



**Submission to the South Australian Parliament  
Social Development Committee Same-Sex Parenting Inquiry**

---

July 2010

Submission to the South Australian Parliament Social Development Committee Same-Sex Parenting Inquiry

Darling House  
64 Fullarton Road  
Norwood SA 5067  
Reception: (08) 8334 1611  
Toll Free: 1800 888 559  
Facsimile: (08) 8363 1046  
Email: [information@acsa.org.au](mailto:information@acsa.org.au)  
Website: [www.acsa.org.au](http://www.acsa.org.au)

Written by Richard Cannon, Senior Policy Analyst, AIDS Council of South Australia.

© AIDS Council of South Australia (ACSA), 2010

This publication is copyright. Apart from fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission. Enquiries regarding this publication should be addressed to the Chief Executive Officer, AIDS Council of South Australia.



## Contents

Glossary of Acronyms	iv
Scope of interest	5
Recommendations	5
Introduction	6
The challenges of being a child of same-sex parents	6
The challenges of being a parent in a same-sex relationship	7
Research supporting same-sex parenting	7
The current laws and their impact on same-sex parents	8
Legal status	8
Access to adoption, surrogacy, IVF and foster caring	8
The relationship between State and Federal laws	9
The relationship to international law	10
In sum	10
Reference list	11



# **GLOSSARY OF ACRONYMS**

---

<b>ACSA</b>	<b>AIDS Council of South Australia</b>
<b>IVF</b>	<b>In-Vitro Fertilisation</b>
<b>GLBTI</b>	<b>Gay, Lesbian, Bisexual, Transgender and Intersex</b>
<b>SSA</b>	<b>Same Sex Attracted</b>

## Scope of interest

The AIDS Council of South Australia (hereafter called ACSA) welcomes this opportunity to provide commentary, information and community knowledge pertaining to the Same-Sex Parenting Inquiry in South Australia. The following submission will set out the current laws in regards to same-sex parents in South Australia and provide a commentary from the community on the ways in which the current laws impact same sex parents and their children. Our primary concern is with enhancing children's wellbeing by equalising the legal rights of same sex parents.

ACSA is a non-government community owned and directed organisation founded in 1986 in response to the HIV/AIDS crisis. ACSA's purpose is to improve the quality of life of our clients and our communities; to reduce the transmission of HIV and to support the growth of strong, resilient and healthy GLBTI people, HIV positive people, people who inject drugs and sex workers. Our vision is "Equity, Health and Human Rights" and we involve our communities in our health promotion and education programs. Advocacy, education programs, personal development and skills building, information and referrals are all part of the range of programs and services provided by ACSA.

In the preparation of this submission, ACSA has consulted with stakeholders and our communities by undertaking a community forum and an online survey.

## Recommendations

The South Australian family related laws in their current form perpetuate disadvantage for the children of same-sex couples and as we will demonstrate, are in contravention of international conventions of which Australia is a signatory. Children in South Australia have a right to be raised within a nurturing, safe and happy environment that is protected by legislation irrespective of the sexuality of their parents. As such, ACSA, through the exploration of related research and in consultation with our communities strongly suggest the following recommendations.

- 1. Amend all discriminatory laws that impact negatively upon same-sex parents and their families; this includes amendments to the *Adoption Act 1988 (SA)*, the *Family Relationships Act 1975 (SA)* and the *Reproductive Technologies Act 1988 (SA)*.**
- 2. Amendments should include the transferral of all rights and associated obligations to same-sex parents that are currently conferred to opposite-sex parents.**
- 3. Make specific references to same-sex relationships within the Acts and not leave terms open to interpretation.**
- 4. Provide information and education material to same-sex couples surrounding the new amendments in order for them to more easily exercise their rights.**

## Introduction

Over our recent history, the term 'a fair go' has become part of the Australian vernacular and has come to be known as a foundation ethos of our culture. However, the perception of 'a fair go' is rarely felt amongst some sections of our society and in 2010 our governments and decision makers continue to implicitly or explicitly discriminate against same-sex attracted individuals and their families. Government continues to make excuses for this institutionalised discrimination as pressure from religious and other interest groups either delays or dilutes any progress in ensuring equal rights for GLBTI populations.

