

Report on Australia Universal Periodic Review - Tenth Round - January 2011

This report is submitted jointly by the **NSW Gay & Lesbian Rights Lobby (Australia)** and the **Sexual Rights Initiative**¹. It starts by providing background information, to then focus on the current legislative inequalities still faced by the **LGBT** population in Australia.

Introduction

1. Although Australia has ratified both the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) there is still no comprehensive legislation protecting individuals against discrimination on the basis of sexual orientation or gender identity at a Federal level. Same-sex couples also continue to be denied access to the institution of marriage. Additionally, there are limited mechanisms (only currently available in Western Australia, ACT, Tasmania and Queensland) in place to allow birth mothers and their partners (if any) to transfer their parenting rights to the intended parents. Same-sex couples are unable to adopt children under most state and territory laws, undermining the rights of the child and discriminating against prospective adoptive parents on the basis of their sexual orientation.

Legal Framework

2. Australia has a Federated Constitutional structure, which necessitates a separation of powers between different branches of Government, and also divides legislative power between the Commonwealth and the individual states and territories. The Australian Constitution offers limited rights protection, and no individual anti-discrimination protection.² For sexual minorities, there is no compensating Federal anti-discrimination legislation either.

3. Australia is the only Western liberal democracy without some form of human rights charter. Despite this, Australia is a signatory to various human rights treaties.³ While this is promising, in the Australian legislative context, international treaty law is not automatically incorporated into Australia. It must be transformed by domestic legislation.⁴ The Federal Government has authority to enact legislation in relation to international treaties that Australia is a signatory to under the external affairs power of the Constitution (s 51(xxix)).⁵ Without municipal incorporation, however, international human rights law has only limited persuasive value in judicial rulings.⁶

4. Following a National Human Rights Consultation in 2009, the Australian Government refused to introduce a charter, but has promised a 'human rights framework' to promote human rights instead. Attempts to promote oversight of human rights compliance is evident in the recent establishment of the Parliamentary Joint Committee on Human Rights and the powers of the existing Human Rights Commission, both of which can scrutinise and hold Parliament accountable for the consistency of national laws with human rights principles.⁷

¹ **The Sexual Rights Initiative** is a coalition including Action Canada for Population and Development; Mulabi – Latin American Space for Sexualities and Rights; Creating Resources for Empowerment and Action-India, the Polish Federation for Women and Family Planning, and others.

² *Commonwealth of Australia Constitution Act 1901 (Cth)*

³ These include the Convention Against Torture, International Covenant on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination Against Women, Convention on the Elimination of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child.

⁴ *Chow Hung Ching v The King* (1948) 77 CLR 449.

⁵ The external affairs power was used to enact the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth). Department of Foreign Affairs and Trade, Treaties and Treaty Making, <http://www.dfat.gov.au/treaties/making/making3.html>. Viewed 5 November 2007.

⁶ *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

⁷ *Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth)* and *Australian Human Rights Commission Act 1989 (Cth)*.

Main Issues

A. Adoption

5. Australia is a signatory to the CRC. Article 2(1) of the CRC notes that States must protect children from discrimination with respect to the status of his or her parent's 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'⁸ As outlined in *X v Columbia* (2007), 'other status' includes sexual orientation.⁹ Despite this, some state and territory laws, such as in NSW, preclude same-sex couples adopting, which discriminates against children living in same-sex families.

6. No person has the right to adopt children, however, people should be eligible to adopt, regardless of sexual orientation. Under the NSW *Adoption Act 2000*, same-sex couples are ineligible to apply.¹⁰ However, heterosexual couples and individuals (including gay and lesbian *individuals*) are eligible to apply to be considered as prospective adoptive parent(s) if they satisfy objective criteria.¹¹ However, couple-based definitions in the *Adoption Act* only recognise people in married and opposite-sex de facto relationships.¹² Same-sex de facto couples are not eligible to apply to be assessed for adoption – no matter what their individual merits or circumstances.

7. This discrimination against same-sex couples applies to the adoption of children already in the care of their parents (known adoption) and the placement of children with new families (unknown adoption). The *Adoption Act* is the only remaining piece of NSW legislation which does not have a de facto definition which includes same-sex de facto couples.¹³

8. Discrimination in the *Adoption Act* is inconsistent with all other family-related legislation applying to families in NSW which recognises same-sex couples. Female same-sex de facto couples who conceive through assisted reproduction technology are both legally recognised as parents to their child.¹⁴ There is no legal barrier to same-sex couples becoming foster carers. Same-sex couples can be granted long-term parental responsibility for a child in their care.¹⁵ Same-sex families are also equally recognised under the Federal *Family Law Act 1975* for the purposes of child-related matters and property division.

