

Submission
No 222

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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Submission to Inquiry into Adoption by same-sex couples

Thank you for the opportunity to provide this submission belatedly and for the chance to appear to give testimony before the Inquiry.

My expertise

I am a Professor of Law at the University of Technology Sydney since 2007, and prior to that was Associate Professor of Law at the University of Sydney. I am an expert in family and relationship law, with a particular focus on non-traditional/non-genetic families. My research has made a distinctive and internationally recognised contribution to the development of critical scholarship on "functional family" and flexible interdependency principles for the recognition of non-traditional family forms. This work has had a significant impact on legal scholarship, broadening legal understandings of family laws and developing new approaches to relationship recognition in law.

My scholarship has been widely influential in the development of law and policy over the past decade. Internationally, my work on family and relationship law has been relied upon by bodies such as the *Law Commission of Canada*, the *New Zealand Law Commission*, the *Belgian Federal Parliament*, the *Law Commission of England and Wales*, and the *South African Law Reform Commission*. In the past decade, every state and federal law reform inquiry in Australia examining issues relating to the legal rights of same-sex couples and families has referred to and relied upon my work in developing their proposals. My "presumed parent" model to recognise the relationships of children with the second female parent in families formed through assisted reproduction was expressly endorsed by the NSW Law Reform Commission in its 2006 Report, *Relationships*, and my work was acknowledged in legislative debates implementing the report through the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). This model is now in place in Western Australia (2002), the Northern Territory (2003) the ACT (2004), NSW, Victoria and federal law (2008) and has been recommended by legislative committee in Tasmania (2004).

In 2006 I was commissioned by the Human Rights and Equal Opportunity Commission as an independent expert to assist with the development of relationship recognition models in federal law. I authored a Research Report which formed the basis of the *Same-Sex Same Entitlements Report* (2007) and provided the framework for the raft of federal legislative reforms which passed in late 2008. I was significantly involved, through the Senate inquiry process, with the re-definition of provisions concerning parent-child relationships, leading to the abandonment of the government's original category and incorporation into all federal law of the presumed parent model through the new s60H of the *Family Law Act 1975* (Cth). My

submissions and oral testimony were relied upon in parliamentary debate surrounding this change of definition. I was also responsible for developing the approach to the federal recognition of families formed through surrogacy implemented through the new s60HB of the *Family Law Act 1975* (Cth).

My research on family and relationship law has been relied upon extensively in judgments of the Family Court of Australia (eg *Re Patrick* (2002) 28 Fam LR 579; *Re Alex* (2004) 31 Fam LR 503; *H & J & D* (2006) 205 FLR 464; *Moore & Moore* [2008] FamCA 32), the Supreme Courts of Queensland (*QFG & GK v JM* [1997] QSC 206) and the ACT (*McKenzie v Storer* [2007] ACTSC 88), and the Administrative Appeals Tribunal (*Roll-over Relief Claimant and the Commissioner for Taxation* [2006] AATA 728).

My publications of most relevance to this inquiry are:

- 'The Role of Functional Family in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 155-182.
- 'The Recognition of Lesbian and Gay Families in Australian Law: Part 2 Children' (2006) 34 *Federal Law Review* 205-260.
- 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541-600.

My submission

In any discussion of adoption it is important to recall that eligibility to apply for adoption and adopting are very different things. Eligibility to apply for adoption enables willing couples to apply and be assessed according to current standards of suitability and *if* evaluated as suitable then matched with a compatible child *if* such a child is available for adoption and then an adoption is completed *if* the court determines such adoption to be in the child's best interests. In fact adoption is an increasingly rare family form in Australia. In my view the unavailability of adoption is a major 'driver' of surrogacy as a means of family formation for gay men in particular.

Excluding same sex couples from eligibility to apply to adopt is neither legitimate nor proportional. It targets a class of people based upon an irrelevant characteristic and discriminatorily excludes them from detailed evaluation and consideration as individual applicants. As I explain below, none of the reputable research emerging from academic institutions supports the view that having two parents of the same sex is in any way harmful to children's emotional and intellectual development or well-being.

If indeed the aim of the NSW legislation is to prevent same sex couples from parenting children, it is also:

1. *ineffective* - lesbians and gay men can, and do, apply to adopt as 'individuals' whether or not living in a same sex relationship with a partner who would also be raising the child, and most lesbian families in fact parent children born to one partner through assisted means; and
2. *inconsistent* - NSW law now recognises same sex couples as de facto relationships through various legislative amendments in 1999, 2000 and 2008 and most recently recognised both female parents parenting together through the *Status of Children Act 1996* (NSW). It is my understanding that DOCS

presently places foster children with same sex couples as do a number of other foster agencies.