Much of the opposition to same-sex parenting comes from suggestions that the nuclear family<sup>1</sup> is the only legitimate form of family (as promoted through religion, tradition and culture) and as such, the parenting environment for children is somehow lessened within a same-sex household. ACSA contends that this assertion is baseless with research over the last decade demonstrating that the psychosocial and educational outcomes of children born into or raised by same-sex parents are similar if not better than children raised by heterosexuals (Wainright et al, 2004; Patterson, 2006; Gartrell and Boss, 2010). Unfortunately, what the continued opposition to same-sex partnerships and their families achieves is to make the living situation legally inequitable and disadvantageous for the children of these families. This is unconscionable, particularly when their opposition is generally underpinned by assertions that they are thinking of the child's best interest. To this end, Tobin (2010) argues that a child centric approach to the question of same-sex parenting demands equal legal protections for both same-sex and opposite-sex parents and their children. He contends that a failure to provide equality of legal protection and recognition creates a discriminatory environment that is detrimental to children being raised in this environment.

The opposition to homosexuality and same-sex parenting has created a unique set of challenges to overcome when choosing to become a parent within a same sex relationship. Some of these challenges are systemic while others are environmental and social. All of these challenges however are underpinned by the prevailing heteronormativity of our institutions, culture, systems and environment. Heteronormativity has been defined as the dominant (heterosexual) social and political structures that influence us from the day we are born. This social framework maintains and promotes the assumption that the human population is inherently heterosexual, that this sexuality is 'normal' and that any other sexuality/type of relationship is deviant and immoral (Rondahl, 2005). The same assumptions are further made in regards to what constitutes a 'family'.

The prescriptive and limited roles associated with the definition of 'family' within heteronormativity are distinctly heterosexual and most often consist of a male head of the household, a female partner and children (most often biological) (Johnson, 2002). This discourse is incessantly replicated and promoted within every aspect of our lives, particularly through religion, tradition, political discourses and through the media. What this limited and erroneous portrayal of gender and sexuality roles coupled with narrow views of what constitutes a 'family' does is isolates and marginalises anyone who does not identify themselves in this way (Johnson, 2002).

The fallout from this all-encompassing negative social environment is that sections of the population not only perceive that being same-sex attracted (SSA) isn't 'normal', but that people who identify as heterosexual have the exclusive right to form relationships and procreate. With legal and systemic support for this notion permeating almost every facet of our society, this can create an almost insurmountable barrier for SSA couples who make the decision to have children together and also seek to have the same familial protections under the law as other couples and families.

## The challenges of being a child of same-sex parents

ACSA survey respondents and forum participants stated quite clearly that many children of same-sex parents bear the brunt of community ignorance and homophobia. Some parents found that when it became common knowledge that they were in same-sex relationships both the children and some of the parents treated their children differently, excluded them and in some cases the children experienced bullying, threats, verbal abuse and physical abuse.

Further and more importantly, the children of same-sex parents live within an environment in which their parents are thought of as second class, not legitimate parents and not worthy of equal treatment under the law. Tobin (2008) asserts that the failure to provide appropriate legal protections for the children of same-sex parents is a form of unlawful (by international standards) discrimination that is essentially harmful for children. This social and legal environment is paradoxical to the oft cited 'child centric approach' to the opposition to same-sex parenting.

---

1 The prevailing traditional family structure that is considered to consist of a male and a female (either married or de facto) and dependant children.

## The challenges of being a parent in a same-sex relationship

With the aforementioned environmental context firmly in mind we explore the barriers to being a parent in a same-sex relationship. The greatest barrier facing same-sex parents is a prevailing and deep seated prejudice and the resultant discrimination. The societal view of homosexuality and same-sex parenting affects not only the ability of some individuals to effectively parent their children but can also have detrimental impacts upon the child. The respondents to the ACSA same-sex parenting survey resoundingly argued that being an 'out' same-sex parent leaves couples and their families vulnerable to abuse, exclusion and misunderstanding. One forum participant who left a 16 year opposite-sex relationship (with children) commented that the day before he 'came out' he was considered by his friends, family and peers to be an 'exceptionally' good father. He was left astonished by the reaction that he received from most of his friends, peers and some family members upon finding out about his sexuality. He had transformed overnight from being thought of as a great friend and father to being viewed with suspicion and having his status as a father dissected and questioned.

