

Submission  
No 163

## INQUIRY INTO ADOPTION BY SAME SEX COUPLES

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## Council of Social Service of New South Wales

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12 February 2009

Standing Committee on Law and Justice  
Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

[lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Sir or Madam,

The Council of Social Service of NSW (NCOSS) would like to thank you for the opportunity to make a submission to the Standing Committee on Law and Justice Inquiry into adoption by same-sex couples.

NCOSS is an independent non-government organisation (NGO) and is the peak body for the non-government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales. It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

In our submission we argue that while a person in a same-sex relationship may be able to adopt a child as a single person the Adoption Act 2000 still discriminates against same-sex couples in not being able to adopt the child of their partner or in being able to jointly adopt another child.

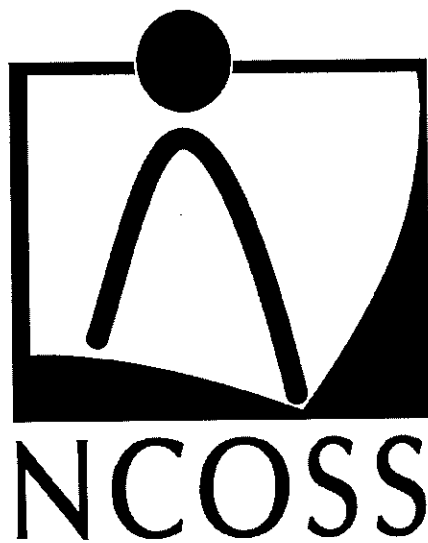
NCOSS believes that it is time for the Adoption Act 2000 to be updated and include same-sex couples as other pieces of legislation in NSW already do.

If you would like any further information please contact Samantha Edmonds, Deputy Director Policy and Communications on (02) 9211 2599 ext 111 or [samantha@ncoss.org.au](mailto:samantha@ncoss.org.au)

Yours Sincerely

Alison Peters  
Director

**Submission to the Standing Committee on Law and  
Justice  
Inquiry into adoption by same-sex couples**



**February 2009**

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## 1. About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation (NGO) and is the peak body for the non-government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals.

Member organisations are diverse; including unfunded self-help groups, children's services, youth services, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, peak organisations and a range of population-specific consumer advocacy agencies.

## 2. Introduction

On the 28 June 1999, the *Property (Relationships) Legislation Amendment Act 1999* came into force in NSW. It amended the *De Facto Relationships Act 1984*, which was renamed the *Property (Relationships) Act 1984* (PRA) by broadening the range of relationships covered to include 'domestic relationships'. A domestic relationship is a 'de-facto relationship' or '*a close personal relationship (other than a marriage or 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*'.<sup>1</sup>

While the key point of the PRA was to provide a framework for the division of property for same-sex de facto couples and others in a 'close personal relationship' it also amended 21 other pieces of NSW legislation. These amendments extended the rights and obligations that de facto opposite-sex couples have to people in same-sex de facto relationships in areas such as inheritance, compensation and stamp duty (to name a few).

On the 1 November 2002, the *Miscellaneous Acts Amendment (Relationships) Act 2002* commenced. It made a slight amendment to the *Adoption Act 2000* (Adoption Act) allowing the release of adoption information concerning a deceased person to their spouse or de facto spouse by extending the definition of spouse to include a same-sex de facto spouse.<sup>2</sup>

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<sup>1</sup> *Property (Relationships) Act 1984*, S5.

<sup>2</sup> *Miscellaneous Acts Amendment (Relationships) Act 2002*, S37(6): 'spouse of a deceased person includes a person with whom the deceased had a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) at the time of his or her death'.

However, there was no extension of the PRA to cover other areas of the Adoption Act 2000.

The result is that same-sex couples are not able to jointly adopt children. While a person in a same-sex relationship may be able to adopt a child as a single person the Adoption Act still discriminates against same-sex couples in not being able to adopt the child of their partner or in being able to jointly adopt another child.

There are increasing numbers of same-sex couples who have children and who want to have children in the future. Gay couples are using surrogacy to enable them to have children and lesbian couples are seeking assisted or self insemination. This means that there will be an increasing number of families where the same-sex partner will want to be recognised as their child's parent through adoption. And, as with opposite-sex couples, there will be same-sex couples who are unable to have children and who will want to adopt a child as a couple.

NCOSS believes that it is time for the Adoption Act 2000 to be updated and include same-sex couples as other pieces of legislation in NSW already do.

