

**SUBMISSION NO. 150**

AUTHORISED: 1-06-05 *Adelle*

**Submission**

on the

**Adoption of Children from Overseas**

to the

**Standing Committee on Family and Human Services**

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## **1. Introduction**

*'The best interests of the child will be their basic concern.'*<sup>1</sup>

Appearing at the end of Article 18(1) of the *Convention on the Rights of the Child*, which Australia ratified on 17 December 1990, this phrase summarises the care which parties to the Convention need to take when dealing with children.

On 16 February 2005, the Family and Human Services Committee resolved to conduct an inquiry into adoption of children from other countries, with the following terms of reference:

*The Committee shall inquire into and report on how the Australian Government can better assist Australians who are adopting or have adopted children from overseas countries (intercountry placement adoptions) with particular reference to:*

*1. Any inconsistencies between state and territory approval processes for overseas adoptions; and*

*2. Any inconsistencies between the benefits and entitlements provided to families with their own birth children and those provided to families who have adopted children from overseas.*

Festival of Light Australia is committed to promoting the care of children and maintaining the family unit as the best environment for raising children, and therefore the best interests of the child. We are therefore pleased to make a submission in relation to the terms of reference.

## **2. Inconsistencies Between State and Territory Approval for Adoption**

Adoption is the process by which a child's legal relationship with its natural parents is extinguished and replaced with a relationship with other adult(s) who are henceforth regarded as the child's parents. Adoption has always been a matter of state and territory law, with the first Australian adoption statutes enacted between 1896 in Western Australia and 1938 in the Australian Capital Territory. There was a move towards uniformity among the jurisdictions in the mid-1960s, but amendments since the early 1980s have resulted in significant inconsistencies in state and territory adoption law. Particularly there is a variety of inconsistent requirements for becoming a prospective adoptive parent.

### **2.1 Adoption by Homosexuals**

The Australian Capital Territory limits adoption to couples who have been in a domestic relationship for at least three years,<sup>2</sup> but a 'domestic relationship' is defined to include homosexual couples.<sup>3</sup> Tasmania also allows adoption by any couple who are married or are parties to a significant relationship, if that relationship is registered by deed.<sup>4</sup> Both of these approaches allow homosexual couples to adopt children, and Tasmania also allows individuals to adopt a child in special circumstances.<sup>5</sup>

Western Australia is more open to individuals adopting children, as the only limitation is an individual who wishes to adopt must be usually resident in the state.<sup>6</sup> A couple wishing to adopt a child in Western Australia must have been married, or in a continuous de facto relationship,<sup>7</sup> for at least three years.<sup>8</sup> This legislative approach allows both individuals and homosexual couples to adopt children.

### **2.2 De Facto Spouses**

Some jurisdictions do not allow homosexual couples to adopt, however they do allow de facto couples to adopt children. For example, an adult resident of New South Wales can adopt a child if they are 18

years older than the child to be adopted.<sup>9</sup> A couple wishing to adopt a child must fulfil these conditions, and also have lived together for at least three years.<sup>10</sup>

In order for a couple to adopt in South Australia, they must have been married or in a de facto relationship for at least five years,<sup>11</sup> but this requirement can be waived if the court determines that special circumstances justify making the order.<sup>12</sup> Victoria allows adoption by a couple who are married, are in an Aboriginal traditional relationship, or are in a de facto relationship.<sup>13</sup> A prospective adoptive couple must have been married or cohabiting for at least two years, or lived in a combination of these relationships for a total of at least two years.<sup>14</sup>

### **2.3 Marriage Only**

Queensland allows an order for adoption to be made only jointly in favour of a husband and wife,<sup>15</sup> and excludes de facto spouses from the operation of the *Adoption of Children Act 1964* (Qld), preventing them from adopting children.<sup>16</sup> By excluding de facto spouses and homosexuals from adopting children, Queensland maintains the privileged status of marriage.