The prevailing homophobia and community reaction (such as the example given above) can leave same-sex parents feeling isolated within their own geographical communities. Relatively few survey participants said, when asked about their sense of connection to their local communities that they had a strong connection to their geographical area. Only 11.1% of participants said they felt a connection to their local environment and just under half (44.4%) felt that they were 'somewhat connected' to their communities. This is compared to nearly half of respondents (44.4%) saying that they felt little to no connection to their local areas. Much of this lack of connection is due to the negative experiences of same-sex parents of the attitudes and beliefs of other parents (opposite-sex). Respondents cited instances of exclusion, a lack of understanding about homosexuality, a lack of cognition surrounding same-sex parenting and old fashioned attitudes surrounding gender roles and parenting roles. This impacts greatly upon same-sex parents in the level of support and understanding that they experience in the community with respondents citing that they are often viewed as not 'real' families because they do not represent the traditional view of the family.

When this view is sanctioned by state legislation, the negative connotations surrounding same-sex parenting are difficult to rally against for many couples and individuals.

## Research supporting same-sex parenting

Proponents of the continued discrimination of same-sex parents and their families cite that children face the potential to be harmed psychologically if they are raised within a same-sex parenting environment. They often support this with religious notions and commentary suggesting that this form of parenting is in direct contravention to 'nature' and tradition. However, over the past decade there has been a growing number of research reports (mostly studying the relationship of lesbian parenting and social and psychological outcomes) that suggests the outcomes for the children raised within same-sex households is as great if not greater than those children raised in opposite-sex households.

For example, recent research from the US revealed that the children of lesbian mothers demonstrated outcomes that were often better than their opposite-sex parented counterparts. According to the report (which studied 154 lesbian mothers and their children until the children reached adulthood) the seventeen year old daughters and sons of lesbian mothers were rated significantly higher in a number of psychosocial categories including, social, academic and total competence levels to the comparison group. Further, the group also rated lower for negative social characteristics such as rule breaking, aggression, and other social problems compared to their aged matched comparisons. The study concluded that the children of lesbian mothers demonstrated a healthy psychological adjustment (Gartrell and Boss, 2010).

Similarly, Patterson (2006) found (in a meta-analysis of comparable studies) that the results of recent research provide no evidence that the sexual orientation of the parent causes any adverse impacts upon the child or their adolescent development. In fact the studies demonstrated that the sexual orientation of the parent is less important than the qualities of family relationships (particularly the relationship between the child and the parent) and the daily interaction was of far greater importance.

Wainright, (et al, 2004) looked into the academic outcomes, psychological adjustment and romantic relationships of forty-four 12-18 year old children of lesbian couples compared to forty-four 12-18 year old adolescents of opposite-sex couples. The study found that overall the children raised by lesbian mothers were developing in positive ways. This group were no more likely to experience anxiety or depression or seek help for psychological issues. The study also found that romantically the offspring of lesbian mothers were no more likely to report same-sex sexual attraction than those children raised by opposite-sex families. This is an important point to raise as many who argue against same-sex parenting contend that sexuality is a choice and as such children can be influenced into making that choice.

The dearth of research into the outcomes of children raised in male same-sex households is disappointing and reflects a paucity of interest in this area over recent years. However the studies described above draw a convincing argument and negate much of the negative assertions regarding the development and welfare of children from those who oppose same-sex parenting.

## The current laws and their impact on same-sex parents

Current laws surrounding children and parenting that impact upon and directly discriminate against people who are in same-sex relationships are the *Adoption Act 1988* (SA), the *Reproductive Technology Act 1988* (SA) and the *Family Relationships Act 1975* (SA). These Acts are very deliberate (particularly the Acts relating to adoption, surrogacy and access to IVF technologies) in their definitions as to who is deemed eligible to access methods to become a parent and in their acknowledgement of legal status as to who will be recognised as a parent. Couples in same-sex relationships, according to the provisions of these Acts are either disadvantaged or negated completely from access to and in the protections contained within the legislation.