Responses to the specific terms of reference follow below.

A. Whether adoption by same sex couples would further the objectives of the Adoption Act 2000

Yes it would do so by:

- broadening the pool of potential applicants able to be assessed on an individual basis to see whether they are capable of meeting the needs of the child in question,
- enabling children who are currently in the care of foster parents who are a same-sex couple the security of a permanent parent-child relationship with their primary caregivers
- enabling children who being raised by a same-sex couple in circumstances where there is only one legal parent but two social parents (eg a lesbian mother through assisted conception who was single at the time but formed a long term partnership shortly after the conception or birth) the security of a permanent parent-child relationship with a non-legal parent
- avoiding the hypocrisy of adoption orders to 'individual' gay and lesbian applicants who are members of, and will be parenting as part of, a couple.

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

Ontario was the first Canadian province to expand eligibility for adoption to same-sex couples as a result of the Constitutional equality challenge in *Re K* (1995) 23 Ontario Reports (3d) 679. Although the facts concerned second parent adoption claims, the ruling covered both unknown and second parent adoptions. All Canadian provinces now have equal access to apply for adoption.

Likewise in South Africa, a successful Constitutional challenge to enable second-parent adoption for a lesbian-led family means that adoption law is now non-discriminatory, see: *Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20; 2002 (10) BCLR 1006.

Individual lesbian and gay applicants have been granted adoption in the UK since the early 1990s, and same-sex couples have been eligible to adopt as couples due to 2002 legislative changes which became operative in 2005.

Second-parent adoption is available to same-sex parent families in around 30 US states, mostly as a result of judicial interpretation.

See

http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_11_08_color.pdf

The Grand Chamber of the European Court of Human Rights has recently declared that exclusion of a lesbian from eligibility to apply to be assessed as an adoptive parent is a breach of European Convention rights to equality, privacy and family life: *EB v France* (Application no. 43546/02)(January 22 2008). This will have a major

impact on those countries within the European Union which do not already permit same-sex couples and gay or lesbian individuals to apply to adopt.

C. Whether there is scope in existing programs for same sex couples to be able to adopt

There are small numbers of infants available to adopt domestically and most sending countries in inter-country adoption impose numerous restrictions (including, often, marital status). It is therefore not surprising that it took five years from the time of the changes to Western Australian law before a same-sex couple actually adopted an unrelated child. In my view the major impact of any change in eligibility will be in known child adoptions, particularly step-parent adoptions.

D. The implications of adoption by same sex couples for children

It is important to note at the outset that there is no body of reputable research which demonstrates that children have been harmed by virtue of being raised by lesbian or gay parents.

To the contrary there is a large and growing body of reputable research which finds that sexual orientation and parenting capacity are unrelated to health and well-being outcomes for children.

By 'reputable' I mean research that is engaged in by professionals qualified in their field of expertise (psychology, sociology etc), who are employed in universities or comparable independent scholarly institutions, published in high quality research outlets subject to peer review and scrutiny.

In my considered view, there is ample evidence to demonstrate the parental sexual orientation does not negatively impact upon children's well-being. I am not a child psychologist nor have I conducted any primary research into children's development and parental sexual orientation. I am, however, an experienced socio-legal researcher with a fair understanding of the principles of research methodology. In 2002 I was commissioned as an independent expert by the Gay and Lesbian Rights Lobby to undertake a summary of the available research. For that project, I read more than 50 and reviewed and summarised the findings of 30 of the studies that had been published in the preceding 15 years, as well as providing an overview of the known data on gay and lesbian family forms (whether through divorce, assisted conception and so on). The result was released by the GLRL as 'Meet the Parents'. In 2003 I updated and expanded on this foundation and linked the findings to current Australian legal and social policy debates; that article was published as 'From here to maternity'.

I note in particular that through the 1990s research methodology became increasingly rigorous in the published studies, for instance with: increased use of a wide range of appropriate control groups for comparison (eg comparing children of divorced lesbian mothers with children of divorced heterosexual mothers, rather than with children of mothers who had never married or were still in an in-tact family unit, and more recently comparing children born through assisted conception to lesbian parents with children born through assisted conception to heterosexual parents and also children born through regular conception to heterosexual parents), the use of standardised psychological instruments to assess factors (rather than relying upon parent's self reports alone), blind application of such instruments (where the person administering them does not know who the target population is, when assessing, for example, a mother's warmth of response), and attempts to make target populations

representative even when they could not be drawn from a random pool (so the range of age, socio-economic status etc of the various populations is roughly similar to each other and to the population at large).

