June 2006:

Submission to the NSW Department of Community Services Review of the Adoption Act 2000, by the Social Issues Executive, Anglican Diocese of Sydney.

Contents:

1. The culture of optimal care 2
2. Procedural issues in adoption 2
3. Men, women and optimal care 2
4. The problem of 'evidence' 4
5. Examining the 'man-and-woman' claim 5
6. Intrafamily adoptions: responses to GLRL recommendations 6
   - *a) Gender neutral definitions* *6*
   - *b) Presumption of right to adoption* *7*
   - *c) More than two parents* *7*
7. Answering objections to our view 8
8. Conclusion 8
9. References 9

Summary

The Social Issues Executive (SIE) of the Anglican Diocese of Sydney is an agency of the Diocese that considers a range of social issues from the perspective of Christian thought. We are thankful for the opportunity to contribute to this important Review.

The substance of our submission is as follows:

1. The Review must retain the best interests of children (rather than the interests of any adult) as the paramount consideration in its deliberations.
2. Calls for procedural changes to adoption practises (made by the NSW Committee on Adoption and Permanent Care) are right and proper, and calls for less stringent processes in intercountry adoption should be rejected.

The main body of our submission concerns the issue of adoption by same-sex carers:

3. Existing definitions in the Act, where adoptive couples are specified as being of dual-gender, should be retained.
4. Ideological conflict over research into outcomes for children under same-sex care, and gaps in this research, mean that legislators do not have any warrant for radical changes to adoption law.
5. The experiences of being mothered *and* fathered remain among the important environmental factors that constitute optimal conditions for child development.
6. Recommendations by the Gay and Lesbian Rights Lobby (GLRL) pertaining to intrafamily adoption (a) would allow practises that are without sufficient evidentiary support; (b) are unnecessary in view of existing Family Court powers that serve the best interests of some children; and (c) would produce new three-parent (or more) families that lack community scrutiny or debate, are legally perplexing, and are therefore unproven in terms of their benefit to children.

We conclude that a cautious, caring State will not be at the vanguard of unnecessary and potentially adverse change in this area. The State governs a delicate social ecology that is potentially as fragile as any other natural ecology. Collective human wisdom has generally held that the contribution of a loving female mother *and* a loving male father is important for optimal care, and a key ingredient in the best-case scenario for human development. To remove this dual-gender contribution as a matter of principle for all adopted children, is an unnecessary and insupportable departure from that longstanding wisdom.

1. The culture of optimal care

Adoption law and practice must provide optimal care for children. We note that §7(a) of the Act emphasises 'that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice'. We are glad to see a culture of children's best interests promoted and upheld in NSW. We ask that all and every change to adoption law and practice demonstrably and certainly enhance children's best interests.

2. Procedural issues in adoption

A submission from the NSW Committee on Adoption and Permanent Care, which includes Anglicare Adoption Services, addresses the procedural aspects of adoption toward this end. We are respectful of this Committee's experience in placing children for adoption, and affirm and endorse its recommendations.

In particular, we repeat their call for equivalent rigour to apply in the selection of adoptive parents in intercountry adoptions as for adoptions transacted within the State. We see no reason for the State to extend a lesser standard of care to children from overseas, for clearly, that would not be in their best interests. Of course where it can be shown that the adoptive process has become too rigorous to be in the child's best interests, we support calls for it to be carefully streamlined; but we see no reason for a 'two-tier' system of care to be allowed to develop.

3. Men, women and optimal care

However our main concern in this submission concerns these Definitions in the Act:

> **couple** means a man and a woman who:
> (a) are married, or
> (b) have a de facto relationship.
>
> **de facto relationship** means the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another.
>
> **married** means:
> (a) a man and woman who are actually married, or
> (b) an Aboriginal or Torres Strait Islander man and woman who are living together in a relationship that is recognised as a marriage according to the traditions of an Aboriginal community or Aboriginal or Torres Strait Islander group to which they belong.
>
> **spouse** of a person means:
> (a) a person to whom the person is married, or
> (b) a person of the opposite sex with whom the person has a de facto relationship of at least 3 years' duration.

We would like to see all references to *a man and a woman* (and 'opposite sex') retained. This view is of particular relevance to adoption orders for children in out-of-home care and/or where a birth-parent needs to relinquish their child. We recognise and will later address the special needs of children whose parent has a same-sex partner.

We realise, of course, that this issue is only one of many important matters under review. Recognising that the Christian posture toward homosexual people has sometimes been clumsy or even contemptuous, we also realise that our comments may be experienced by them as hurtful and marginalising. We seek to extend the good news that God always has humanity's best interests at heart. (We have learnt this truth ourselves, while in the grip of many sins and errors.) We also seek to be

supportive of children already in the care of gay and lesbian people, and we hope for their very best.