### **Legal status**

While the Domestic Partnerships amendments of the *Family Relationships Act 1975* (SA) opened up interpretations of domestic partnerships to be more than just heterosexual relationships, the final amendments (in their relation to the rest of the Act) were still sufficiently vague enough not to actually change much within the legal landscape for same-sex parents. Within the *Family Relationships Act 1975* (SA) the interpretations and provisions in regards to presumption of paternity, recognition of paternity, IVF and surrogacy are crafted to refer only to relationships between men and women (and relationships of consanguinity<sup>2</sup>) and therefore negate relationships and families that do not fit the heterosexual and nuclear family framework.

Further, the presumption of parent status has been enacted to protect the male partner of women undertaking IVF treatment. This provides that men will be presumed the parent of the unborn child and this operates from birth onwards. This allows the male partners' name to be included on the birth certificate as being 'assumed' to have caused the pregnancy. This is provided for in section 10D (1) of the *Family Relationships Act 1975* (SA). Unfortunately the same presumption of parenting status is not afforded to lesbian couples in South Australia. This is not the same in other states, for example Western Australia provides for both the birth mother and the non-birth mother to be included on the birth certificate as parents of the child (Tobin, 2008).

There are however avenues in which same-sex parents and their children can be afforded a modicum of legal protection but these are fraught with limitations and subject to interpretation. 'Parenting orders by consent', give any interested person the opportunity to approach the Family Court to apply to be recognised as a legal parent of a child. The sexuality of the applicant has no bearing in the application nor does the applicant have to be related by blood to the child. The parenting order provides the applicant with various protections and the ability to exercise various functions involved with raising children, such as educational and medical decision making. However, (and as highlighted by forum participants) the order can not be applied for until the child has been born which could cause issues if there are complications involved in the pregnancy. Further, these orders can be challenged by anyone connected with the child and the orders cease when the child turns 18. Overall, the parenting order falls short of the legal recognition provided to the biological parent and to parents in opposite-sex families (Tobin, 2008).

Survey and forum participants expressed dismay as why South Australia is still trailing behind the other jurisdictions in regards to acknowledging same-sex parenting and in amending legislation to be more equitable and to provide legal protections for same-sex parents and their children. Participants shared stories of the negative impacts of not being legally recognised as a parent including the negative impacts of proving parenting status in medical and in custody issues.

### **Access to adoption, surrogacy, IVF and foster caring**

Within the *Adoption Act 1988* (SA) the provisions are quite clear in who is deemed eligible for adoption in South Australia. In section 4 a 'marriage relationship' (which underpins eligibility for adoption) is defined as "the relationship between two persons cohabitating as husband and wife or *de facto* husband or wife". This effectively nullifies any relationship that is not between or man and a woman (heterosexual) and deems them ineligible for adoption.

Surrogacy laws within the *Family Relations Act (SA) 1975* were amended in 2009 with the Statutes Amendment Surrogacy Act (SA) 2009. However while altruistic surrogacy is now permitted in South Australia (within a recognised surrogacy agreement), the new provisions are limited to those who are 'married' (i.e. male and female) or in a heterosexual *de facto* relationship for at least 3 years (Page, 2010). Step-parent adoption is relatively common place amongst opposite-sex couples for the legal recognition of a child-parent relationship between a partner and the child of a previous relationship. This offers the step-parent, co-parent or second parent legal recognition for their role as a parent of the child and is recognised in other jurisdictions. However, this option is only available to same-sex couples in jurisdictions such as Western Australia, the ACT and Tasmania and remains off limits to same-sex couples in South Australia (Tobin, 2008).

Similarly, the access to IVF treatment is strictly controlled through the provisions of the *Reproductive Technology Act 1988* (SA). The Act makes clear that access to IVF technologies will only be to the benefit of 'married couples' who are either infertile or where it appears that conceiving a child naturally would lead to an increased risk of genetic defect. The Act states that a 'married couple' (apart from those who are legally married) may include couples who aren't married but are living as 'husband' and 'wife' (once again denoting male and female) in the immediately preceding five years or who have lived as husband and wife for periods aggregating five years.

