11 March 2016

Ms Megan Giles

Executive Director, Legislative Reform

Department of Communities, Child Safety and Disability Services

Child and Family Legislative Review

PO Box 806

BRISBANE QLD 4001

Dear Ms Giles

**REVIEW OF THE OPERATION OF THE *ADOPTION ACT 2009***

Thank you for your email of 24 February 2016 inviting the Commission to make a submission on the review of the operation of the *Adoption Act 2009*.

I note the review includes consideration of whether adoption legislation, policy and practices align with contemporary community standards, meet the best interests of children requiring an adoptive placement, and are effective and efficient. The current process under the legislation is described in the Discussion Paper.

In this submission I refer to two issues regarding contemporary community standards and the best interests of children: eligibility of same- sex couples, and traditional Aboriginal or Torres Strait Islander adoption.

**Adoption by same-sex couples**

In Queensland, same-sex couples are not eligible to adopt, either as step-parents or generally.

Historically, the former Anti-Discrimination Tribunal[[1]](#footnote-1) held that the regulations under the previous *Adoption of Children Act 1964* were inconsistent with and in breach of the *Anti-Discrimination Act 1991* because the eligibility requirements discriminated on the bases of age and marital status[[2]](#footnote-2). Consequently, the current *Adoption Act 2009* specifically overrides the *Anti-Discrimination Act 1991*.[[3]](#footnote-3) In 2016 this type of provision is anachronistic and unreasonably discriminatory.

The *Anti-Discrimination Act 1991* prohibits discrimination on the basis of sexuality, which is defined as meaning heterosexuality, homosexuality and bisexuality.

Same-sex couples can apply for adoption in New South Wales, the ACT, Tasmania and Western Australia. South Australia and Victoria are currently reviewing their legislation, specifically addressing the issue of amending eligibility criteria to allow adoption by same-sex couples.

The main object of the Adoption Act 2009 is to provide for adoption of children in Queensland in a way that promotes the wellbeing and best interests of adopted persons throughout their lives. The wellbeing and best interests of an adopted child, both though childhood and the rest of his or her life, are paramount.

Prospective adoptive parents being a same-sex couple is not inconsistent with the objects of the legislation and principles for its application. A person’s sexuality should be an irrelevant consideration in assessing their suitability as an adoptive parent.

There is no credible evidence that same-sex adoption has any detriment or adverse impact on the best interests of the child.[[4]](#footnote-4) Therefore, in accordance with anti-discrimination principles, there is no reason why same-sex couples should not be allowed to adopt on the same guidelines as opposite-sex couples.

**Recognition of traditional adoptions**

Traditional adoptions occur in both the Aboriginal and Torres Strait Islander cultures; however it is more predominant amongst Torres Strait Islander people. Traditional adoption involves the biological parent or parents giving a child to another person or couple, on a permanent basis and to ‘grow up’ the child as their own.

The Adoption Act 2009 specifically discourages formal adoption for traditional adoption arrangements on the basis that legislative adoption is not part of the Aboriginal tradition or Island custom. Adoption under the Act is only to be considered as a way of meeting the needs for long-term stable care of an Aboriginal or Torres Strait Islander child, only if there is no better available option.[[5]](#footnote-5) With the additional legislated principle that it is in the best interests of an Aboriginal or Torres Strait Islander child to be cared for within a respective community, these provisions oust traditional adoption from formal recognition.

The lack of formal recognition of traditional adoptions can adversely impact the parties. Some people use the Family Court to obtain orders recognising parental responsibilities. These orders are not a panacea and difficulties may still ensue in relation to inheritance.

Whilst the Family Court can make orders for the custody and guardianship of children who are the subject of a traditional adoption, the court does not have the power to effect a change of the parentage of the child recorded on the child’s birth certificate. In a case where a Queensland family applied to the Family Court for consent orders to govern the parental responsibilities for a child in a traditional Torres Strait Island adoption, the Watts J reflected:

Notwithstanding the orders I make today, under the Family Law Act, the respondents remain the child’s parents and the Applicants do not become the child’s parents. **The difficulty with the birth certificate is an example of a practical problem that flows from the lack of formal recognition of the Applicants as the parents of the child.[[6]](#footnote-6)** (emphasis added)

In another case, a person who had been adopted by his aunt according to Aboriginal law, was denied inheritance when his adoptive mother died without leaving a Will.[[7]](#footnote-7) Under the Succession Act, he was neither ‘issue’ for the purposes of rules of intestacy, nor a ‘child’ for the purpose of a family provision claim. The Court of Appeal held that the definition of adopted child does not include a child adopted under Aboriginal or Torres Strait Islander laws. Fraser JA concluded that any disadvantage suffered by Aboriginal and Torres Strait Islander people is a matter of policy for the government and not the court.

Disadvantages should be addressed by providing a means of recognising traditional adoptions.

**Conclusion**

The Commission recommends that:

1. The eligibility criteria be amended to allow same-sex couples to apply to become adoptive parents; and

2. Queensland adoption legislation provide for the recognition of traditional Aboriginal and Torres Strait Islander adoptions.

Yours sincerely



**KEVIN COCKS AM**

**Anti-Discrimination Commissioner**

1. The functions of the Anti-Discrimination Tribunal were taken over by the Queensland Civil and Administrative Tribunal (QCAT) when QCAT commenced in December 2009. [↑](#footnote-ref-1)
2. Opinion re: Adoption of Children Regulation 1991 [2000] QADT 19. [↑](#footnote-ref-2)
3. Adoption Act 2009, section 8. [↑](#footnote-ref-3)
4. See for example: Deborah Dempsey, Same-sex parented families in Australia, Australian Institute of Family Studies, Australian Government, December 2013. [↑](#footnote-ref-4)
5. Adoption Act 2009, section 7. [↑](#footnote-ref-5)
6. Beck and Anor & Whitby and Anor [2012] FamCA 129. [↑](#footnote-ref-6)
7. Eatts v Gundy [2014] QCA 309. [↑](#footnote-ref-7)