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Parliament of Tasmania

JOINT STANDING COMMITTEE ON COMMUNITY
DEVELOPMENT

REPORT

ON

AMENDMENTS TO THE RELATIONSHIPS
(CONSEQUENTIAL AMENDMENTS) BILL
2003

*Report of the Joint Standing Committee on Community Development
Laid upon the Table of both Houses*

Membership of the Committee

Hon. Lin Thorp, MLC (Chair)	Ms Kathryn Hay, MHA
Hon. Allison Ritchie, MLC	Mr Brenton Best, MHA
Hon. Jim Wilkinson, MLC	Mr Brett Whiteley, MHA
Hon. Kerry Finch, MLC	Mr Tim Morris, MHA

JOINT STANDING COMMITTEE ON COMMUNITY DEVELOPMENT

**INQUIRY INTO AMENDMENTS TO THE RELATIONSHIPS
(CONSEQUENTIAL AMENDMENTS) BILL 2003**

Terms of Reference

In accordance with the establishing rules and procedures of the Joint Standing Committee on Community Development the Attorney-General forwarded a reference on 2 September 2003 requesting that the Committee inquire into and report upon the provisions which were omitted from the *Relationships (Consequential Amendments) Bill 2003* by amendment in the Legislative Council.

The provisions in question are as follows:

Status of Children Act 1974

Proposed Section 10C(1A)

Where a woman is in a significant relationship, within the meaning of the *Relationships Act 2003*, with another woman and, with the consent of that other woman, undergoes a fertilization procedure as a result of which she becomes pregnant, the consenting woman is, for the purposes of the law of the State, to be treated as if she were the parent of any child born as a result of that pregnancy.

Adoption Act 1988

Proposed Section 29(4A)

In the case of a child whose mother was in a significant relationship, within the meaning of the *Relationships Act 2003*, with a woman at the time of the child's birth or at or after the time of its conception but before its birth and the child has not previously been adopted, the appropriate persons are the parties to that relationship if—

- (a) the child was born as a result of a fertilization procedure to which the female partner in the significant relationship with the mother had given consent; or
- (b) there is no man required to give consent under section (3).

SECTION 1 – INTRODUCTION

Conduct of the Inquiry

- 1.0 The Committee met on four occasions to hear evidence and consider matters relating to the clauses omitted from the *Relationships (Consequential Amendments) Bill 2003*.
- 1.1 The Committee placed advertisements in the three major Tasmanian newspapers on Wednesday 3 September 2003 inviting public submissions from individuals and organisations wishing to comment on the omission of the clauses from the *Relationships (Consequential Amendments) Bill 2003*.
- 1.2 The Committee received 48 submissions from the following:
- (1) Sasha Cunningham – private submission.
 - (2) Kristen Walker, Senior Lecturer in Law, University of Melbourne.
 - (3) Julian S. Punch AM, Catholics Against Oppression.
 - (4) Daniele Crosariol – private submission.
 - (5) Alex Bainbridge - private submission.
 - (6) Samantha Hardy LLM, Lecturer in Law, University of Tasmania
 - (7) Dr Jason Hoare – private submission.
 - (8) Ms R. Wealands – private submission.
 - (9) Maxine Drake – private submission.
 - (10) Mr E. J. Holmes – private submission.
 - (11) Ms Kate Fitzpatrick – private submission.
 - (12) Mr Barry Scott – private submission.
 - (13) Cris Fitzpatrick – private submission.
 - (14) Ms Sonya Stanford, School of Sociology and Social Work, University of Tasmania
 - (15) Ms Els McIntosh, Co-ordinator, Parents, Family and Friends of Lesbians and Gays Tasmania.
 - (16) Mrs Betty Roberts OAM, For The Catholic Women’s League Tas. Inc. Social Questions Committee.
 - (17) Ms Emma Bridge, Co-convenor, Tasmanian Rainbow Labor.
 - (18) Louise North – private submission.
 - (19) Damian Voss – private submission.
 - (20) Viki Rutter – private submission.
 - (21) Barbara Smith – private submission.
 - (22) Jen Van-Achteren – private submission.
 - (23) Geoff Hall – The Let’s Get Equal Committee South Australia.
 - (24) Ms Louise Sullivan – private submission.
 - (25) Paul Duncombe, Corporate Services Manager, Family Planning Tasmania.
 - (26) Mrs Mieke de Vries, Secretary Australian Family Association Tasmania.