### **3. Terms of Reference**

#### **3.1 *Ascertaining whether adoption by same-sex couples would further the objectives of the Adoption Act 2000***

The objects of the Adoption Act are very clearly stated in section 7 of the Act. We have made a brief response below each object on how adoption by same-sex couples will further the objectives of the Adoption Act (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,***
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage,***

Currently the definition of a 'de facto' partner in the Act excludes same-sex couples. It means that same-sex partners cannot adopt the children of their partner. This means that the best interests of children in same-sex parent families are not being met as their relationship with their non-biological parent cannot be legally recognised.

Further preventing same-sex couples from being able to adopt children in general seems ridiculous in light of the widespread number of same-sex couples who are foster parents.<sup>3</sup> If same-sex couples are able to provide short-term support and care, and a balanced family life,

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<sup>3</sup> NSW Gay and Lesbian Rights Lobby, *Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, 2006.

for foster children, then there is no reason to deny them this same right in regards to an adopted child. The only difference being that this will be for the whole of the child's life.

***(d) to recognise the changing nature of practices of adoption,***

Internationally there are an increasing number of countries that allow the adoption of children by same-sex couples. These include Canada, United Kingdom, Belgium, Germany and Ireland (to name a few). This is discussed further under 3.2 below.

In Australia, the ACT, Western Australia and Tasmania allow adoption by same-sex couples. In Victoria, at the time of writing this submission, the adoption of children by same-sex couples is still undecided. Queensland, the Northern Territory and South Australia still discriminate against same-sex couples under their adoption laws.

Therefore both internationally and within Australia changes to adoption practices are occurring and NSW should change the Adoption Act accordingly.

***(e) to ensure that equivalent safeguards and standards to those that apply to children from New South Wales apply to children adopted from overseas,***

Enabling same-sex couples to adopt would not change this object.

***(f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,***

Australia is a State Party to the Convention on the Rights of the Child (CRoC). There are four key principles that underlie the CRoC, these are:

1. 'The best interests of the child shall be a primary consideration' in all actions concerning that child.<sup>4</sup>
2. That 'every child has the inherent right to life' as well as survival and development.<sup>5</sup>
3. Children have a right to express their own views and that these should be taken into account in all matters that affect them.<sup>6</sup>

The fourth key principle of the CRoC is that of non-discrimination. It states in Article 2:

*'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.*

As the Public Interest Advocacy Centre (PIAC) notes:

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<sup>4</sup> *Convention on the Rights of the Child*, Article 3(1).

<sup>5</sup> *Convention on the Rights of the Child*, Article 6(1)(2).

<sup>6</sup> *Convention on the Rights of the Child*, Articles 13,14,15,16,17.

*The Committee on the Rights of the Child has stated that in 'considering the family environment', it should reflect 'different family structures arising from various cultural patterns and emerging family relationships'. The Human Rights Committee has found that 'the concept of the family may differ in some respects from state to state, and even from region to region within a state, and it is therefore not possible to give the concept a standard definition'.<sup>7</sup>*

Therefore it could be argued that by preventing a same-sex partner from adopting the child of their partner, the rights of the child are being breached as their family is being discriminated against on the basis of the sex of their parents.

It could also be argued that preventing same-sex couples from adopting as a couple also impacts on the rights of the child in that the child's choices are being limited to only opposite-sex couples. As the Adoption Act states '*if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances*'.<sup>8</sup>

**(g) to encourage openness in adoption,**

**(h) to allow access to certain information relating to adoptions,**

**(i) to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.**

Enabling same-sex couples to adopt would not change these objects.

### **3.2 The experience in other Australian and overseas jurisdictions that allow the adoption of children by same-sex couples**

NCOSS is unable to comment fully on this TOR – there are other organisations that have far greater knowledge of these issues.

However we do note that:

- (a) The Supreme Court of Canada has held that the Canadian Charter of Human Rights prohibits discrimination against a person on the basis of their sexual orientation and that Canadian federal and provincial anti-discrimination law now prohibits discrimination on the basis of sexual orientation. In Ontario the *Child and Family Services Act 1990* was modified by the Ontario Court so that the definition of 'spouse' also included same-sex couples. Same-sex couples may also jointly apply to adopt in the provinces of Quebec, British Columbia, Ontario and Saskatchewan.<sup>9</sup>
- (b) In the United States adoption by same-sex couples varies from state to state.

<sup>7</sup> PIAC, *Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, 26 June 2006.

