessing public policy and legislation concerning children. As a signatory to this convention, Australia has an obligation to implement and protect the rights of the child, including a child's right to family. Article 7 of CROC states that a child has the right to know and be cared for by his or her parents as far as possible.

- 4.1 The current NSW adoption laws do not provide children living in same-sex families with the full benefit of the right to family. There is no legal recognition of the parenting responsibilities of the same-sex partner of a legal parent to their child. The name of the partner does not appear on the child's birth certificate. Before a child develops their own legal capacity, a same-sex partner is not legally authorised to make medical or legal decisions on behalf of that child. If the partner wishes to be invested with this legal authority, they must go through the expense and process of applying for a parenting order in the Family Court. This significantly reduces the fulfilment of the child's right to be cared for by both parents and the right to have both parents involved in their care and development.
- 4.2 One of the resources provided by the NCYLC is a LawMail service. This is an online feature which allows children and young people across Australia to ask questions about their rights and the law as it affects them. Through this service we gain insight into the concerns and experiences of children and young people. It is clear in our experience that children are vitally engaged in the experience of family.
- 4.3 Each year our information website for children (www.lawstuff.org.au) receives around 4 million hits. In the same period, we answer over a thousand requests for information from children. Consistently about a quarter of those requests concern their family relationships and how the law affects them. Their questions deal with situations of conflict, lack of recognition and in some circumstances abuse. What is clear from their accounts is that they conceive of family in terms of the relationships that they have with those that they live with on a day-to-day basis. What matters is not the sexuality of the parent but the relationship between the adult who performs the role of a parent to the child.

4.4 In our experience children link their experience of family to those people:

- they know and live with;
- who they consider play the role of parent;
- who they have a parent-child relationship with;
- who treat them like their child;
- who other people know and recognise as their parent or family; and most importantly,
- who are there when they need them.

Examples of the language used by children includes:

"I have grown up seeing my step father as the father figure in my life, although I have seen my father regularly as he is more like a friend than anything else he's never been parental...my step father has always been there through thick and thin."

"I don't live with my real dad and I haven't since I was 9 months old but I have been living with my step dad and my mum but I have to use the name that is on my birth certificate but I hate using that name coz I don't even know my dad"

4.5 Mission Australia's National Survey of Young Australians¹ also provides support for the view that family relationships are of vital importance to children and young people. In the seven years this survey has been conducted, the answer to the question "What do young people value?" has remained consistent. Family relationships and friends were most highly ranked, with 75.3% of respondents considering family relationships most important. We note that sexuality (relationships, health, identity) was a concern to 12.2% of respondents.

4.6 Children of gay and lesbian parents in America have also expressed similar views:

"...My mother is a lesbian and I'm proud of her for not being afraid to show it. She's been a great mother for the last fourteen years, and she's always been there when I needed her. She has kept us both alive and well as being the only source

¹ National Survey of Young Australians 2008 – Key and Emerging Issues. Mission Australia Survey



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*of money. She is my best friend. I don't know exactly what I think about being the son of a lesbian, but I know I'm damn lucky to have a mum like mine."*²

"My mom met her lover, L, fourteen years ago.... After the divorce, L moved with us... I saw them kiss – they didn't sneak off or anything... I always told my friends soon after I met them...It doesn't matter what kids have – fathers, mothers, or both – they just need love and support" ³

"Ever since I can remember, my parents (and by this I mean my mom and J) have done nothing but put me first on their list of priorities. Not a single day goes by without each of them worrying for me, teaching me, disciplining me. We are typical parents and child...What matters most in a family is genuine mutual trust, love and support"⁴..

"...healthy families require love, and gay couples are just as wonderful as parents as straight parents. The common denominator is the word "parents." I see every day how my mom and dad are parents first, and they just happen to be gay. I also hope to show people that just because a family structure is unfamiliar doesn't mean that it is something to fear". ⁵

*"Each of my mothers already had a girl when they got together, and now they have one together, too. I consider both M and J my mothers. When I was little I never noticed anything different about us; I never felt it was different having two moms"⁶
[writer was adopted when she was 3]*

- 4.7 Unfortunately we have been unable to identify similar research in Australia to date. However we feel confident on the basis of our experience that Australian children living with same-sex parents would express similar views.