The basic findings of this research are summarised below.

The reputable research

There is now a wealth of credible data that demonstrates lesbian and gay families are 'like' heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment. It is family *processes* and not family *structures* that are determinative of children's well being. The number of adults and the sex of the adults in a household has no significant bearing on children's well being – one adult or two, female or male, heterosexual or homosexual - whereas the happiness of the *relationship between adults* in the household, and the openness of warmth and communication *between the adult/s and the children* do have a major impact on the child. Children are not harmed, or disadvantaged, through being raised by lesbian mothers or gay fathers.

This research is accepted by all of the relevant professional organisations which have expertise in this field, such as the American Psychological Association, the Australian Psychological Association and the Australian Medical Association. It is also not disputed by any secular scholars in these or related fields.

In 2001 Judith Stacey and Timothy Biblarz undertook a meta analysis of 21 of the best studies that had been published prior to that date. Stacey is Professor of Sociology at New York University and the work was published in the leading US sociological journal.¹ The authors selected only studies that included a comparison group of heterosexual parents and children, assessed differences between groups in terms of statistical significance and included findings directly relevant to children's development. This is a highly readable and rigorous review of the body of research that existed to date and I recommend it to the committee.

Stacey and Biblarz confirm that there is no difference in children's psychological well-being, cognitive functioning, mental health and social adjustment, nor in parenting styles and investment with children based upon the parents sexual orientation.

However Stacey and Biblarz did take issue with the overall 'no difference' conclusion of earlier research. They argue rather children from lesbian and gay families,

do differ in modest and interesting ways...Most of these differences, however, are not causal, but are indirect effects of parental gender or selection effects associated with heterosexist social conditions under which lesbigay-parent families currently live.²

¹ Judith Stacey and Timothy Biblarz, "(How) Does the Sexual Orientation of Parents Matter?" (2001) 66 *American Sociological Review* 159.

² *Ibid* at 176.

In particular, they note that some studies found that children from lesbian-mother households are more open to non-traditional gender roles, and as adolescents and adults may be more open to considering same-sex attractions (although they were no more likely than the children of heterosexual parents to identify as lesbian, bisexual or gay.) While writers such as Lynn Wardle (discussed below) conclude from such findings that children *are* harmed, because, inter alia, they are less likely to express an ambition to marry, less likely to live gender-stereotyped lives, and more likely to have pre-marital sex, this is clearly a value judgment based upon the author's own view of what the world, and the families in it, ought to be. It is not, on any objective measure, evidence of *harm*, only of some fairly modest *difference*. Stacey and Biblarz conclude that:

Most of the differences in the findings ...cannot be considered deficits from any legitimate public policy perspective. They either favour the children with lesbian/gay parents, are secondary effects of social prejudice, or represent 'just a difference' of the sort democratic societies should respect and protect.³

Since Stacey's review was published there have been a number of other research studies published, with increasing attention to comparator groups and sampling rigour. Other more recent reviews have also been undertaken, for example by the Victorian Law Reform Commission in its exhaustive 5 year inquiry into Adoption, Surrogacy and Assisted Conception.

In the US see the work of Professor Charlotte Patterson (and colleagues) from the University of Virginia, most recently:

- Telingator, Patterson, Jellinek and Henderson, 'Children and Adolescents of Lesbian and Gay Parents' (2008) 47(12) *Journal of the American Academy of Child and Adolescent Psychiatry* 1364.
- Wainright and Patterson, 'Peer Relations Among Adolescents with Female Same-Sex Parents' (2008) 44(1) *Developmental Psychology* 117.

In the UK see the work of Professor Susan Golombok (and colleagues) from Cambridge University, most recently:

- MacCallum and Golombok, 'Children raised in fatherless families from infancy: A follow-up of children of lesbian and single heterosexual mothers at early adolescence' (2004) 45(8) *Journal of Child Psychology and Psychiatry* 1407.
- Golombok, Perry, Burston, Murray, Mooney-Somers, Stevens and Golding, 'Children with lesbian parents: a community study' (2003) 39(1) *Developmental Psychology* 20.

The dissenters

The only individuals and bodies who have continued to argue that this body of research is flawed or should not be accepted are those motivated by strong anti-gay and lesbian sentiment, and are often associated with extreme religious splinter groups. Vocal in the US, for example, are Joseph Nicolosi, Paul Cameron and Lynn

³ Stacey and Biblarz at 177.