<sup>8</sup> *Adoption Act 2000*, S8(d).

<sup>9</sup> Tanya Canny, *Same Sex Couple Adoption: The Situation in Canada and Australia*, Law and Bills Digest Group, Research Note 29 1999-2000, Parliament of Australia, 11 April 2000.

- (c) In the European Union Belgium, Germany, Netherlands, Ireland, Norway, Spain, Sweden, Spain and the United Kingdom all allow same-sex couples to either adopt as a couple or a same-sex partner may adopt their partner's child. Denmark and France allow a same-sex partner to adopt their partner's child but do not allow adoption by same-sex couples.

### **3.3 Whether there is scope within the existing programs (local and international) for same-sex couples to be able to adopt**

As with the above TOR there are other organisations that can provide more detailed information in response to this question.

However, NCOSS would argue that using an argument of whether or not there are enough children available for adoption to determine whether or not same-sex couples should be able to adopt, is not in line with the objects of the Adoption Act. This argument views the child as a commodity waiting to be given rather than looking at what is in the best interests of the child or who is best placed to meet the child's needs. The Adoption Act specifically states 'adoption is to be regarded as a service for the child'.<sup>10</sup>

This argument, based on the number of children available, implies that there are not enough children and therefore only opposite-sex couples should be able to adopt, regardless of whether or not they are suitable. Same-sex couples being able to adopt will provide a wider range of potentially eligible (and culturally appropriate) parents for the child.

Rather than focusing on whether or not there are enough children available for adoption the focus should be on whether or not the adoptive couple (same-sex or opposite-sex) is able to provide the child with a permanent, loving, supportive and nurturing environment. It is the quality of the relationship between the couple and the potential child that is important not what sex each partner is.

As the NSW Law Reform Commission note in their Review of the *Adoption of Children Act 1965*:

*'any assessment should ensure that unfair or unjustified assumptions are not made about the relevance of applicants' sexual orientation and their suitability as adoptive parents. The assessment should focus on the ability of the applicants to meet the parenting needs of children and the needs of the particular child. Submissions also raised the birth parents' wishes as to the type of adoptive parent for their child as a significant factor in placing a child'.<sup>11</sup>*

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<sup>10</sup> *Adoption Act 2000*, S8(b).

<sup>11</sup> NSW Law Reform Commission, Report 81 (1997) - *Review of the Adoption of Children Act 1965 (NSW)*



### **3.4 Examining the implications of adoption by same-sex couples for children**

Within NSW the relationship between a non-biological parent within a same-sex relationship and their children is not legally recognised. This has a negative impact on both the child and the family in areas such as being able to have parental authority (for medical or school issues) if the biological parent is unable to assist and not being able to claim child support, or arrange contact visits if the relationship ends. If a same-sex parent is able to adopt the child of their partner many of these issues would be addressed.

As noted above many same-sex couples are having and raising children. As with opposite-sex couples there are the usual trials and tribulations faced by families as children grow up. However, for children of same-sex couples there is additional stress caused by the discrimination faced by their parents. If same-sex couples are able to adopt the child of their partner and this was recognised in law, much of this pressure would be removed.

It should also be noted that the implications of adoption for children would be that there is a larger pool of couples wanting to support and care for them.

### **3.5 If adoption by same-sex couples will promote the welfare of children, then examining what legislative changes are required**

Under the *Adoption Act* 2000 people in same-sex relationships are not able to jointly adopt, and the partner of a biological parent is not able to be legally recognised as a step-parent where they take on that parental role. This is due to the definition of a couple contained within the *Adoption Act*, which is limited to 'a man and a woman' who are either married or in a de facto relationship.

Therefore the Act needs to be amended so that same-sex relationships are included within the definitions of who is eligible to adopt.

## **4. Recommendations**

NCOSS recommends that

1. The *Adoption Act* should permit an adoption order to be made in favour of same-sex couples
2. The *Adoption Act* should enable a same-sex partner to adopt the child of their partner
3. The Government should consult with relevant Gay and Lesbian advocacy groups and legal organisations as to the best wording for the *Adoption Act* i.e. whether to use the language of the *Property (Relationships) Act 1984* or different definitions.
4. That the Standing Committee refer to the Australian Human Rights Commission website on the Same-Sex: Same Entitlements Inquiry that was held in 2006, for further information about adoption and parenting issues for same-sex couples - [http://www.humanrights.gov.au/human\\_rights/samesex/index.html](http://www.humanrights.gov.au/human_rights/samesex/index.html)