The best interests of children, and their optimal care, motivates our concern. We note in §7(b) of the Act 'that adoption is to be regarded as a service for the child concerned'. Adoption law and practice must never degenerate to being dominated by the 'rights' or desires of adults. The aspirations of minority groups, church groups, members of parliament, or adults who have no child to care for, are all entirely irrelevant. Children's best interests must always be fore-grounded as the State's sole concern in its adoption law and practice, which should be framed *entirely* in terms of what we know, for certain, to constitute a child's optimal care.

In this connection we note (according to the DoCS issues paper) that an objective of the Review is to ensure that 'eligibility criteria for the assessment and selection of adoptive parents reflect contemporary standards' (p. 4). But we respectfully suggest that neither the Review, nor the Government, is at liberty to align selection of adoptive parents with 'community standards', but only with what can certainly be known to constitute a child's optimal care. 'Community standards' offer no such certainty. We therefore urge the Review, and the State Government, *not* to be guided by these standards where they conflict with the optimal care of children.

Since adoption should provide optimal care for children, responsible legislators will:

- only consider what certainly constitutes optimal care for children;
- make the judgment of 'optimal care' very cautiously; and
- concern themselves with the best interests of children, ignoring adult interests and concerns.

What constitutes 'optimal care for children'? All parties agree that optimal care includes:

- carers who have a lifelong commitment to care; and
- a healthy and stable relationship between these carers.

Points of controversy, though, are whether optimal care also includes:

- the contribution of a male and a female carer; and even
- whether adoptive care should be limited to two carers only.

At this point the Review will be forced to consider a large body of sociological and psychological literature, from which it is often claimed that no deleterious outcomes appear in children raised by lesbian carers. We have three concerns with this conclusion:

- The literature suffers from a serious philosophical problem. Political and ideological considerations make the design of this research, and its subsequent interpretation, impossible to pursue with any assurance of objectivity (see further page 4, below). Such a fraught situation among adults is never good for children. The State must therefore act cautiously, even when such caution will be unpopular.
- The relevant datasets are probably not extensive enough to act as a basis for public policy. We do not mean that suspicion should somehow attach to existing gay carers. We simply mean that if optimal care does *not* in fact include the experience of being mothered and fathered, the evidence to-date is very far from conclusively proving that claim to be the case (see further page 5).
- All parties agree that little research has been conducted with children who are cared for by gay men (see further page 6).

4. The problem of 'evidence'

In such a highly politicised debate, much of the literature associated with the care of children by same-sex carers is concerned with the secondary task of uncovering methodological flaws in opposing research.[1] The literature is also full of acrimonious disputes about opposing researchers' motives. It is an evidentiary quagmire. We are intrigued by the honest and incisive comment of U.K. pro-gay researcher, Stephen Hick:

> I do not believe that the topic of lesbian and gay parenting can or should be assessed on the basis of 'the evidence alone'. That evidence is too thin, too equivocal and, more importantly, does not represent the facts of the matter, for these are moral as well as epistemological questions.[2]

Hicks reflects a growing awareness that none of us can see the 'evidence' in a straightforward way.[3] Likewise, U.S. pro-gay researchers Judith Stacey and Timothy Biblarz agree with their opponents that 'ideological pressures constrain intellectual development in this field.'

> We wish to acknowledge that the political stakes of this body of research are so high that the ideological 'family values' of scholars play a greater part than usual in how they design, conduct, and interpret their studies. Of course, we recognise that this is equally true for those who criticize such studies (including ... ourselves). The inescapably ideological and emotional nature of this subject makes it incumbent on scholars to acknowledge the personal convictions they bring to the discussion.[4]

(Stacey and Biblarz go on to argue that although differences between lesbian-parented children *can* be found—e.g. that they are more engaged in homosexual activity[5]—the wider question is whether these differences really matter.) Likewise U.S. researchers Silverstein and Auerbach, who are open about their reading of scientific literature to support their political agenda (against 'policy that privileges the two-parent, heterosexual, married family'), also know the difficulties involved:

> From our perspective, science is always structured by values, both in the research questions that are generated and in the interpretation of data. For example, if one considers the heterosexual nuclear family to be the optimal family structure for child development, then one is likely to design research that looks for negative consequences associated with growing up in a gay or lesbian parented family. If, in contrast, one assumes that gay and lesbian parents can create a positive family context, then one is

---

[1] For an account of deficiencies in pro-gay research, cf. George Rekers and Mark Kilgus, "Studies of Homosexual Parenting: A Critical Review," *Regent University Law Review* 14 no. 2 (2002); online: http://www.regent.edu/acad/schlaw/academics/lawreview/articles/14_2Rekers.PDF (accessed 21/2/2006). For an account of deficiencies in conservative research, see Louise B. Silverstein and Carl F. Auerbach, "Deconstructing the Essential Father," *American Psychologist* 54 no. 6 (1999).