9. The Australian Capital Territory, Western Australia, and Tasmania (in specific circumstances) are the only jurisdictions within Australia that permit same-sex couple adoption. However, with over 4,300 children living in same-sex families across Australia, refusing same-sex couples access to adoption in the remaining states and territories denies children the rights, benefits and entitlements conferred by legal parentage.¹⁶

10. Adoption is one of the few ways in which the law recognises a child-parent relationship, including after the child becomes an adult. As a result of discrimination against same-sex couples in adoption, some children living with same-sex families may only have one (or indeed, none) of their parents legally recognised. The legal recognition of a child-parent relationship (legal parentage) confers many benefits, entitlements and protections upon a child and his or her parents. On the other hand, same-sex adoption reform is consistent with legal

⁸ Article 2(1), Convention on the Rights of the Child, GA Resolution 44/25, 20 November 1989.

⁹ *X v. Colombia*, UNHRC, 2007, Unreported.

¹⁰ *Adoption Act 2000* (NSW), s 8(1)(c). The *Adoption Amendment (Same-Sex Couples) Bill* has been introduced in NSW, to amend this situation.

¹¹ *Adoption Act*, ss 26 – 28.

¹² See definitions of *couple*, *spouse* and *de facto relationship*: *Adoption Act 2000* (NSW), Dictionary.

¹³ For example, see *Property (Relationships) Act 1984* (NSW), s 4.

¹⁴ *Status of Children Act 1996* (NSW), s 14(1A).

¹⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 149(2).

¹⁶ ABS (2007) *2006 Census of Population and Housing: Number of Children in Same-Sex Couple Families* (unpublished).

developments in Australia (in particular, the Australian Capital Territory, Western Australia and Tasmania).

11. Sexual orientation is a not meaningful indicator of parenting ability. A wide body of credible social science and psychological research documents that the sexuality of a child's parents bears no detriment on the welfare and development of the child.¹⁷

B. Surrogacy

12. While surrogacy has never been expressly outlawed in NSW or Australia, the law has failed to protect the interests of children born through surrogacy arrangements. NSW recently legislated to permit altruistic surrogacy.¹⁸ For both heterosexual and same-sex couples alike,¹⁹ there is currently no satisfactory option allowing a child born through a surrogacy arrangement to have their intended parents legally recognised.

13. In all surrogacy agreements, the biological mother should have a paramount presumption of parentage, and only with her free consent (at the time of conception and after the birth) should a parentage transfer be considered. Informed consent must be obtained by providing the birth parent(s) with legal advice (including a certificate to ensure it has been obtained) and counselling throughout the surrogacy arrangement.

14. Children born through surrogacy are often in a precarious legal position, as their relationship to their intended parents is not completely recognised. A mechanism for the transfer of parentage from the surrogate mother (and her partner, if any) – with their express consent – is urgently needed to secure parental status for the intended parents of children born through surrogacy arrangements (including overseas).²⁰ Surrogacy transfer of parentage orders might recognise the parent-child relationship across all federal and state laws. This ensures a child has access to entitlements and protections, such as access to a parent's superannuation, inheritance or worker's compensation.

15. There is currently no adequate process for recognising children born through surrogacy overseas. Children born through overseas surrogacy arrangements may not be automatically entitled to citizenship by descent and may perhaps have *no* legally recognised parents once in Australia.²¹ Where the free consent of the birth parent(s) is duly granted, a NSW transfer of parentage scheme should provide a mechanism for the recognition or conversion of transfer of parentage orders issued overseas.²²

16. Surrogacy, aside from some legal mechanisms of recognition, does not need further regulation in NSW. In particular, surrogacy reform should not intrude upon private reproductive choices and family planning decisions of couples.²³

C. Non-Discrimination

¹⁷ Charlotte Patterson (2000) 'Family Relationships of Lesbians and Gay Men', *Journal of Marriage and the Family* 62:1052 at 1064.

¹⁸ *Assisted Reproductive Technology Act 2007 (NSW)*. Commercial surrogacy is prohibited.

¹⁹ See *Re Michael: Surrogacy Arrangements* [2009] FamCA 691.

²⁰ Recommendation 8, Standing Committee on Law and Justice (2009) *Legislation on Altruistic Surrogacy in NSW* (Report No. 38), Legislative Council, NSW Parliament, at 121.

²¹ Jenni Millbank (2009) 'De facto relationships, Same-Sex Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationships Reforms' (forthcoming), *Australian Journal of Family Law* 23(3) at 41.

²² See *Re Mark* [2003] FamCA 822 where the court was only able to grant the intending same-sex parents parental responsibility, as s60HB *Family Law Act 1975* did not provide a mechanism for recognising transferral of parentage from overseas jurisdictions.

²³ National Health and Medical Research Council (NHMRC) (2007) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research Use*, Canberra: NHMRC. www.nhmrc.gov.au/publications/synopses/files/e78.pdf (accessed October 20 2009).

17. Current federal anti-discrimination legislation prohibits discrimination on several grounds, including sex, race, ethnicity, marital status and disability. Legislation in those areas has proven to be an essential tool for promoting, respecting and protecting equality in Australian society. However, no such protections exist for gay men, lesbians, transgender persons, or sex and gender diverse individuals despite the fact that they continue to be subject to discrimination in all aspects of daily life.