- (27) Neil Trivett, Co-convenor, Working It Out Inc., Lecturer, Teaching and Learning, Flexible Education Unit, University of Tasmania.
- (28) Dr Barbara Baird, Coordinator, Women's Studies Program, School of Philosophy, University of Tasmania.
- (29) Ms Barbara Smith – private submission.
- (30) Helen Watson and Sielito – private submission.
- (31) Lang Goodsell – private submission.
- (32) Ms Sandra Mackintosh – private submission.
- (33) Ms Mauria Sutherland – private submission.
- (34) Trish Collins, A/WEL Australia Chair, WEL Australia.
- (35) Terri Francis – private submission.
- (36) Mr Eric Lockett, Chair, Public Questions Committee, Baptist Churches of Tasmania.
- (37) Julianne Campbell, Health Worker, Hobart Women's Health Centre.
- (38) Ms Lisa Singh, President, YWCA Tasmania.
- (39) Ms Susan Fahey, Womens Legal Service (Tas) Inc.
- (40) Ms Jacklynn Draper, Convenor COAL, Coalition of Activist Lesbians.
- (41) Ms Jane Dunsford – private submission.
- (42) Louise Pratt MLC – private submission.
- (43) Ms Gail May – private submission.
- (44) Ms Jane Hutchison, Manager, Hobart Community Legal Service.
- (45) Michael Ferguson, Tasmanian Family Institute and J.J.A. Wallace, AM, Australian Christian Lobby.
- (46) Nick McKim MHA, Greens Member for Franklin.
- (47) Tasmanian Gay and Lesbian Rights Group.
- (48) Ms Lisa Hutton, Director, Legislation Development and Review, Department of Justice.

1.3 Of the submissions received forty three submission supported the amendment of the *Status of Children Act 1974* and *Adoption Act 1988* to provide for the presumption of parent status for a woman in a same sex relationship whose partner has a child through assisted reproductive technology (ART) procedures to which both parties have consented. Only five of the submissions received were against the reinstatement of the omitted provisions. In the main these submissions put forward moral arguments for the differential treatment of same sex relationships.

Documents Received

- 1.4 The following documents were tabled and taken into evidence:
- (1) Correspondence received by the Attorney-General from the Attorney-General, ACT Parliament concerning the introduction of Australia's first bill of rights legislation, in particular the - Sexuality Discrimination Legislation Amendment Bill 2003 and the Parentage Bill 2003.
 - (2) The *Relationships Act 2003* and the Attorney-General's second reading speech.

- (3) The *Relationships (Consequential Amendments) Act 2003* and the Attorney-General's second reading speech.
- (4) The Tasmania Law Reform Institute Issues Paper No. 4 February 2003, entitled 'Adoption by Same Sex Couples'.
- (5) The Tasmania Law Reform Institute Final Report No. 4 May 2003, entitled 'Adoption by Same Sex Couples'.

Witnesses

- 1.5 The following witnesses were called to appear before the Committee:
 - Ms Lisa Hutton, Director of Legislation Policy and Review, Department of Justice.
 - Mr Rodney Croome, Tasmanian Gay and Lesbian Rights Group.

Background

- 1.6 The legal standing of non-traditional significant personal relationships in Tasmania has been a matter of public debate for some time.
- 1.7 In 2001 the Joint Standing Committee on Community Development received a reference from the Attorney-General, the Hon. Judy Jackson MHA, to inquire into the legal recognition of significant relationships.
- 1.8 The Committee found that Tasmania's laws were deficient in not recognising same sex and other non-traditional personal relationships.
- 1.9 The Committee noted that in areas such as property division on the breakdown of relationships, accident and workers compensation entitlements, superannuation, taxation, intestacy and maintenance matters, and employment entitlements the law provided support and protection to some personal relationships while ignoring others.
- 1.10 The Committee found that the denial of legal recognition to non-traditional relationships creates unjustifiable hardship and expense. Legal entitlements that automatically flow to parties in traditional relationships must be fought for in court in the case of same sex and other non-traditional relationships, with no certainty of outcome.
- 1.11 The Committee also noted that the maintenance of discriminatory relationships legislation was contrary to the precepts of the *Anti-Discrimination Act 1998* and that reform was necessary to address this.
- 1.12 The Committee recommended the amendment of the *De Facto Relationships Act 1999* to provide a catch-all definition for 'significant personal relationships' that would capture same sex and other non-traditional significant personal relationships within the meaning of 'de facto spouse' or

‘partner’ for the purposes of other relevant Acts and thus afford equality of treatment before the law for all significant personal relationships.

