

Submission
No 227

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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Human Rights
Commission**

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25 February 2009

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director

Thank you for the opportunity to make a submission to the NSW Standing Committee on Law and Justice Inquiry into adoption by same-sex couples.

Same-Sex: Same Entitlements, the report of the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) National Inquiry into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits canvassed issues relevant to adoption by same-sex couples. In particular, I refer you to Chapter 5 of our report, 'Recognising Children'. A CD copy of the report is included.

The report focused on discrimination against same-sex couples and their children in financial and work-related entitlements laws. As such, the Inquiry only considered adoption laws in terms of their potential to provide same-sex couples who are already parents with legal parental status. Approximately 20% of lesbian couples and 5% of gay male couples in Australia are raising children.¹

At the end of 2008, the Australian Government amended most federal laws which discriminate against same-sex couples, thus implementing many of the recommendations of the *Same-Sex: Same Entitlements* report. The Commission welcomes these reforms. However, while the reforms allow for lesbian co-parents to

¹ Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p206, referencing M Pitts et al, 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians' (2006); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Position Paper Two: Parentage*, (July 2005), para 3.1.

be legally recognised, they do not automatically confer parental status on all same-sex couples. Accordingly, adoption laws remain an important tool by which same-sex couples can gain legal recognition as parents.

The Committee might find it useful to consider some of the following observations on the importance of adoption for same-sex couples drawn from our Inquiry.

Adoption by same-sex couples as a means to gain legal recognition as parents

In *Same-Sex: Same Entitlements*, the Inquiry pointed out that adoption is one way in which same-sex couples, a lesbian co-mother or a gay co-father would all be recognised as the legal parents of a child. Adoptive parents can generally access the same financial and work-related entitlements as birth parents.

In theory, adoption should be a powerful tool for same-sex families who face biological challenges to being birth parents. However, in practice, the adoption laws in the various states and territories make it extremely difficult – and sometimes impossible – for same-sex couples to adopt. At present, only WA and ACT allow same-sex couples to register for adoption of an unrelated child.² However, even in those states very few gay or lesbian couples successfully adopt children in Australia. On the other hand, opposite-sex couples can apply to adopt an unrelated child under all state and territory laws.

Restrictive adoption laws have a particular impact on gay couples who are parents. A gay male couple cannot have a child, whether through ART or intercourse, without involving a child-bearing woman. While the Inquiry did not support the enactment of parenting presumptions which would automatically remove the rights of a child-bearing woman, it should be possible for a gay couple to adopt an unrelated child, or a child born through ART to a surrogate or friend, after the birth mother has made a positive decision to transfer her legal parenting rights.

Surrogacy and adoption

Altruistic surrogacy is one way that gay couples can have a child of their own. Surrogacy laws can provide a mechanism for the transference of legal parentage to same-sex couples, as is the case in the ACT.³ In NSW, however, although surrogacy is not prohibited, the mother will be the legal parent unless she allows the couple to adopt the child. Hence, adoption is a particularly important mechanism for gay parents to obtain legal parental status.

Step-parent adoption

Under 'step-parent adoption' laws, one member of a couple can apply to adopt the birth child of the other member of the couple. Theoretically this would be an effective mechanism for a gay co-father or lesbian co-mother to obtain legal parental status regarding the child he or she has been caring for from birth.

² *Adoption Act 1994* (WA), ss 38-39; *Adoption Act 1993* (ACT), s 18(1). In Tasmania, a same-sex partner can apply to adopt a child if that child is related to his or her partner: *Adoption Act 1988* (Tas), s 20(1)-(2A).

³ Section 26, *Parentage Act 2004* (ACT).

However, NSW does not allow step-parent adoption for same-sex couples.⁴

Comments from gay couples trying to adopt

The Inquiry received some submissions from gay couples trying to adopt. For example, Dr James Dowty compared adoption for same-sex couples in Australia and the Netherlands. He argued that adoption provides greater protection for children:

...I think it is important that same-sex couples should be allowed to adopt children. When the Dutch parliament was debating [legal] recognition of same-sex relationships they decided that same-sex couples should be given the same opportunities as opposite-sex couples to adopt. In a country where approximately 20% of lesbian couples have children from previous relationships, this was mainly seen as a way of ensuring the best outcome for the children in the event of the death or incapacity of the biological parent. Australian children deserve the same protections as Dutch children in such situations.⁵

Frank Gomez comments on his experience when considering adoption:

I have over the years enquired about adopting a child, as I think this would be an option I would like to entertain if I was ever in a long term, serious relationship again. However I have found that it is impossible for gay men to even be considered for adoption, regardless of income, character or [the] seriousness of their relationships.⁶

As pointed out in the Inquiry, the *Convention on the Rights of the Child* requires that the best interests of a child be *the paramount consideration* in adoption (article 21). I am concerned that adoption laws which arbitrarily exclude a couple on the grounds of sexuality may result in a breach these rights because they fail to consider the best interests of a particular child.⁷

Thank you for the opportunity to make a contribution to your Inquiry.

Yours sincerely



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⁴ *Adoption Act 2000* (NSW), s 30.

⁵ Dr James G Dowty, Submission 99.

⁶ Frank Gomez, Submission 216.

⁷ See 5.2.4 (d), *Same-Sex: Same Entitlements*.