The Northern Territory also requires a couple wishing to adopt a child to be married, but it also accepts a couple in a recognised Aboriginal traditional marriage for at least two years.<sup>17</sup> The Northern Territory does allow adoption by an individual, but only when the child is under the guardianship of the Minister, and exceptional circumstances make it desirable to do so.<sup>18</sup>

## **3. The Best Interests of the Child**

If the best interests of the child are the guiding principle for decisions regarding the life of the child, then consideration must be given to what environment best suits an adopted child's physical, mental and social development. These interests are best served by requiring those who adopt children to be a man and a woman and by requiring the adopting couple to be married.

### **3.1 Mothers and Fathers**

The best context for the healthy development of a child is the in the setting of a two parent family,<sup>19</sup> but children also require a mother and father. Some studies have claimed homosexual parenting is not harmful to children, but many of these have been found to suffer from methodological inconsistencies, making them unreliable.<sup>20</sup>

A review of studies which generally favour homosexual parenting has revealed even these studies show a higher incidence of harm to children in the form of suicidal behaviour, promiscuity, anxiety, sadness, hostility and defensiveness.<sup>21</sup> Children need a mother and a father.

#### **3.1.1 Need for a Mother**

Although most single parent families have the mother as the parent,<sup>22</sup> studies of children who have spent a large amount of time in child care reveal the hazards of separating a child from his or her mother. When an infant is placed in daycare for more than twenty hours a week, they are more likely to lack a secure attachment to their mother, and are more likely to be uncooperative, less popular, have poorer grades and study skills, and have lower self-esteem.<sup>23</sup>

But the poorer development of children who spend a lot of time away from their mothers cannot be explained away by the lack of personal attention in daycare centres. A study of affluent families which compared children who were cared for by the mother and children who were cared for by an employed full time caregiver determined the latter group was more likely to have the same insecure relationship with their mothers.<sup>24</sup>

The effects of the absence of a mother are apparent not only in relation to infants, but also in relation to young children. A study found a higher incidence of hitting, kicking, threatening and arguing among those children between the ages of five and eight who had spent more time in daycare.<sup>25</sup> While children can spend more time away from their mother as they age, being confident in the mother's availability, responsiveness and helpfulness promotes the development of a secure attachment which can positively affect the child as they become an adolescent, young adult and parent.<sup>26</sup>

### **3.1.2 Need for a Father**

The father has an important position in the family, which is illustrated by the damage which results from his absence. The bulk of single parent families have an absent father, and children from such a home, on average, obtain fewer years of education, are more likely to commit delinquent acts, engage in drug and alcohol abuse and have a lower socio-economic status.<sup>27</sup> Criminal activity is higher in a community where the father is generally absent, regardless of the level of poverty in that community.<sup>28</sup>

In Australia, a study concluded children with regular contact with their father were more cooperative and self-reliant in school, and more paternal contact is generally linked with better achievement in the first year of school.<sup>29</sup> A girl who has a good relationship with her father is also less likely to have difficulty relating to men in later life.<sup>30</sup>

In terms of mental health, a study of preschool children admitted to hospitals in New Orleans as psychiatric patients over a period of approximately three years concluded nearly 80 per cent came from fatherless homes. A study on admissions of teenagers to psychiatric hospital determined only 16 per cent were living with both parents when they were admitted.

## **3.2 Marriage**

In order to create the best environment for raising a child, there must be both a mother and a father, but the optimum environment is where the man and woman are married. Marriage provides the best environment for raising children for two reasons. Those reasons are, firstly, the best environment for the healthy development of children is in a heterosexual two parent family,<sup>31</sup> and secondly marriage is a more stable relationship which is less likely to dissolve and place the child in the care of a single parent.

### **3.2.1 Best Environment for Raising Children**

In his 1996 paper, *Children in three contexts*, Dr Sotirios Sarantakos explored the relationship between family environment and behaviour of primary school children living in three family contexts: married, cohabiting heterosexual and homosexual.<sup>32</sup> Sarantakos asked teachers to rate the language, mathematical, social studies and sports performance of the children, as well as socialisation, learning attitudes and parental support. The children were also interviewed about parental methods of discipline and the degree of freedom the children were allowed in the home.