[2] Stephen Hicks, "The Christian Right and Homophobic Discourse: a Response to 'Evidence' that Lesbian and Gay Parenting Damages Children," *Sociological Research Online* 8 no. 4; online: www.socresonline.org.uk/8/4/hicks.html (accessed 3/06/2004).

[3] Hicks thinks the 'sexuality' of carers is not relevant to child development, but that 'homophobic Christian discourses' *do* damage children. We oppose all stigma and persecution directed to any child. We also point out that to disagree with gay and lesbian claims is not necessarily an instance of 'phobia'.

[4] Judith Stacey and Timothy J. Biblarz, "(How) Does the Sexual Orientation of Parents Matter? ," *American Sociological Review* 66 no. 2 (2001), 160 & 161.

[5] Ibid., 177-79.

> likely to initiate research that investigates the strengths of children raised in these families.[6]

Our point is to show that even the scholars concerned are very aware of the difficulties in gathering and handling the evidence. It follows that no member of the wider community will easily assess the evidence with any kind of objectivity. Such a fraught situation among adults is never good for children, and in view of this very great difficulty, we contend that for the best interests of children **the State must err on the side of caution for children in its care. The evidence as it stands does not warrant radical change to the law; and NSW adoption law and practice must not become a laboratory to settle these vexed matters.**

The best judgment to-date, as reflected in existing law, is that a certain kind of male-female couple (usually married) offers the best prospect for the optimal care of children. This judgment is an exercise of community wisdom, and should be retained in law. The State has no warrant to change that law if to do so would not certainly be in a child's best interests.

5. Examining the 'man-and-woman' claim

Of course those who contend that optimal care probably requires the contribution of a male and a female carer do need to offer some account of this view. It presumes that men and women differ in various subtle ways; that the delicate structures and processes of a child's brain and ongoing development are acutely sensitive to a variety of environmental factors; and that the differing contributions of male and female carers may be among the important environmental factors that constitute optimal conditions for child development.

The nature and extent of these claims are, admittedly, also hard to describe and measure, partly because the extent and importance of male-female difference is another politically vexed issue in our community. However attempts have been made to describe and measure the contribution of men and women to parenting, and useful surveys of such research can be found.[7] Some aspects of this kind of work can be criticised; nevertheless, the possible importance of both genders for the optimal care of children may only be discarded when we are certain that it is irrelevant. No such certainty is even close.

Consider, for example, Silverstein and Auerbach's influential critique of the 'neoconservative' and 'essentialist' view of fatherhood. They do not think that fathers uniquely contribute to child development. Yet they candidly observe persistent findings of poor outcomes for boys post-divorce, and the persistent correlation of father-presence and better developmental outcomes for boys. Since only small differences can be found between the way mothers and father treat girls and boys, Silverstein and Auerbach prefer to speculate that some intervening economic or social variable, rather than something specific to the relationship between an older and a younger male, may explain 'these persistent but unclear findings.'[8] But equally plausibly, some aspect of male care that is as-yet unmeasured or ultimately immeasurable, may be at work. The unresolved nature of this issue highlights the need for cautious public policy. Until such time as we may certainly say what aspect of father-presence is protective for boys, legislators and policymakers should prefer the simpler inference: that boys, in particular, need a father.

---

[6] Silverstein and Auerbach, "Deconstructing," 399 & 398.

[7] For example in the U.S. context, A. Dean Byrd, "Gender Complementarity and Child-rearing: Where Tradition and Science Agree," *Journal of Law and Family Studies* 6 no. 2 (2004).

[8] Silverstein and Auerbach, "Deconstructing," 403.

The Review will note that we are not attempting to impugn the capacity of gay and lesbian people to care for a child. We simply ask the Review to remember that the State must ensure *optimal* care for children, and that it is not unreasonable to think that optimal care includes both the experience of being mothered, and the experience of being fathered. A cautious estimate of optimal care conditions would therefore retain this dual contribution. But by removing it,

- the State at least risks adopted children asking, in several years time, 'why was I denied the experience of a mother/a father when I could have been cared for by a person of that gender?'
- the State at most risks adopted children suffering in as-yet-unknown ways as a result of being denied the experience of a mother or a father, when the State could have provided such an experience.