² From the COLAGE website. 'Children of Lesbians and Gays Everywhere' <http://www.colage.org/>

³ http://www.familyresearchinst.org/FRI_homokids.html

⁴ <http://www.experienceproject.com/stories/Have-Gay-Parents/359635>

⁵ See note 4 facebook cause

⁶ http://www.familyresearchinst.org/FRI_homokids.html



5.0 Further Child Rights Issues

- 5.1 The NSW law on same-sex couple adoption could be said to fail to put into full effect the provisions of Article 18 of CROC which states that governments shall use their best efforts to ensure that both parents have common responsibilities for the upbringing and development of the child.
- 5.2 Article 5 of CROC seeks respect for the responsibilities, rights and duties of parents or members of the extended family, to provide appropriate direction and guidance for the child. If a same-sex partner's relationship with their child is not legally recognised, this limits their ability to meet their responsibility to guide their child.
- 5.3 By failing to legally recognise the rights of same-sex parents, NSW adoption laws may not secure the right of children in these families to not be separated from their parents against their will and the right to an adequate standard of living, as set out in Articles 9 and 27 of CROC.
- 5.4 Unless a Family Court parenting order has been made, children living in same-sex families that break down have no legally recognised right to visit or maintain a relationship with their non-biological or non-legal parent.
- 5.5 NSW adoption laws also contravene Article 2 of CROC - a child's right not to be discriminated against, irrespective of the child's or the parent's sex, social origin, or other status.
- 5.6 As a result of the current laws, "children raised in same-sex families miss out on many legal certainties and rights that other children in NSW take for granted"⁷. For example, they have no right of succession or inheritance if their legal parent's partner dies, nor do they enjoy the legal recognition of both their parents.

⁷ *In the Best Interests of My Child*, note 1 at 4.

6.0 Further Research and Study

- 6.1 According to the Victorian Law Reform Commission's report, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* ⁸, arguments against same-sex parenting are usually based on an assumption that heterosexual relationships are the most favourable environment for a child's development. The report indicates that "there is simply no credible evidence that [same-sex] relationships cause harm to the intellectual, emotional, psychological or sexual development of children by virtue of the sexuality of their parents." In fact, there is an overwhelming and growing body of evidence to suggest that people living in same-sex relationships are equally as capable of fulfilling their duties and responsibilities towards children in their care as parents living in heterosexual relationships.⁹
- 6.2 The sexuality of a child's parent's has no *direct* bearing on that child's best interests. It is in a child's best interests to have his or her family legally recognised and have his or her relationship of emotional and financial dependence **reflected** and **protected** by law. The current laws restrict a second parent's ability (in a same-sex partnership) to properly care for their child and also facilitate legal and social discrimination towards children living in same-sex families. The laws not only fail to promote the best interests of these children but in many circumstances also create direct obstacles to the realisation of such interests.
- 6.3 Again this research accords with the NCYLC's understanding of the concerns expressed by children in Australia and our own child rights analysis of the issue. Increasingly, this has been recognised in law reform in Australia and elsewhere.

⁸ Victorian Law Reform Commission. *Occasional Paper*. "The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction" (2004).

⁹ *Occasional Paper*, note 3 at 16.



7.0 The Experience in other Australian and Overseas Jurisdictions

Second parent adoption or adoption of a child by the same-sex partner of the legal parent, is now legal in Western Australia, the ACT and in Tasmania (in limited circumstances). In Western Australia, reforms to the adoption laws have provided children living in existing same-sex parent families with legal protections such as the right of succession and inheritance from the second parent, as well as securing the child's rights and future family environment, should their legal parent die or become disabled.

