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Department of Communities, Child Safety and Disability Services
Strategy, Engagement and Innovation
Policy and Legislation
Child and Family Legislative Review
GPO Box 806
BRISBANE QLD 4001

By Email: adoptionactreview@communities.qld.gov.au

Dear Minister Fentiman,

Submission to the review of the *Adoption Act 2009*

The LGBTI Legal Service (the **Legal Service**) is grateful for the opportunity to make a submission to the Queensland Government's review (the **Review**) of the operations of the *Adoption Act 2009* (Qld) (the **Act**) and its impact on children and families. The Legal Service is seeking to remove any possible instances of discrimination towards lesbian, gay, bisexual, trans, intersex and queer (**LGBTIQ**) families contained within this Act. We strongly support the Government's commitment to promoting equality and ending discrimination in our State's laws. These reforms would work to fix the injustice and significant barriers to parenting faced by same-sex families in Queensland on top of providing legal certainty and peace of mind.

The Legal Service has assisted many LGBTIQ clients with adoption matters and as such has a level of experience that warrants the observations and recommendations made in this submission. We believe the issues raised should be addressed by experts in the field of statutory interpretation, family law and legislative drafting.

The Legal Service consents to this submission to be made public and/or referred to in any public documents.

1. About the LGBTI Legal Service

- 1.1. The Lesbian, Gay, Bisexual, Trans, Intersex Legal Service Inc. is a non-profit and unfunded community-based legal service, which began service on 7 July 2010 and was officially launched on 1 December 2010 by The Hon. Michael Kirby AC CMG. The Legal Service staffed entirely by volunteers. The team of around 45 includes the management committee, the Executive Director and three Directors, lawyers, evening coordinators and legal assistants. The Legal Service recognises the difficulties faced





by the LGBTIQ community and seeks to assist the Queensland LGBTIQ community to gain access to justice through the provision of legal services.

- 1.2. In addition to our core advice work, the Legal Service also endeavours to provide community legal education activities and resources in order to increase awareness of legal rights and responsibilities for the LGBTIQ community in Queensland. The Service includes a law reform division, which is actively involved in advocating for law reform and human rights.

2. The current law in Queensland

- 2.1. Section 76(1) of the Act provides the conditions that determine eligibility of inclusion on the expression of interest register; a necessary facet of adoption. This section stipulates that a person attempting to adopt must have a spouse that is not the same gender as the person (s76(1)(g)(ii) and be married or in a de facto relationship of two years or more. This wording goes further than just the exclusion of same sex couples; it is intentional discrimination against same-sex couples looking to adopt. In Queensland, there is no prohibition on single LGBTIQ people being able to adopt (subject to approval by the chief executive), and this should be mirrored for couples. However, this is only for exceptional circumstances and should not be considered a reasonable alternative for LGBTIQ people or a reason to delay the suggested recommendations. The current law causes children of families that have one legal parent to have little legal certainty particularly those solely conceived by one parent but dependant on both parents.
- 2.2. There are protections provided to LGBTIQ people under the *Anti-Discrimination Act 1991* (Qld) (the **ADA**), the Act expressly states that the ADA does not apply in the context of the *Adoption Act*.¹
- 2.3. A prominent feature of the Act is to allow for foster parents to adopt foster children more easily. However, while same-sex couples can foster children, they are expressly excluded from adopting their foster children; a condition that shows the inconsistent nature of the Act.² The current law does not allow for same-sex adoption in any manner, even in existing situations such as a step-parent adopting their partner's biological child, where the family unit is already established.

¹ s8 Anti-Discrimination Act 1991

² Adiva Sifris, Gay and lesbian parenting – The legislative response, FPL no. 10, Australian Institute of Family Studies, May 2014 (available at: <https://aifs.gov.au/publications/families-policy-and-law/10-gay-and-lesbian-parenting-legislative-response>)





3. Adverse impact of the current law

3.1. The discrimination within this Act negatively impacts a range of different families.³ Due to the exclusion of same-sex families, families are forced into complicated arrangements in an effort to provide legal certainty for their children. For these family units, for example foster parents, step-parent families and children born through surrogacy, permanent care orders are the closest thing these children have to ensuring relationships to their parents or siblings are recognised. Former State Minister for Child Safety, Phil Reeves, said:

*Foster carers with children in their care for a long time, often from birth, frequently express a desire to adopt these children. It is only natural that a child in this situation often feels a true part of the family they have lived with long-term.*⁴

3.2. Notwithstanding this recognition, same-sex couples cannot adopt their foster children like their male-female couple counterparts.