In our view, the experience of both a mother's and a father's care is, in a sense, the child's first 'cross-cultural' experience. People can and do function adequately without this experience, and many are denied it due to a parent's death or departure. But these are less than optimal conditions for care, which the State has no right or warrant to impose when the optimal alternative is so readily achievable.

6. Intrafamily adoptions: responses to GLRL recommendations

The above comments apply most directly to adoption orders for children in out-of-home care and/or where a birth-parent needs to relinquish their child. We will now address proposed revisions to the Act concerning the same-sex partner of a child's parent. To do so, we will reply to three recommendations for changes to the Act as proposed by the Gay and Lesbian Right Lobby (GLRL) according to their 2003 publication.[9]

a) Gender neutral definitions

Their first recommendation is 'to make the definition of de-facto partner gender-neutral' (in order to accommodate gay and lesbian 'step-parents' and 'co-parents').[10]

However the change as recommended would allow couples both of gay men, and lesbians, to adopt. The change relies upon the GLRL view, based upon their assessment of the evidence, that no negative effects upon children can be attributed to lesbian care. But the GLRL also acknowledges that '[t]here is relatively little information on gay father led families with resident children.'[11]

Without wishing to offend gay men, we need respectfully to observe that in the absence of evidentiary support regarding the effects of their care, the proposed legal change is without proper evidentiary support. It appears to pivot on an ideological assertion: that care by gay men is as harmless for children as care by lesbians. But children without an experience of mothering may miss out on something very important. It is simply unknown to what extent, if any, such effects will be adverse.

This blanket proposal, then, would effect changes to the law that are without evidentiary merit.

---

[9] Jenni Millbank, *And then … the brides changed nappies* (Darlinghurst, NSW: Gay and Lesbian Rights Lobby Inc (NSW), 2003); online: www.glrl.org.au (accessed 30/5/2006).

[10] Ibid., 19.

[11] Jenni Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families* (Darlinghurst, NSW: Gay and Lesbian Rights Lobby Inc (NSW), 2002), 12 & 33.

b) Presumption of right to adoption

The second GLRL recommendation is 'to include a new provision for co-parent adoption … with a presumption in favour of adoption where there exists only one legal parent or there is a second legal parent who is consenting'.[12]

This proposal, for presumption in favour of a 'co-parent', is alarmingly close to an assertion of that person's 'right' to adopt a child. The Review should remember that no adult's 'right' is relevant, since *all* that matters is the child's best interest.

We realise, of course, that some children develop a bond of trust and love with their parent's gay partner, who would therefore need authority for ongoing provision of the child's care. We respect that a child's best interests may be served by the State granting such authority. It seems, though, that the Family Court is already empowered to assist these carers by means of a special issues order. Sweeping changes to adoption law are not necessary to handle these important, yet exceptional, cases.

We also note that the U.N Convention on the Rights of the Child specifies that each child shall have, 'as far as possible, the right to know and be cared for by his or her parents'.[13] Obviously, precisely the point at issue in adoption law is the designation of a child's *legal* parent (whose role in a child's life is honoured by the Convention). But this consideration must not be used to displace a child's rights in reference to her *biological* parents (who also remain primary in the logic of the Convention). Therefore no change to adoption law should presume for a would-be adoptive parent in such a way as may risk displacing her biological parent.

The GLRL candidly admits that ongoing tensions in the gay and lesbian community keep re-emerging about the relationship and status of biological fathers to their children. This complex social difficulty cannot be resolved simply by adoption law fiat. Any attempt to do so risks marginalising the legitimate role of biological fathers that international law may seek to protect.

c) More than two parents

Easily the most radical GLRL recommendation is the suggestion of a new provision:

- 'to permit co-parent adoption that grant[s] legal status to more than two parents'.[14]

This recommendation is intended to solve the problem raised above (that a child has an interest in her biological father, her mother, and her mother's partner). It also relies upon the view that two-parent care is inherently 'heterosexist', and asks the community to accept that for a child to have three or more 'parents' is in his or her best interest.

Of course this view is put entirely without any evidentiary basis, and with minimal argumentation. Whether such a departure from mainstream cultural practise is in the best interests of children would require a much wider community discussion than is mandated by the Review. That discussion would have to include evaluations of the extent to which children are served, for example, by systems of extended family care.

Children can certainly be the happy recipients of love and care from circles of adult carers. But it moves a long way beyond this truth seriously to suggest that more than two people should be given *legal* authority to care for a child. The community requires to know more about the effects upon any children so cared for. The community also has a legitimate interest in the effects upon children caught up in relational

[12] Millbank, *Brides*, 20.