Interestingly, to be considered for a foster care placement in South Australia, the criteria is not as limited and discriminatory as the legislation explored earlier. To be a foster carer you need to be 25 or older, can be male or female, can be single, married, or be de facto partners and while you don't need to have children currently in your care you are required to have the skills to look after children. Same-sex attracted individuals or couples are not explicitly or implicitly prevented from becoming foster carers but maturity, health and 'lifestyle' will also be taken into account when being assessed for a placement (Government of South Australia, 2009).

When we explore the current legislation it is clear that same-sex couples are still implicitly or explicitly discriminated against in regards to having their relationships acknowledged and their rights as parents set down in legislation. This leaves couples and their children unprotected by the laws that heterosexual couples and their families take for granted. SSA individuals do however have access to equal opportunity legislation. For example, state equal opportunity legislation (the *Equal Opportunity Act 1984* (SA)) makes it unlawful to discriminate against someone on the basis of a person's sexuality or presumed sexuality. This protection is provided for in the areas of employment, education, accommodation, provision of goods and services, being in a club or an association, and in advertising. This has been a great step forward and has removed discrimination against SSA individuals in a variety of areas but the legislation still prevents SSA couples from adoption and access to IVF technologies (Page, 2010).

The differences in legal status across the states and territories of Australia are also a cause of frustration for same-sex couples in South Australia. In light of a discussion regarding the current legal landscape in South Australia at the ACSA forum one participant commented that if they had just travelled to Canberra to have their child by donor insemination they would have been able to include both mothers on the birth certificate.

This is not an exhaustive list of the current South Australian laws that actively discriminate against same-sex couples and parents in South Australia, but these examples demonstrate the complex nature of trying to gain legal recognition for same-sex parents and access to the same legal protections as every other family.

## The relationship between State and Federal laws

A frustrating paradox exists within the interplay of Commonwealth and State legislation in child support provisions. From 1st July 2009, same-sex parent *were* recognised (at a Commonwealth level within the *Family Law Act 1975* (Cth)) as legal parents and as such a separated parent from a same-sex relationship is able to apply for child support from a co-parent who is recognised as a parent under the Act. This means that under Commonwealth law, a same-sex parent can be liable to pay child support for their legally recognised child within a state (such as South Australia) which doesn't recognise them as the legal parent. This is just one of many instances in which same-sex couples *are* being recognised within Commonwealth law (mainly for tax purposes and for access and eligibility to Centrelink benefits) while still being invisible or actively discriminated against in South Australian law. As one forum participant commented, the obligations that flow from the recognition of same-sex couples and same-sex parents through Commonwealth legislation (particularly in regards to child maintenance) do not confer any other rights, particularly at state level.

## The relationship to international law

With Australia being one of the original signatories to the Universal Declaration of Human Rights (1948) sixty years ago, one would be forgiven for thinking that Australia (and each state and territory making up this country) would have basic human rights in the forefront of their minds when developing and reviewing legislation that allows implicit or explicit discrimination to occur in any group or population. For example, article 7 states;

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.*

Clearly, legislation that denies an individual’s rights based upon their sexuality would be in direct contravention of this Article.

While Commonwealth legislation is slowly changing (reflective of international conventions) to provide same-sex individuals and couples with greater equality, we know that discriminatory legislation still exists both at the Commonwealth level and particularly in South Australia.

In addition, the United Nations Convention on the Rights of the Child (1990) states that the family is a fundamental group in society and acts as “the natural environment for the growth and wellbeing of its members”. As such, the Convention submits that the family should be afforded the necessary protections and support in order for it to carry on its functions and responsibilities in the community. Further to this, the Convention stresses the importance of a happy, harmonious family environment for the child to grow up in to facilitate the positive growth of a child’s personality to fully prepare them for life within society. The government knows the importance of the family for child development and as such, has provided protections within legislation. Unfortunately this legislation discriminates against same-sex couples and their families.

However, the international conventions that Australia have become signatories to have not been ratified into the laws of this country and essentially, South Australia is continuing to discriminate against families other than opposite-sex, traditional nuclear families.

As stated earlier, the argument proffered by opponents to same-sex parenting that they are working in the best interests of the child is an untenable commentary. This ‘mantra’ has been hijacked by certain groups within society to promote their own agenda and particular ideology. The premise that we work in the best interest of the child by depriving a defined group of families and their children from access to rights and entitlements is illogical and can only lead to marginalisation and disadvantage (Tobin, 2008).