The major finding of the study was that family type made a significant difference to the children's school achievements. Children with married biological parents scored best of the three groups in language, mathematics and sport, and the children of homosexuals scored lowest.<sup>33</sup> While class behaviour of all children rated well, more children of homosexuals were reported to be timid and reserved, unwilling to work in a team or talk about home life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with." The socialisation scores for the three groups again showed children of married couples were outperforming the other groups, with the children of homosexual parents again falling last.

Ratings of parent-school relationships and parental support of homework saw married couples have the highest rating and homosexual couples have the lowest rating. The study also discovered that children of married couples had greater parental expectations in relation to finishing school while children of

cohabiting couples and homosexual couples had a higher incidence of wanting leave school, get a job and quickly establish themselves as independent.

Another area reported as a problem was sexual identity, as children of homosexuals were described as more expressive, more effeminate (irrespective of gender) and “more confused about their gender” than children of heterosexual couples. Sarantakos discovered that primary-aged children from homosexual households seem to be less happy at school than other children, achieve markedly lower grades in language and maths, and some are confused about their sexual identity. The study concluded married couples seem to provide the best environment for the social and educational development of a child.<sup>34</sup>

In addition to the advantages in social and educational development, raising children by married parents also has a positive effect on crime. Children of cohabiting couples are more likely to be found among offenders than are the children of married couples, and Sarantakos concluded the link between cohabiting parents and the participation of children in crime is beyond contention.<sup>35</sup>

### ***3.2.2 Stability of Marriage***

Marriage is the voluntary union of one man and one woman for life,<sup>36</sup> and includes a public commitment that is registered with the government. Although the divorce rate in Australia nears 50 per cent, the public recognition and commitment inherent in marriage is not present in a de facto relationship.

A de facto relationship may arise from the parties' negative opinion of marriage, or they may simply see the de facto relationship as an alternative to marriage.<sup>37</sup> Some also consider de facto relationships to be a 'trial marriage', a period of preparation for actual marriage which becomes a part of the courtship process.<sup>38</sup> Regardless of the reason, it still lacks the public commitment of marriage, and is still significantly less stable than marriage.

Less than two per cent of all non-marriage cohabiting relationships last for 10 years, and while a period of cohabitation is sometimes used to prepare for marriage, the reality is couples who cohabit prior to marriage are divorcing at a higher rate than those who have not cohabited prior to the wedding.<sup>39</sup> A study by the Australian Institute of Family Studies found from the date of marriage at five years, 10 years and 20 years, the percentage of divorced couples who have cohabited prior to marriage is approximately double the percentage of divorced couples which did not cohabit prior to marriage.

A cohabiting couple has already indicated a limit to their mutual commitment by refusing to marry, which is a public pledge to take each other, to the exclusion of all others, in a form the government recognises. In the event of a dispute, cohabiting couples are more willing to end a relationship in which they are not currently satisfied, and less willing to persevere with a relationship than married couples.<sup>40</sup>

Of particular importance in relation to the adoption of children is the higher dissolution rate of de facto relationships, which can be as high as four to five times the rate of divorce.<sup>41</sup> Further supporting the superiority of marriage is the rate of depression among cohabiting couples, which is more than three times the rate of depression among married couples.<sup>42</sup>

## **4. The Way Forward**

### **4.1 Guiding Principles**

If the best interests of the child are the guiding principle, then in relation to adoption the government must ensure each adopted child has both a mother and a father. The government must ensure the mothers and fathers entrusted with the adoption of children are married, as only marriage provides the best environment for the raising of children. Marriage, while subject to an undesirably high divorce rate, is still the most stable union of a couple and should be required of couples wishing to adopt a child in order to reduce the chance of the household becoming a single parent home.