18. A lack of Federal protection can affect an individual's access to healthcare, the provision of goods and services, accommodation and aged care services. Although the Australian Human Rights Commission can make recommendations in relation to complaints based on sexual orientation in employment, or discrimination by the Commonwealth or its agents, these are not enforceable.

19. Protections do exist under anti-discrimination and equal opportunity acts at a state level in relation to 'sexual orientation', 'sexual preference', and 'sexuality'. However the lack of consistent terminology describing sexuality in state-based anti-discrimination legislation and the broad ranging exemptions available to religious organisations makes Federal protection against sexuality and gender identity discrimination all the more necessary.

D. Marriage

20. Australia has a dual path for legislative relationship recognition. Unlike other countries, couples have different modes of recognition, either through marriage, or the common law status of being in a 'de facto' relationship. In a legal sense, de facto couples and married couples have the same rights at a federal level, and virtually all state and territory laws.

21. The differences between the options is largely practical and administrative in nature, as you have to prove de facto status against a set of legislative criteria, while marriage issues automatic proof of a relationship. However, symbolic recognition of same-sex relationships is still largely unavailable with the absence of a nationally consistent civil union scheme or marriage equality.

22. In the space of seven years (1999-2006) de facto recognition has been comprehensively expanded to guarantee the rights of same-sex couples in state and territory laws.²⁴ At the end of 2008, the Federal Government passed a series of reforms to largely mirror the recognition offered by states and territories. Same-sex couples were recognised in taxation, parentage, superannuation, veteran's affairs, social security and immigration laws.²⁵ The effect of the reforms was to give same-sex couples the same rights, entitlements and responsibilities as heterosexual de facto couples at a Federal level.

23. However, marriage remains strictly defined in heterosexual terms. In 2004 the *Marriage Act 1961* was amended to expressly define marriage as a 'union between a man and a woman, to the exclusion of others voluntarily entered into for life.'²⁶ The change in definition explicitly excluded same-sex couples from marrying.

24. Article 2(1) of the ICCPR²⁷ provides that individuals should not be subject to discrimination and Article 26²⁸ emphasises that individuals should be treated equally before the law. Sexual orientation has been included as a valid category of discrimination as 'other

²⁴ Reg Graycar and Jenni Millbank (2007) 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition', *Journal of Law and Policy* 24 121 at 122.

²⁵ See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Act 2008*.

²⁶ *Marriage Act 1961* (Cth) s5(1).

²⁷ Article 2(1), International Covenant on Civil and Political Rights, G.A res. 2200A (XXI), 22 U.N. GAOR Supp. (No. 16) at 52.

²⁸ *Id.*, Article 26.

status'.²⁹ In a holistic reading of the ICCPR, the *Marriage Act* breaches these international human rights principles by discriminating against same-sex couples on the basis of their sexual orientation.³⁰

25. Some Australian states offer relationship register schemes to recognise partnerships, as a means to provide greater relationship recognition, however they are not a substitute for marriage equality.³¹ Tiering different kinds of conjugal relationships on the basis of sexuality effectively promotes a relationship 'apartheid' with same-sex relationships being considered as 'inferior' or 'lesser than' heterosexual married couples.

26. In Australia marriage is a civil institution, created by secular laws, and therefore religious opinion should not dictate the meaning of marriage. Federal legislation should mirror the civil character of marriage by allowing couples to marry regardless of sexual orientation or gender identity.

Recommendations

The government of Australia should:

27. Reform to all Australian state and territory adoption laws to allow same-sex couples eligibility to adopt which includes a co-parenting provision to allow the partner of a legal parent to adopt a child.

28. Reform to all Australian state and territory laws which includes:

- a transfer of parentage mechanism for parents who conceive via surrogacy arrangements to allow the consenting birth mother and partner (if any) to transfer their parental rights to the intending parents;
- the recognition of overseas surrogacy arrangements in circumstances where biological mother or parents (if any) have legally given their free consent and the child is living in Australia with the intended parent(s).

29. Proceed to the removal of the current discriminatory language in the *Marriage Act 1961 (Cth)* including the current ban on the recognition of overseas under s 88EA, to allow all couples, regardless of sexual orientation or gender identity, the right to marry.

30. Introduce comprehensive anti-discrimination legislation protecting individuals against unfair discrimination on the grounds of their sexual orientation and gender identity.

31. Introduce a secretarial or ministerial portfolio to ensure the effective implementation of anti-discrimination legislation on the basis of sexual orientation and gender identity, and ensure access to remedies when these rights have been breached.

²⁹ *X v. Colombia*, UNHRC, 2007, Unreported.

³⁰ See also *Toonen v Australia*, Communication No. 488/92, 31 March 1994 and *Young v Australia*, Communication 941/2000, 6 August 2003.

³¹ Currently available in NSW, Victoria, Tasmania and the ACT.