For example, within international law (Article 8 of the International Convention on the Rights of the Child, 1990), children have the right to birth registration and the right to an identity (Tobin, 2008). Through South Australian law, this fundamental right is being denied to the children of same-sex parents everyday. What current South Australian laws fail to recognise is that by depriving same-sex couples (particularly the non-biological parent) from being included on the child’s birth certificate, they are effectively denying that child’s right to be recognised within the child family affiliations and familial identity. Our government must actively work within the international conventions that we are signatories to and take active measures in ensuring the child’s right to have their identity and familial affiliations recognised (Tobin, 2008). In fact, as a matter of international law, Australia (as signatories to the international conventions) is bound to ratify the provisions within the conventions into domestic law.

## In sum

Tobin (2008) cites a declaration made by the American Academy of Paediatrics in 2002 which said that the failure to legally recognise parents prevented ‘children from enjoying the psychological and legal security that comes from having two willing, capable and loving parents; and this applies to all children, whether their parents are of the same or opposite sex’. While some positive changes have been seen in various jurisdictions of Australia, the continued failure of the South Australian government in recognising the rights of same-sex couples and their children deprives those children of the same family and social environments as the children of opposite-sex families (Tobin, 2008).

Clearly, same-sex parents and their children are being negatively impacted upon by the existing laws which allow discrimination against them based solely on their sexuality. The ACSA forum and survey participants shared many stories of discrimination and legal complexities that have called into question their status and abilities as parents and their connections to their families.

The dire need for social and legislation change was expressed by one of the ACSA survey participants, who lamented the once great South Australia as a leader in social change across the country. It is high time that we once again led the country in changing the social status for those who are marginalised, vulnerable and disadvantaged. South Australia trails the rest of the country in amending discriminatory laws that negatively affect same-sex parents with particular emphasis on children of same-sex partnerships. Maintaining an inequitable living environment for the children of same-sex couples can only impact negatively on those children and in their continued family lives.

## Reference list

Gartrell, N, Bos, H 2010, 'US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents', *Pediatrics*, vol. 126, no. 1, pp. 28-36

Government of South Australia 2009, 'Becoming a foster carer', Department for Families and Communities, viewed 13 July 2009  
<<http://www.dfc.sa.gov.au/pub/Default.aspx?tabid=282>>

Johnson, C 2002 'Heteronormative citizenship and the politics of passing', *Sexualities*, vol. 5, no. 3, pp. 317-336

Office of the United Nations High Commissioner for Human Rights (1990), *Convention of the Rights of the Child*, viewed 16 July 2010  
<<http://www2.ohchr.org/english/law/crc.htm>>

Page, S 2010, *Surrogacy Guide State by State*, Gay Dad's Australia: a Resource for Gay Dads and Those Thinking of Becoming Dads, viewed 13 July 2010  
<[http://gaydadsaustralia.blogspot.com/2010/02/australian-gay-and-lesbian-law-blog\\_07.html](http://gaydadsaustralia.blogspot.com/2010/02/australian-gay-and-lesbian-law-blog_07.html)>

Patterson, CJ 2006, 'Children of Lesbian and Gay Parents', *Current Directions in Psychological Science*, vol. 15, no. 5, pp. 242-244

Rondahl, G 2005, 'Heteronormativity in a nursing context: attitudes towards homosexuality and experiences of lesbians and gay men', Digital Comprehensive Summaries of Uppsala Dissertations from the Faculty of Social Sciences 1, Doctorate thesis, Uppsala Universitet.

Tobin, J 2008, 'Recognising same-sex parents: bringing legitimacy to the law', *Alternative Law Journal*, vol. 33, no. 1, pp.36-40

United Nations (1948) *The Universal Declaration of Human Rights*, viewed 15 July 2010  
<<http://www.un.org/en/documents/udhr/>>

Wainright, JL, Russell, ST, Patterson CJ 2004, 'Psychosocial adjustment, school outcomes and romantic relationships of adolescents with same-sex parents', *Child Development*, vol. 75, Number 6, pp. 1886-1898