

Submission
No 192

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

Organisation: Association of Children's Welfare Agencies (ACWA)
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The Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
NSW Legislative Council
Parliament House
Macquarie Street, Sydney
NSW 2000 Australia

Dear Committee Chair,

Re: Inquiry into adoption by same sex couples

The Association of Children's Welfare Agencies (ACWA) is the NSW peak body representing agencies providing direct services to children and young people, and their families. This year, ACWA is celebrating 50 years of social advocacy, particularly for the Out of Home Care (OOHC) sector.

The main points outlined in this submission are:

- The needs of the child are predominant factors in adoption matters and as such an inclusive approach that equally considers same-sex applicants is needed.
- The *Adoption Act 2000* needs to be grounded in International Law and the principles of equality before the law.
- Research shows that there is no connection between people's parenting abilities and their sexual orientation.

In general, the needs of the child for a stable and nurturing environment and the rights of same-sex couples at International Law to be treated equally before the law require legislative change.

Should you require further information, please contact Enis Jusufspahic, Policy Officer, on 02 9281 8822 or email enis@acwa.asn.au.

Yours sincerely,

Sylvia Ghaly
Manager of Policy and Membership

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Inquiry into adoption by same sex couples:

A submission prepared by The Association of Children's Welfare Agencies

Executive Summary

The Association of Children's Welfare Agencies (ACWA) supports an inclusive approach to adoption by allowing same sex couples to participate equally in the adoption process. We note that long-term research has borne out that there are no connections between people's parenting abilities and their sexual orientation.

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

The objectives of the *Adoption Act 2000* (*the Act*) are developed further by allowing same sex couples to apply for adoption as it would allow the Court to make an adoption order that is in the best interest of the child by considering all prospective adoptive parents. This is a socially inclusive approach to adoption that is consistent with International Law. In section 7 of *the Act* there is enough scope for legislative change as discussed in this submission.

We note section 7(g) of *the Act* which states that the objects of the Act are "*to encourage openness in adoption*" as well as section 7(d) of *the Act* which provides that the Act is required to "*recognise the changing nature of practices of adoption.*" The nature of practice of adoption in overseas jurisdictions, particularly Guam, Andorra, Belgium, Iceland, the Netherlands, Spain, Sweden, South Africa, France and Britain has changed significantly to allow for adoption by same sex couples. In part b we consider the inclusive adoption approach in the United States and Canada.

Section 7(f) of *the Act* provides that the "*adoption law and practice complies with Australia's obligations under treaties and other international agreements*". In 1976 Australia signed the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR states that "*all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.* Furthermore, the Human Rights and Equal Opportunity Commission that a restricting and in some cases banning adoption by same sex couples in Australia may breach article 2 of the *Convention on the Rights of the Child* (best interests of child must be the paramount consideration in adoption) because it prevents an objective assessment of what is in the child's best interest.¹

ACWA represents non-government agencies providing placements for children in out-of-home-care. Adoption under the *Adoption Act 2000* needs to

¹ *Same Sex: Same Entitlements National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Human Rights and Equal Opportunity Commission, May 2007, p. 51

be consistent with the permanency planning principles for children and young people in out-of-home care as set out in section 78A of the *Children's and Young Persons (Care and Protection) Act 1998* ("Care Act"), which may include adoption where such permanent placement is in the best interests of the child or young person (please see section 9(f) of the Care Act).²

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

This section of the submission focuses on the United States and Canada because both are common law countries where same sex adoption is not permitted in every state, province or territory. We also draw on the experiences of Western Australia and the Australian Capital Territory.

United States

A Florida Circuit Judge Lederman struck down a statute that prohibits same sex couples from adopting children although the law allows homosexual people to be foster parents. In her decision Lederman J noted, "*A law such as the blanket ban on adoptions by homosexuals infringes on the foster child's right to be free from undue restraint and to be expeditiously placed in an adoptive home that serves the child's best permanency interests.*"³

Canada

In *Re A*⁴ Martin J found that it is reasonable and just to interpret the term "step-parent" as inclusive of same sex couples given the diverse family structures acknowledged by the legislature. The Court also noted that every cases is decided on its facts in the best interest of the child, placing emphasis on the petitioner's relationship with the child that is, whether that person has made a commitment to assume the role of the parent to that child.⁵

Western Australia

In Western Australia, section 39(1)(d) and (e) of the *Adoption Act 1994* permits same sex couples to apply for child adoption. The West Australian Attorney-General, Jim McGinty stated that in making the amendments to the *Adoption Act 1994*, "*we wanted to get rid of irrelevant considerations, old prejudices, we wanted to make sure that child was first and centre when it came to adoption and we wanted the only criteria to be the child's interests and that is what the legislation now reflects.*"⁶ The NSW Law Reform Commission concurs with the WA position and notes that, "*any assessment should focus on the suitability of the applicants to promote the best interests of the child. It should ensure that unfair or unjustified assumptions are not*