- 1.13 In moving towards reform of discriminatory legislation in relation to non-traditional significant relationships in November 2002 the Attorney-General asked the Tasmania Law Reform Institute to examine the issue of adoption by same sex couples.
- 1.14 In June 2003 the Attorney-General introduced the *Relationships Bill 2003* and *Relationships (Consequential Amendments) Bill 2003* into Parliament.

Main Provisions of Reform Legislation

- 1.15 The Attorney-General’s second reading speech makes clear that the intent of the *Relationships Bill 2003* is to recognise the diversity of relationships in Tasmanian society.

“...Government has a responsibility to recognise the relationship choices that are being made, and to support people to cope with the changes in their lives. One way to do this is by changing the law to accord these relationships with the full recognition they deserve.”

- 1.16 The *Relationships Bill 2003* achieves this by extending the scope of the *De Facto Relationships Act 1999* to deliver equitable treatment before the law to all personal relationships.
- 1.17 The main aspects of reform introduced by the *Relationships Bill 2003* include the following:
- The repeal of the *De Facto Relationships Act 1999*;
 - The creation of a category of ‘significant relationship’ applicable to unmarried adult couples including same sex couples, thus replacing the category of ‘de facto relationship’;
 - The creation of a category of ‘caring relationship’ between two adults, one or both of whom provide domestic support and personal care to the other; and
 - Provision for the formal registration of significant and certain caring relationships.
- 1.18 The *Relationships Act 2003* is predominantly an instrument that validates the legal standing of parties to a significant personal relationship in order to ensure just and equitable treatment in respect to property division and maintenance obligations upon the breakdown of the relationship.
- 1.19 The *Relationships (Consequential Amendments) Act 2003* is established to eliminate discrimination against same sex and non-traditional significant personal relationships in areas other than property and maintenance.

- 1.20 The Attorney-General's second reading speech describes the purpose of this legislation as follows:

"The Relationships (Consequential Amendments) Bill 2003 makes amendments to accord equal rights and responsibilities to the personal relationships defined in the Relationships Bill 2003.

...This Bill includes amendments that will directly affect the daily lives of Tasmanians in same sex and caring relationships, by granting them the equal status and legal legitimacy they deserve."

- 1.21 Approximately 70 Tasmanian Statutes were identified that discriminated against same sex and other non-traditional relationships. Examples include the *Anti-Discrimination Act 1998*, *Adoption Act 1988*, *Duties Act 2001*, *Fatal Accidents Act 1934*, *Motor Accidents (Liabilities and Compensation) Regulations 2000*, *Retirement Benefits Act 1993*, *Testator's Family Maintenance Act 1912*, and *Status of Children Act 1974*.
- 1.22 The *Relationships (Consequential Amendments) Act 2003* amends discriminatory relationships legislation by removing narrow definitions of 'de facto spouse' or 'partner' used in the determination of eligibility for benefits etc and replaces them with more inclusive and gender neutral definitions to include same sex partners.

SECTION 2 – EVIDENCE

- 2.0 With the passing of the *Relationships Act 2003* and the *Relationships (Consequential Amendments) Act 2003* the Committee recognises that the Parliament has affirmed the principle of equality before the law for all significant personal relationships.
- 2.1 Consequently the Committee feels it is not appropriate for this inquiry to revisit any moral or philosophical arguments raised in connection with the recognition of same sex relationships. The Committee has approached the issue of the clauses omitted from the *Relationships (Consequential Amendments) Bill 2003* as a technical matter requiring an assessment of the current provisions of the Act and how well they correspond with the intent of the principal Act.
- 2.2 Submissions received from legal practitioners and others support the presumption of parenthood for the same sex partner of a woman who conceives a child through a fertility procedure with the consent of her partner. The key arguments presented in support of this position are the principle of anti-discrimination and upholding the Rights of the Child.

- 2.3 Ms Kristen Walker, Senior Lecturer in Law, University of Melbourne, suggests that as Australia is a party to the United Nations Convention on the Rights of the Child the law must not disadvantage children in same sex families by denying the child equal rights to children born into traditional families.

“The law should recognise the child’s actual family circumstances. For children born through fertilisation procedures to women in same sex relationships this means the possibility of having two legal parents rather than one.

If the law does not recognise the child’s actual family circumstances, the child is disadvantaged legally, financially, socially and emotionally. Their parents are also disadvantaged by not having the role of the non-biological mother recognised in law. For example, the child will not automatically inherit from his or her non-biological mother, nor from his or her non-biological grandparents or other relatives. Further, ability to provide medical care for the child may be compromised if one parent is unable to consent because she is not legally acknowledged as a parent, and the legally recognised mother is unavailable.” (Submission No. 2 p.1)

- 2.4 Ms Lisa Hutton, Director of Legislation Policy and Review, Department of Justice also argued for reinstatement of the omitted clauses on the grounds of children’s rights and equal treatment before the law.

