Position Paper on Adoption Law Reform

March 2013
Introduction

What is adoption?

Adoption is the legal process which permanently transfers all the legal rights and responsibilities of parenthood from the child's birth parents to the adoptive parents. The parent-child relationship dictates who has the authority to make decisions regarding the child's welfare, such as education and medical procedures and also has important ramifications in relation to inheritance.

The Adoption Act 1988 (the Act) sets out the processes and requirements for adoptions in Tasmania. No person has an automatic right or entitlement to adopt a child. If an individual or couple is seeking to adopt a child, they must undergo rigorous tests and meet stringent criteria. Throughout the adoption application process, the welfare and interests of the child are regarded at all times as the paramount consideration (Adoption Act 1988, Section 8).

The Department of Health and Human Services (DHHS) is responsible for the provision of adoption services in Tasmania, sharing responsibility for local adoptions with one approved agency, the Catholic Private Adoptions Agency (Centacare). DHHS is the only agency that may arrange inter-country adoption placements and step-parent and relative adoptions.

Local adoption refers to Tasmanian children who are adopted within Tasmania. Such adoptions are referred to as either ‘known’ or ‘unknown’. In ‘unknown’ adoptions the child has been relinquished by his or her birth parents and is available for adoption by suitable applicants. ‘Known’ adoptions are where a child has an existing relationship with their prospective adoptive parents, such as relatives, step-parents or other carers. Inter-country adoptions involve non-Australian citizen children entering Australia for the purposes of adoption through an established inter-country adoption program.

Who may adopt?

The Act currently provides that only persons who are married may adopt an unknown child, whether local or inter-country.

The Act also provides that couples – either heterosexual or same-sex – who are in a registered significant relationship under the Relationships Act 2003 may adopt a known child, that is, a relative or step-child. The Act was amended in 2003 in conjunction with the passage of the Relationships Act to allow same-sex couples to adopt a known child, who would usually be a child of one of the partners to the relationship.
**Why are these changes being made?**

As currently drafted, the *Adoption Act 1988* prevents a couple who are in a significant relationship from having an adoption order made in their favour, unless the child has a pre-existing familial relationship with one or both of the people in the relationship. This means that unmarried couples who have a registered significant relationship are treated less favourably than married couples.

The rights to non-discrimination and equality before the law are human rights protected under international human rights law, including Article 26 of the *International Covenant on Civil and Political Rights*.

Tasmania’s *Anti-Discrimination Act 1998* provides that it is unlawful to discriminate on the grounds of sexual orientation, marital status and/or relationship status.

Amendments to the Act have now been drafted.

The proposed amendments will provide the Court with the authority to make an adoption order in favour of a couple who have a significant relationship registered under the *Relationships Act 2003* to adopt an unknown child. The Bill also substitutes a new Section 20(3) to rectify an unrelated drafting issue, in relation to persons for whom adoption orders cannot be made.

The effect of these amendments will be that, for the first time in Tasmania, both opposite sex and same-sex couples with a significant relationship registered under the *Relationships Act 2003* will be able to have their eligibility to adopt an unknown child assessed.

The amendments to the Act will not alter the obligation under international law to consider the best interests of the child in assessing adoption requests. Article 3(1) of the *Convention on the Rights of the Child* provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In addition, Article 21 of the *Convention on the Rights of the Child* requires countries that permit adoption to make sure that the best interests of the child are the ‘paramount consideration’ in the process.

The *Convention on the Rights of the Child* does not prescribe a particular family structure. It adopts a broad and flexible definition of “family” considering cultural patterns and emerging familial relationships.

At 27 February 2013, there were 329 registered significant relationships in Tasmania. Of these relationships, 163 were couples of opposite sex, and 166 were same-sex couples.
2012 consultations on the changes to the Act

A targeted consultation on the changes to the Act was undertaken by DHHS during February and March 2012. Letters were sent to 18 organisations, inviting comments on the proposed changes to the Adoption Act. The letters were sent to:

- Adoption support groups
- The Tasmania Law Reform Institute
- Gay and lesbian rights groups
- Religious organisations
- The Commissioner for Children
- The Social Inclusion Commissioner
- The Office of the Ombudsman and Health Complaints Commissioner and
- The Anti-Discrimination Commissioner.

More than 100 responses were received.

Outcomes of consultations

Responses to the consultation indicated that there are very strongly held views within the Tasmanian community on this issue.