² *Review of Adoption Act 2000*, Report to Parliament, Department of Community Services, October 2006, http://www.community.nsw.gov.au/docswr/assets/main/documents/adoption/report_adoption_act.pdf, page 18

³ *John Doe ats John Doe*, Lederman J' ruling, page 40, <http://www.aclufi.org/pdfs/GillRedactedFinal.pdf>

⁴ [1999] A.J. No. 1349

⁵ *Same Sex Couple Adoption: The Situation in Canada and Australia*, Research Note 29 1999-2000, Parliament of Australia

⁶ *A-G defends gay adoption*, ABC News, 14 June 2007, <http://www.abc.net.au/news/newsitems/200706/s1950882.htm>

made about the relevance of the applicants' sexual orientation or marital status to the applicants' suitability as adoptive parents."⁷

Australian Capital Territory

In the Australian Capital Territory the *Adoption Act 1993* allows for de facto adoption. In particular section 18(1)(b) refers to a "domestic partner" which is further defined in section 169 of the *Legislation Act 2001* as "someone who lives with the person in a domestic partnership, and includes a reference to a spouse or civil partner of the person."

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

There is scope for same sex adoption within the current state and Commonwealth legislation. However, amendments would need to be made to take into account same sex partners where that is not the case. We note that as at March 2007 the *Family Law (Same Sex Adoption) Bill* seeks to 'amend the Family Law Act 1975 to indicate that adoptions by same sex couples of children from overseas under either bilateral or multilateral arrangements will not be recognised in Australia'. The Bill is presently not publicly available.⁸

d. Examining the implications of adoption by same sex couples for children

Same sex families are a reality of Australian society. The 2005 Australian census data shows that approximately 20 per cent of lesbian couples and 5 per cent of gay male couples in Australia are raising children.⁹

The NSW Law Reform Commission states that "*there is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents.*"¹⁰ Likewise the American Psychological Association notes that, "*there is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation.*"¹¹ Furthermore, the American Psychiatric Association notes that, "*research over the last 30 years has consistently demonstrated that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social and sexual functioning as children raised by heterosexual parents. The research also indicates that optimal development for children is not based on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.*"¹² The American Academy of Child and Adolescent

⁷ *Review of the Adoption Act 1965 (1997)*, NSW Law Reform Commission Report 81, Chapter 6

⁸ *Same Sex: Same Entitlements National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, p 96

⁹ *Year Book Australia: Same-Sex Couple Families*, Australian Bureau of Statistics, 2005, p142

¹⁰ NSW Law Reform Commission Report 81, *Review of the Adoption Act 1965 (1997)*, Chapter 6

¹¹ *APA Policy Statement: Sexual Orientation, Parents, & Children*, Adopted by the APA Council of Representatives July 28 & 30, 2004, www.apa.org/pi/lgbcp/policy/parents.html

¹² *Adoption and Co-parenting of Children by Same-sex Couples Position Statement*, APA Document Reference No. 200214, archive.psych.org/edu/other_res/lib_archives/archives/200214.pdf

Psychiatry amongst other professional organisations supports this position.¹³

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

The NSW Law Reform Commission recommends that, "*The legislation should permit an adoption order to be made in favour of either a couple (whether married or living in a de facto heterosexual or homosexual relationship) or a single person.*"¹⁴ Furthermore, the American Bar Association notes that it "*supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child.*"¹⁵

Section 26 of the Act provides that "*an application for an adoption order may be made in accordance with this Act solely by or on behalf of one person or jointly by or on behalf a couple*" where "couple" is defined in the Dictionary as "*a man and woman who are married or have a de facto relationship.*"

In order to effect the changes "a couple" would need to be defined as "*two people who are in a de facto relationship.*" However, "de facto relationship" would need to be amended to mirror section 5(b) of the *Property (Relationships) Act 1984* as "*a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.*"

¹³ *Gay, Lesbian and Bisexual Parents Policy Statement*, Approved by Council June 1999, http://www.aacap.org/cs/root/policy_statements/gay_lesbian_and_bisexual_parents_policy_statement

¹⁴ NSW Law Reform Commission Report 81, *Review of the Adoption Act 1965 (1997)*, recommendation 58

¹⁵ American Bar Association, Adopted by the House of Delegates on August 12-13 2003 <http://www.abanet.org/lrr/policies/committees/sexualorient/0803parentchildrelationships.pdf>