“...we know that many people in the community believe that the ideal family unit consists of a mother, a father and their child or children. However, it is just as clear that there are now, and will continue to be, Tasmanian families consisting of a same sex couple and their child or children. So if we take the view that the child’s rights are to be paramount in all these arrangements, there can be no distinction between children on the basis of whether the woman who gives birth to them is married or is in a significant relationship with a man or a woman. The policy aim, from our point of view, is to ensure that wherever possible there are two adults who are legally obliged to provide for that child’s needs as it grows up.” (Transcript 24/2/2004 p.4)

- 2.5 The Tasmanian Gay and Lesbian Rights Group (TGLRG) submit that the lack of legal recognition for same sex co-parents will adversely affect the children involved.

“The law as it currently stands also disadvantages the children concerned by re-inforcing the social stigma which is attached to lesbian and gay parenting. If the law is loath to recognise the parenting rights and responsibilities of same sex couples, if it continues to foster the view that same sex couples and their children are second-rate or dysfunctional families the children in these families will inevitably suffer.” (Submission No.47 p.3)

- 2.6 The TGLRG also note that the omission of the clauses providing presumptive parent status for the same sex partner of women who have children through fertilisation procedures violates the principles of the *Anti-Discrimination Act*.

“Currently under Tasmanian law the married heterosexual male partners of women who have children through fertilisation procedures are presumed to be the child’s other parent.

When the Relationships Bill becomes law the same rights and responsibilities will accrue to the unmarried heterosexual male partners of women who have children through fertilisation procedures.

It is discriminatory for the same rights and responsibilities not to be afforded to female partners in similar circumstances.

This discrimination violates the spirit of those provisions of the State Anti-Discrimination Act which prohibit discrimination on the grounds of sexual orientation, sex and lawful sexual activity.

It also violates the spirit and intent of the new Anti-Discrimination Act provisions - resulting from the passage of the Relationships Bill – which prohibit discrimination on the grounds of relationship status.” (Submission No. 47 p.6)

Status of Children Act 1974

- 2.7 Evidence presented to the Committee on the *Status of Children Act 1974* indicated that this Act was originally designed to protect ‘illegitimate’ children from the disadvantage of having only one legal parent. The Act provided for a person to be deemed the child’s father if he had lived with the mother during her pregnancy or if he was married to the mother at the time of the child’s conception but died before it was born.
- 2.8 The development of assisted reproductive technologies such as artificial insemination and in vitro fertilisation that may involve the use of donor ovum or sperm necessitated the amendment of the Act to clarify the status of children born through the use of these procedures.
- 2.9 Prior to the proclamation of the Relationships Act 2003 on 1 January 2004 the *Status of Children Act 1974* defined the status of a child born as a result of a fertility procedure as follows:

Where a child is born to a married woman as a result of a fertilization procedure:

- *the woman giving birth was deemed to be the child’s mother, and*
- *if the treatment was carried out with the consent of the woman’s husband he was deemed to be the father of the child.*

A ‘fertilization procedure’ was defined as artificial insemination or in vitro fertilization.

An ovum donor was not to be the mother of a child born as a result of a donation.

A sperm donor was deemed not to be the father of the child unless he was the birth mother's husband or de facto partner.

- 2.10 Thus under these provisions the person deemed to be the father of a child born through the use of fertility procedures need not have any biological relationship with the child.
- 2.11 With the proclamation of the *Relationships Act 2003* and *Relationships (Consequential Amendments) Act 2003* the *Status of Children Act 1974* is amended to also give recognition to heterosexual couples in significant relationships.

Where a child is born to a woman who is married or in a significant relationship with a man as a result of a fertilization procedure:

- *the woman giving birth is deemed to be the child's mother, and*
- *if the treatment was carried out with the consent of the woman's husband or male partner he is deemed to be the father of the child.*

- 2.12 The Committee feels that the denial of recognition to the same sex partner of a woman in equivalent circumstances is discriminatory and inconsistent with the intent of the legislation.
- 2.13 Evidence before the Committee suggests that the main purpose of the *Status of Children Act* is to ensure that children born as a result of assisted reproductive technologies have two parents. A secondary objective is to ensure that sperm and ovum donors do not acquire parent status.
- 2.14 The Department of Justice notes in its submission that:

"The Act has never required a husband to have made a physical contribution to the conception of a child born through ART before he was deemed to be its father. The prerequisite has always been simply that he and the mother must have decided that they want to have a child together."(Submission No.48 p. 2)