### ***Recommendations***

*In recognition of the duty of Australia to act consistently in the best interests of children, the federal government should encourage all Australian jurisdictions to permit adoption only by:*

- *husbands and wives who have been married for at least three years,*
- *individuals in relation to their step-child by marriage, with the consent of the birth parent.*

## **4.2 Legal Amendments**

The federal parliament is empowered to legislate on matters relating to immigration,<sup>43</sup> and under this power can issue an adoption visa to a child who is entering this country in order to be adopted, if entering with his or her prospective adoptive parents. In addition to the constitutional power to deal with immigration, the federal government has the moral responsibility to ensure that minors who are permitted to immigrate in order to be adopted have the best possible environment for their development.

As the federal government is able to attach conditions to the entry of any immigrant, it is within the power of the federal parliament to refuse to issue an adoption visa to a child where the prospective adoptive parents do not offer the best environment for the development of the child. Accordingly the federal government can limit overseas adoption to married couples, or a step-parent in relation to their step-child.

### ***Recommendation***

*Adoption visas should be issued only to children whose prospective adoptive parents are either a married couple, or their parent and step-parent.*

Section 68F(2) of the *Family Law Act 1975 (Cth)* provides a series of conditions that should be considered in making custody orders in the best interests of children. As has been established above, the best environment for the development of a child is in the care of both a mother and a father, who are in a stable marriage relationship. The *Family Law Act 1975 (Cth)* should therefore require the court to give priority to placing a child in the custody of a married couple.

### ***Recommendation***

*Section 68F(2) of the Family Law Act 1975 (Cth) should be amended to affirm that it is in the best interests of a child available for adoption to be placed in a home with a married mother and father.*

The recommendations outlined above require a positive discrimination in favour of married couples. While discrimination is often used in a negative sense, any decision in favour of one option represents a discrimination against another option. Discrimination is often used in a positive sense, such as the law's refusal to allow children under the age limit to apply for a driver's licence. This example shows discrimination against a person based on their age, but it is deemed to be in the interests of our society.

In the same way, discrimination against the adoption of children into a situation where they will not be cared for by a married mother and father represents a decision to uphold the best interests of the child. The growth of children in the best possible environment is also in the interest of society, and it therefore appropriate that the government discriminate in favour of married couples.

### ***Recommendation***

*The Sex Discrimination Act 1984 (Cth) should be amended to permit discrimination on the ground of marital status in relation to adoption.*

## 5. Conclusion

The process for adoption across state jurisdictions is significantly inconsistent, since some Australian jurisdictions restrict adoption to married couples, some extend adoption to unmarried heterosexual couples, and some allow homosexuals to adopt. This situation is undesirable and not in the best interests of the child.

The best interests of the child should be paramount when an overseas child is adopted by Australian parents. Abundant evidence shows that it is the best interests of the child to be raised in a home with a father and mother who are married to each other. Consequently, the adoption of overseas children should be restricted to married couples.

The federal government should encourage all state jurisdictions to limit adoption to married couples, or to the step parent of a child. Federal parliament should legislate to restrict adoption visas to overseas children whose prospective adoptive parents have been married for several years.

## References

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2. *Adoption Act 1993* (ACT) s 18(1).
3. *Legislation Act 2001* (ACT) s 169 (2).
4. *Adoption Act 1988* (Tas) s 20(1).
5. *Adoption Act 1988* (Tas) s 20(4).
6. *Adoption Act 1994* (WA) s 39(1).
7. Which includes homosexual couples: *Interpretation Act 1984* (WA) s 13A(3).
8. *Adoption Act 1994* (WA) s 39(1).
9. *Adoption Act 2000* (NSW) ss 27, 28.
10. *Adoption Act 2000* (NSW) ss 28(4).
11. *Adoption Act 1988* (SA) s 12(1).
12. *Adoption Act 1988* (SA) s 12.
13. *Adoption Act 1984* (Vic) s 11(1).
14. *Adoption Act 1984* (Vic) s 11(1).
15. *Adoption of Children Act* (NT) s 12.
16. *Adoption of Children Act 1964* (Qld) s 67A.
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18. *Adoption of Children Act* (NT) s 14.
19. Bill Muehlenberg, *Case for the Two-Parent Family*, FOL Resource Paper, November 1993.
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