3.3. A plethora of research, both Australian and from various other countries, clearly demonstrates that children of same-sex relationships are just as well off as children of heterosexual relationships; they are as socially, emotionally and educationally adept as the average child.⁵

3.4. There is no logical justification or reasoning to continue discriminating against same-sex couples as currently done under the Act. Not only does this adversely affect the LGBTIQ couple involved, it undermines the legal certainty which should be afforded to all families.

4. Inconsistency with existing legal frameworks and Australian best practice

4.1. The current wording in s76(1) of the Act that explicitly allows discrimination against same-sex couples is inconsistent with a number of other Australian jurisdictions. It also fails to follow the mandate set by the Australian Government on non-discrimination relating to inter-country adoption arrangements by same-sex couples.

³ 5.2.4 (e), Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships, Human Rights and Equal Opportunity Commission, 2007

⁴ AAP, 'Foster parents set to win adoption rights', Star Observer, 5 May 2014 (available at: <http://www.starobserver.com.au/news/local-news/same-sex-couples-included-in-overseas-adoption-agreement-for-the-first-time/122370>)

⁵ Deborah Dempsey, Same-Sex Parented Families in Australia, CFCA Paper No. 18, Australian Institute of Family Studies, December 2013 (available at: <http://www.aifs.gov.au/cfca/pubs/papers/a145197/cfca18.pdf>)





- 4.2. The Human Rights and Equal Opportunity Commission issued a 'National Inquiry into Discrimination against People in Same-Sex Relationships' in 2007, which recommended amending or creating laws that recognise the relationship between a child and both same-sex parents. Particularly, the report recommended:

'Stepparent adoption' laws should more readily consider adoption by a lesbian co-mother or gay co-father. This will require amendments to remove the prohibition on same-sex stepparent adoption in all state and territory laws other than in WA, the ACT and Tasmania.⁶

The final report went before the Federal Parliament on 21 June 2007; following which NSW and Victoria have implemented legislation allowing for same-sex couple adoption and same-sex step-parent adoption. This places Queensland in the minority of jurisdictions that still allow this discrimination.

5. Pathway to reform

- 5.1. The key amendment necessary to address this issues is to delete sections 76(1)(g)(ii), 89(7)(b)(5)(A) and 92(1)(h) which refers to the requirement that couples consist of two people of opposite gender.
- 5.2. The Legal Service also recommends that, as far as possible, any references to 'male' and 'female' be replaced with gender neutral language. Similarly, the term 'same-sex' should not be used in drafting (though it is not currently used) due to the possibility of excluding gender diverse, transgender or intersex people.

6. Additional issues for consideration

- 6.1. There are a number of interrelated issues which should be considered alongside the review of the Act, including for example:
- 6.1.1. amendments to the *Births, Deaths and Marriages Registration Act 2003* (Qld) to allow greater flexibility to couples seeking to register an adoption;
 - 6.1.2. ensuring that couples with children born through surrogacy arrangements are able to adopt their children in a streamlined manner, similar to step-parent adoptions; and
 - 6.1.3. the Act's interaction with the ADA, which should as far as possible be limited to excluding those provisions critically necessary to protect the children's best interest, without allowing discrimination on irrelevant grounds.

⁶ 5.2.4 (e), Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships, Human Rights and Equal Opportunity Commission, 2007





6.2. These issues fall outside the scope of this submission and the Legal Service does not at this time express an opinion on them. However, it is important that they be considered by the Review and should involve community and stakeholder consultation.

7. Additional measures

7.1. Adoption Services within the Department of Communities, Child Safety and Disability Services, as well as third party services and agencies involved in the adoption process, should be provided with training and education to assist the implementation of these reforms, to ensure they are aware that discrimination against any same-sex couples is not permitted.

7.2. The Legal Service is aware that, while the majority of religious institutions do not discriminate against same-sex couples, it is still important to ensure all service providers, including religious institutions, are not permitted to discriminate. The best interests of the child must remain the paramount consideration and they should not be denied adoption by a loving family based on the sexual orientation of the parents.

Conclusion

The Legal Service commends the Queensland Government on its commitment to addressing the inequality issues in Queensland. We hope this review results in a legislative response that is aligned with the aim of our submission; to recognise the results of substantial research and remove the discriminatory facets of the Act. Many LGBTIQ families across the State, and Australia as a whole, have suffered with uncertainty and instability for too long (particularly those who already live with same-sex parents) and there is now a chance to resolve this.

We welcome any opportunity to be involved in further consultation or feedback.

Yours sincerely,

Tom Clark

Director of Law Reform