- 2.15 In Tasmania there is no legal impediment to women who are not married accessing artificial reproductive technologies. It is therefore feasible that women in same sex relationships will make use of such technology and conceive children with the consent of their partners. Under such circumstances the same sex partner is in an identical situation to the husband or male de facto partner of a heterosexual woman undertaking fertility treatment.
- 2.16 The Committee believes that the differential legal treatment of persons in equivalent circumstances is unjustifiable and contrary to the spirit and intent of the Act.
- 2.17 The TGLRG also point out the internal inconsistency and contradiction created within the legislation with the omission of the presumptive parent provisions for same sex partners. The omission of these provisions from the

Relationships (Consequential Amendments) Bill denies parent status to same sex partners, whilst other provisions are retained to allow for known child adoption by same sex partners.

- 2.18 The TGLRG however argue that the provision for known child adoption cannot be used as a justification for denying presumptive parenthood under the *Status of Children and Adoption* acts.

“...the failure to allow presumption is a slight against lesbian and gay parenting. Why should same sex partners have to prove that they are good parents through the adoption assessment process when heterosexual partners are presumed to be good parents from the start? The only answer to this is that lesbian and gay parenting is seen by the law as second rate or dysfunctional. ... this erroneous message has a negative impact on the well being not only of lesbian and gay parents but also their children. (Submission No. 47, p.10)

Adoption Act 1988

- 2.19 Amendments proposed to Section 29 of the *Adoption Act 1988* reflect the changes that would have occurred if the amendments to the *Status of Children Act 1974* had been retained and presumptive parenthood had been extended to same sex partners.
- 2.20 Section 29 of the *Adoption Act* sets out who is required to give consent before a court can make an order for adoption. Generally it is the parents of the child that must give consent. The Act does however recognise a husband or a man in a significant relationship with the mother at the time of the child’s birth or conception as the father of the child.
- 2.21 The proposed amendments to this section would have extended the presumption of parenthood to a woman who took part in the decision for her partner to conceive a child through a fertility procedure. Under these circumstances the Committee feels it would be reasonable for the non-birth parent to be a consenting party in the event of the child being relinquished for adoption.
- 2.22 The omission of these amendments means that the law will continue to treat people in equivalent circumstances differently on the basis of their relationship choices.

SECTION 3 – CONCLUSION

3.0 The Committee found that the omission of clauses from the *Relationships (Consequential Amendments) Bill 2003* to deny parental status to the same sex partner of a woman who conceives a child through fertilisation procedures with the consent of her partner is inconsistent with the intent of the legislation and seems to contradict the adoption provisions already enacted.

3.1 In the opinion of the Tasmanian Law Reform Institute the interests of the child are best served when both parties who consent to the conception of a child through fertility procedures are presumed to be the parents.

“ While step-parent and relative adoption should be available to the same sex partner of a parent or relative of a child, in the case of co-parents (lesbian couples who have a child as a result of a planned pregnancy) adoption is not the optimal choice. A more appropriate legal response in such a situation is presumptive recognition of both parents from birth.

The Institute recommends:

(a) that both step-parent and relative adoption should be available to the same sex partner of a parent or relative of a child; and

(b) that the Status of Children Act 1974 s10C be amended to apply conclusive presumption of parenthood to the same sex partner of a woman who, with her partner’s consent, conceives a child as the result of an artificial fertilisation procedure.” (Tasmanian Law Reform Institute – Adoption by Same Sex Couples – Final Report No4 p.7)

3.2 The Women’s Legal Service (Tas) submit that:

“ ...the presumption of parenthood for same sex partners of women who have children utilising fertility procedures where the sperm donor is anonymous must be reconsidered for inclusion in the Relationships Bill 2003. Not only is it consistent with the principle purpose of that Bill but to omit it would be discriminatory and in contravention of other State laws upon the commencement of the Relationships Bill. (Submission 39 p.4.)

3.3 Given the anomalies presented above the Committee believes that in its current form this Statute may be open to legal challenge.

3.4 The Committee recognises that the current provisions of the *Relationships Consequential Relationships Act 2003* do not provide the full recognition and equality before the law to all significant personal relationships as was the intent of the reform process.

Recommendation

1. The Committee recommends that both clauses omitted from the original Bill be reintroduced to Parliament as amendments to the *Relationships (Consequential Amendments) Act 2003* in order to remove the inconsistencies created in the legislation by their omission.

Parliament House, Hobart
17 June 2004

Hon. L. E. Thorp
Chairperson.