7.1 The paramount concern when considering adoptive parents should be the best interests of the child, not the sexual preference of the parent. This was the view of the Canadian courts in *Re A* (1999)¹⁰, where a lesbian couple were found to be just as capable of being the legal parents of a child as heterosexual couples. In that case, Martin J stated that each case must be decided on the basis of individual facts, and, as in all cases, an application for adoption would only be approved if the court was satisfied that it was in the best interests of the child.

7.2 American states that have legislated for adoption by same-sex couples have found that children in same-sex families gain a number of benefits such as:¹¹

- the formalisation of the child's relationship with their non-biological parent;
- eligibility for benefits in insurance, Social Security, workers' compensation;
- potential for the child to inherit under the intestacy laws and to bring a wrongful death action in the event of the adoptive parent's death; and
- providing stability and security in the event of the biological parent's death (where the partner would automatically assume full custodial rights).

7.3 By contrast, in Florida, the only state in America that has explicitly banned same-sex adoption, arguments have arisen over the validity of such a ruling, which prevents judges from taking the child's best interests into account¹².

¹⁰ [1999] A.J. No. 1349

¹¹ *Handschu, B and Kisthardt, M.K. "Same-Sex Adoption Issues". National Law Journal. New York: Oct 27, 2008. Vol. 31, Iss. 9 at 13.*

8.0 A Child's Right to Family Re-examined

8.1 The NCYLC supports a child's right to a safe, supportive family environment regardless of the structure that family takes. The Victorian Law Reform Commission's report suggests:

"Studies about the experience of children living with single lesbian mothers when compared to children living with heterosexual single mothers have revealed the former are no more likely to be teased or ostracised by their peers...[T]here is a growing body of evidence to suggest that same-sex parenting causes no harm to children."¹³

8.2 In their Occasional Paper, the Victorian Law Reform Commission also commented on a 2002 policy statement and technical report on Co-parent or Second Parent Adoption by Same-Sex Parents issued by the American Academy of Pediatrics which concluded that:

"A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes."¹⁴

8.3 Furthermore, the 1999 American Academy of Child and Adolescent Psychiatry policy statement on Gay, Lesbian and Bisexual Parents states:

"There is no evidence to suggest or support that parents with a gay, lesbian or bisexual orientation are per se different from or deficient in parenting skills, child centered concerns and parent-child attachments, when compared to parents with a heterosexual orientation."¹⁵

¹² Ruggeri, Amanda *A Quiet Fight Over Gay Adoption; The battle lines are similar to the same-sex marriage debate.* U.S. News & World Report. Washington: Nov 3, 2008. Vol. 145, Iss. 10, at 29.

¹³ *Occasional Paper*, note 3 at 16.

¹⁴ *Occasional Paper*, note 3 at 15.

¹⁵ *Occasional Paper*, note 3 at 14.



9.0 Recommendations

The *Adoption Act 2000* (NSW) should be amended to enable same-sex couple and second parent adoption. This will help to ensure that the best interests of the child are met and their rights are protected. A child's stable, nurturing family environment is not jeopardised by the sexual preference of that child's parents.

- 9.1 The NCYLC proposes the following changes to the dictionary of the *Adoption Act 2000* (NSW):

"couple" means two people who:

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

"de facto relationship" means the relationship between two people who live together as husband and wife on a bona fide domestic basis although not married to one another.

- 9.2 These changes will allow gay and lesbian parents to use the current couple or step-parent adoption provisions under sections 28 and 30 of the Act.
- 9.3 The current laws that prevent adoption by same-sex couples and second parent adoption infringe on a child's right to family and to the legal recognition of that family. They also infringe upon a child's right not to be discriminated against (legally or otherwise) due to the sexual preference of their parents.
- 9.4 Each case must be looked at individually to ensure the appropriateness of the applicants and their ability to care and provide for a child. Laws which prevent a certain group of people from adopting, based on a criterion other than their ability to care for and support a child are not in the best interests of any child, and run counter to the objectives of the Act.

We thank you for the opportunity to provide these comments. If you require further information regarding this submission or elaboration of our views, please contact the Director James McDougall on 02 9385 9588 or director@ncylc.org.au.