[13] *U.N Convention on the Rights of the Child* (1989); online: http://www.unhchr.ch/html/menu3/b/k2crc.htm (accessed 30/5/2006), art. 7.1. (Cf. 9.1, 9.3 & 18.1.)

[14] Millbank, *Brides*, 21.

breakdowns between adults involved in such systems of care, where legal arbitration would be exponentially more complex and perplexing than is now the case.

This third recommendation is the logical outcome of the first two. But it highlights the way ideological, not only evidentiary, considerations have shaped the recommendations, which do not offer any sure prospect of optimal care for children.

7. Answering objections to our view

There are some other objections to the view we have espoused, and we urge the Review not to place any weight on them.

- 'Heterosexuality is no guarantee of a functional relationship.' Of course unstable and unhealthy heterosexual relationships certainly exist; but no one proposes that children be committed to such care. Even if some gay relationships seem more healthy and stable than some heterosexual relationships, the point at issue is whether children's development is best and optimally served by the contribution of a male and a female carer.
- 'Children can thrive, whatever the family form.' Some children may indeed thrive under the care of single carers or gay carers. We can be very glad for them, but their existence is not a safe basis for responsible public policy, and no child should be used to advance the cause of any adult-centred ideology. Until the State knows incontrovertibly that it can remove mothering or fathering from a child with no negative outcomes, it has no business to do so.
- 'Some children are desperate, and should be placed with whoever can care for them well.' With the exception of children with disability, the situation we face is generally not an emergency, where more children are in need of care than there are available married men and women to care for them. However when such situations arise, they are *not* best addressed by legislating for less-than-optimal care. Rather, community leaders need to strategise for, and then encourage, a more hospitable and generous culture, where all needy children—particularly the disabled—find many men and women willing to welcome them. When a society degenerates into careless and unfriendly attitudes toward vulnerable and disabled children, adoption law and practice should not be expected to carry the burden of this malaise. It must be addressed through other means.
- 'Your conclusion is motivated by ongoing discrimination against gays.' Perhaps the best response to this imputation is as follows. The Christian community graciously accepts that special considerations govern children already in the care of gays and lesbians. In response, the gay community could graciously concede a general benefit-of-doubt: that in general, society should plan for children to have a mother and a father.

8. Conclusion

A cautious, caring state will not be at the vanguard of unnecessary and potentially adverse change. It will only act on the basis of an overwhelming and longstanding consensus about what is in a child's best interest. We are very far from such a consensus, except to say that optimal care can certainly be given by a man and a woman 'of good repute [who] are fit and proper persons to fulfil the responsibilities of parents' (Act §28).

The State governs a delicate social ecology that is potentially as fragile as any other natural ecology. Collective human wisdom has generally held that the contribution of a loving female mother *and* a loving male father is important for optimal care, and a key ingredient in the best-case scenario for human development. To remove this dual-gender contribution as a matter of principle for all adopted children, is an unnecessary and insupportable departure from that longstanding wisdom.

9. References

Byrd, A. Dean. "Gender Complementarity and Child-rearing: Where Tradition and Science Agree." *Journal of Law and Family Studies* 6, no. 2 (2004), 213-35.

Hicks, Stephen. "The Christian Right and Homophobic Discourse: a Response to 'Evidence' that Lesbian and Gay Parenting Damages Children." *Sociological Research Online* 8, no. 4. Online: **www.socresonline.org.uk/8/4/hicks.html** (accessed 3/06/2004).

Millbank, Jenni. *And then ... the brides changed nappies*. Darlinghurst, NSW: Gay and Lesbian Rights Lobby Inc (NSW), 2003. Online: **www.glrl.org.au** (accessed 30/5/2006).

———. *Meet the Parents: A Review of the Research on Lesbian and Gay Families*. Darlinghurst, NSW: Gay and Lesbian Rights Lobby Inc (NSW), 2002.

Rekers, George, and Mark Kilgus. "Studies of Homosexual Parenting: A Critical Review." *Regent University Law Review* 14, no. 2 (2002), 342-84. Online: **http://www.regent.edu/acad/schlaw/academics/lawreview/articles/14_2Rekers.PDF** (accessed 21/2/2006).

Silverstein, Louise B., and Carl F. Auerbach. "Deconstructing the Essential Father." *American Psychologist* 54, no. 6 (1999), 397-407.

Stacey, Judith, and Timothy J. Biblarz. "(How) Does the Sexual Orientation of Parents Matter? ." *American Sociological Review* 66, no. 2 (2001), 159-183.

U.N Convention on the Rights of the Child. 1989. Online: **http://www.unhchr.ch/html/menu3/b/k2crc.htm** (accessed 30/5/2006).