Wardle and others associated with Christian think-tanks such as the 'Marriage Institute'. It is relevant to highlight these figures because Australian organisations such as the Australian Family Association, Festival of Light and Salt Shakers have relied heavily upon their work in previous submissions to policy and legal inquiries.

Nicolosi is a major advocate of 'reorientation therapy and the prevention of homosexuality' and is closely associated with Exodus, an American group which aims to convert lesbians and gay men to heterosexuality. The motto of Exodus is, 'Freedom from homosexuality through the power of Jesus Christ' (see <http://www.exodus-international.org/>). Nicolosi formed the National Association for Research and Therapy of Homosexuality (NARTH) an inter-faith homosexual-conversion organisation: see <http://www.narth.com> (accessed 10 February 2009).

Cameron's views on the correlation between homosexuality and crimes such as murder and paedophilia have been published widely in the US and he is equally widely discredited there. In the 1980s, Cameron was expelled by both the American Psychological Association and the American Sociological Association for unethical and misleading research practices. In the US judicial system Cameron's views were discredited many years ago in: *Baker v Wade* 106 FRD 526 (1985) and *Gay Student Services v Texas A & M University*, 737 F2d 1317, 1330 (5th Cir 1984).

Lynn Wardle is a Professor at Brigham Young, a Mormon university in the US. While himself a scholar, Wardle relies heavily upon Cameron's work as support for his claims that the children of lesbians and gay men are at 'heightened risk' of 'being drawn into homosexual behaviour themselves', that lesbians and gay men die younger than heterosexuals, are exposing their children to 'some serious risk factors' including sexual molestation because of their 'sexual irresponsibility': Lynn Wardle, 'The Potential Impact of Homosexual Parenting on Children' (1997) *University of Illinois Law Review* 833, at 852, 865, 866.

The most common argument raised by those who critique the existing body of research is *not* that there is any convincing evidence that children are harmed by same sex parents, rather they argue that there is *insufficient evidence* that they are not harmed. Wardle for example argues that studies through to the mid-1990s were methodologically flawed because of small sample sizes, lack of comparator groups and self-select methodology.⁴

In a lengthy refutation of Wardle's arguments, Carlos Ball and Janice Pea point out that researchers in the area have in fact been very mindful of the methodological limits of their work and modest about their assertions.⁵ Carlos and Pea point out that random sampling is not a viable research method in family dynamic and child development research. It is notable that in the past decade far more studies have included appropriate comparator groups. Sample sizes have increased, as has the ability to draw meaningful comparisons through meta-analysis of several studies, and the ability to undertake longitudinal analysis.

⁴ Lynn Wardle, "The Potential Impact of Homosexual Parenting on Children" (1997) *University of Illinois Law Review* 833.

⁵ Carlos Ball and Janice Pea, "Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents" (1998) *University of Illinois Law Review* 253.

Yet even *if* the research could be considered methodologically flawed or inconclusive, as some critics contend, it is an inappropriate legal policy approach to *assume* that any class of people are harmful to children or deficient parents in the absence of clear evidence. There is no such evidence in 30 years of research.

Alternately, some argue that 'father absence' is likely to cause harm to children raised in lesbian-led families. It is well documented that in Australia and elsewhere, American literature on 'father absence' has been much misused. Louise Silverstein and Carl Auerbach argue concisely that much literature on 'father absence' represents an essentialist view of fathers and a 'dramatic oversimplification of the complex relations between father presence and social problems'.⁶ They make the point that studies positing the detrimental effects of 'father-absence' are in fact explicable as a direct result of maternal poverty. When poverty is controlled for in studies there is no demonstrable difference in the well being of children in father-present and father-absent families.⁷

E. What legislative changes are required

The definition of de facto relationship in the legislation should be replaced with a modern gender-neutral definition drawn, for example, from the *Property (Relationships) Act 1999* (NSW) or from the newly amended *Family Law Act 1975* (Cth).

The existing provision on step-parent adoption is premised on the understanding that granting parental status to the 'new' social parent involves severing parental status from an existing biological parent, which current social policy opposes unless there are extreme circumstances. A separate provision for step-parent adoption should be inserted into the Act for situations where the child has only one legal parent. This new provision should not include the current onus which weighs against making the order.

Yours sincerely,

Jenni Millbank

⁶ Louise Silverstein and Carl Auerbach, "Deconstructing the Essential Father" (1999) 54 *American Psychologist* 397.

⁷ These arguments are also made forcefully by many others: see eg Stacey and Biblarz, Susan Golombok, Fiona Tasker and Clare Murray, "Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology, and Psychiatry and Allied Disciplines* 783..