A number of consistent themes were apparent from the responses provided by community members who expressed opposition to the changes to the Act:

- A child needs both a mother and a father.
- A same-sex couple would be unable to serve the complex needs of a child as well as a heterosexual couple. Men and women routinely think and act differently and can therefore complement each other’s capacities.
- There are many couples who are unable to have a child, and so the only way is to adopt or use surrogacy. Heterosexual couples should not have their priority for adoption lowered due to same-sex couples’ demands.
- Consider what is in the best interests of the child, not what is best for those who are wanting to adopt. Adoption is a service for children, not adults.
- A child should be given every opportunity to be raised by a mum and a dad because the overwhelming evidence proves that provides the best possible environment in which to grow up.

These themes have changed little since changes to allow same-sex adoptions were first recommended by the Tasmania Law Reform Institute in 2003.
A number of consistent themes were also apparent from the responses provided by community members who expressed support for the changes to the Act:

- Decisions on adoption applications should continue to be based on the best interests of the child.
- The amendments will provide more consistency and reduce discrimination against couples in registered significant relationships.
- Laws including adoption law should be based on principles of social justice, fairness, respect, and non-judgemental approaches.
- Changes should be made to remove discriminatory practices and unfair processes within our community.
- Couples in registered significant relationships are currently being denied access to the adoption process on an unfair or discriminatory basis.

The themes that came out of the 2012 consultations on the changes to the Act also reflect those which were apparent in key formal inquiries held in Tasmania and New South Wales into the issue of same-sex adoptions. The next section contains a summary of the Tasmania Law Reform Institute Report (2003) and the Report of the NSW Standing Committee on Law and Justice (2009).

**Formal Reports and Inquiries into Same-Sex Adoption**

**Tasmania Law Reform Institute Report – Adoption by Same Sex Couples (2003)**

In 2002, the Tasmanian Attorney-General requested that the Tasmania Law Reform Institute (TLRI) undertake a project on same-sex adoptions.

Following a broad community consultation and careful consideration of the issues, the TLRI recommended that the Act be amended to permit a couple to apply for adoption regardless of the gender or marital status of the partners making up the couple.

The TLRI Report found that:

- The reforms would be in the best interests of children.
- Continuing to deny same-sex couples eligibility to adopt was unjustified, and unfairly discriminated against same-sex couples.
- Discrimination on the grounds of sexual orientation is prohibited by the International Covenant on Civil and Political rights.
- In Tasmania, the *Anti-Discrimination Act 1988* prohibits discrimination on the basis of sexual orientation, race, sex or religion.
- So both international human rights standards and our domestic laws require Tasmania to eliminate discrimination on grounds of sexual orientation from our statutes.

In its report, the TLRI noted that those opposing change relied on nine main points:

- That homosexuality is wrong and unnatural;
• Same-sex adoption would be detrimental to society and to marriage;
• And for that reason unconstitutional and contrary to international law;
• That same-sex adoption is not in the best interests of children;
• That social science studies cited in support are flawed and prove nothing or that they were selectively sighted and interpreted;
• That denying same-sex couples eligibility to adopt is not discriminatory;
• That there is no need for reform;
• That such a change lacks public support; and
• That such a change would have adverse effects on the adoption process.

The TLRI Report addressed each of these arguments in detail, and found that none had merit. The TLRI recommended that the law should be changed to allow same-sex couples to be assessed as applicants for adoption.


New South Wales Standing Committee on Law and Justice Report – Adoption by Same-Sex Couples (2009)

The New South Wales inquiry examined a range of issues associated with whether same-sex couples should be able to adopt both ‘unknown’ children and children who are already ‘known’ to gay and lesbian people through existing foster care, step-parent and second parent relationships.

A majority of the Committee found that:

• An adoptive child’s best interests are determined in the context of an assessment of the individual child’s needs and the individual prospective parents’ capacity to meet those needs.

• Same-sex parents should be able to be assessed on exactly the same basis as other prospective parents.

• If legally eligible to adopt, gay and lesbian people would, like all prospective parents, be subject to a rigorous assessment process by accredited adoption agencies to determine their suitability to adopt. They would also be subject to the preferences of relinquishing parents, and they must ultimately satisfy a court that they could first field the best interests of the child concerned.

• The best interests of the child would be served by reform to allow adoption by same-sex couples. In particular, it was highly desirable to broaden the pool of adoptive parents in order to increase the likelihood of the best match between an individual child and a prospective parent.
• Removing discrimination from the New South Wales Adoption Act would promote equality and send an important message to broader society about the positive contributions and capacities of gay and lesbian parents.

The Committee also agreed that an exemption from the new provisions should be made available to faith-based adoption agencies, to allow these agencies to continue their work in facilitating adoptions in New South Wales. The Committee concluded that, as a matter of policy, faith-based adoption agencies should be exempt from discrimination law in relation to providing same-sex couples with adoption services.

A full copy of the New South Wales Standing Committee's Report is available at: