

Pragmatic imbalances: Australian lesbian and gay foster carers negotiating the current legal context

Abstract

In Australia, foster carers play a considerable role in providing for the long-term needs of children who cannot live with their birth parents, yet they do so with little legal protection. For lesbian and gay foster carers, this lack of legal protection of their relationship to children in their care is exacerbated by ongoing homophobia and heteronormativity which, it is suggested, can impact upon the assessments they receive prior to registration and the support they receive once approved. This chapter explores the current Australian legal and policy context in detail, and the ways in which it is negotiated by a sample of Australian lesbian or gay foster carers. Specifically, it is noted that many participants reported negotiating what are termed here 'pragmatic imbalances': that they were willing to prioritise the rights or possible needs of children in their care over and above their own. Examples of this are discussed and the chapter concludes with recommendations for legislative and policy changes that address the shortcomings in current laws and policies without making this a 'gay rights' issue. Rather, the point is made that these are systemic issues that must be addressed in order to best meet the needs of all children.

Introduction

Gay rights activists have increasingly recognised the importance of avoiding using the language of 'gay rights' when making claims about the rights of lesbians and gay men to parent (see Hicks, 2005, for a discussion of this in the context of the UK, and Riggs, 2009, for a discussion of this in the context of Australia). Largely this has been in response to ongoing challenges from those with 'traditional' views on what constitutes a family, who assert that 'gay rights' to parent are contrary to the 'rights' of children to a mother and father (see for example policies outlined by the Australian Family First political party). Focusing, instead, on the rights of children to have their parents recognised as such has been one alternate approach adopted by those advocating for the rights of lesbian- or gay-parented families (Short, 2007).

Yet whilst a children's rights approach has been successful in many Australian jurisdictions in achieving legislative change, it is nonetheless important for gay rights activists not to slip into what Baird (2008) has termed 'child fundamentalism'. Baird suggests that child fundamentalism occurs when the category of 'the child' comes to stand in for the lives of actual children, and where recourse is made to particular stereotyped assumptions about children's needs in order to secure rights for adults. In the case of rights for lesbian- or gay-parented families, the possibility of child fundamentalism exists when children's needs are automatically conflated with those of adults. This is not to say that children do not grow up healthy and well living in lesbian- or gay-parented families: empirical research clearly shows that children in such families do exceptionally well despite living in a context of ongoing homophobia and heteronormativity (e.g., Gartrell and Bos, 2010). Rather, the point made here is that the needs of adults for a legally recognised relationship with their child may be motivated by factors that both overlap with, but also differ from, those that motivate children to seek proximity to the adults who care for them (Riggs, 2008).

Furthermore, it is important to recognise that legislative change aimed at protecting lesbian and gay parents is likely to primarily benefit such parents who have a legal relationship to their children. Whilst this is, of course, vital, it is nonetheless the case that there are some lesbian or gay parents in Australia who do not (and cannot) claim a legal relationship to their children, namely those who parent in the context of foster care. In response to this, the findings presented in this chapter explore how a group of lesbian and gay foster carers reported negotiating the current legal system and how, it is suggested, they balance their own needs with those of the children in their care.

The project from which the findings are drawn involved a survey (60 participants) and interviews (30 participants) conducted in late 2009, with carers from four Australian states: Victoria; Queensland, New South Wales and South Australia. Before presenting findings from the interview data, the chapter first outlines the current legislative and policy context, as it pertains to lesbian and gay foster carers, in the four states. While the interviews focused primarily upon the participants' experiences of support from foster care agencies, many spoke about the apparent disparity between the rights of lesbian and gay foster carers and the rights of the children in their care. The concept of 'pragmatic imbalances' is coined here to provide one way of understanding the management of this disparity. The chapter concludes with a number of recommendations for law and policy reform designed to address the needs of all parties.

Australian foster care context as it pertains to lesbians and gay men

Foster care agencies across Australia currently face a drastic shortage of people willing to provide care to children who cannot live with their birth parents. In contrast to the US and UK, children removed from their parents in Australia are rarely placed for adoption. Instead, such children are typically placed (where long-term orders are granted) with foster parents who care for them in a family context until they come of age. While in some Australian jurisdictions foster parents may be granted limited guardianship of children, instances of this are few, and such guardianship is always shared with the State (with individual agency social workers acting as proxy guardians for the State). Yet despite not having legal guardianship of foster children, Australian foster carers are expected to carry the primary responsibility for raising foster

children. Perhaps because of this absence of any recognition of a legal relationship between foster carer and child, it has become increasingly difficult, in Australia, to recruit and retain sufficient numbers of foster carers to meet the placement needs of children removed from their birth families. This lack of registered foster carers (estimates suggest there are around 10, 000 registered foster carers in Australia) is a significant concern, given that in an average year there are 340, 000 child protection notifications made. At present there are 35, 000 children currently in care, 25, 000 of whom are on guardianship orders (i.e., either a 12 month order or an order that places them under the guardianship of the Minister until they are 18), with 47% of child on guardianship orders living in foster care (AIHW, 2010).

One ‘solution’ to the lack of available foster carers that has recently been explored by a range of foster care agencies across Australia, is a consideration of a more diverse range of applicants. Moving beyond the heterosexual nuclear family, some agencies now accept applications from lesbians and gay men interested in becoming foster carers. Yet despite the growing recognition that lesbians and gay men potentially have much to contribute to national child protection agendas in Australia, and despite the rapidly growing numbers of lesbians and gay men registered as foster carers in Australia, little consideration has been given to the specific needs of this population. The little research that has been undertaken suggests that, in multiple ways, lesbian and gay foster carers are not adequately supported, and that to a large degree this is the product of a lack of policy, legislation or guidelines aimed at setting out best practice for working with this population (Riggs, 2010a). Troubling has also been the finding that some Australian lesbian and gay foster carers report ongoing experiences of homophobia on the part of child protection workers (Riggs and Augoustinos, 2009).

It is important to acknowledge that none of the laws pertaining to foster care across Australia explicitly prohibit lesbians and gay men from becoming foster parents. This does not mean, however, that all of the relevant laws explicitly *protect* lesbian and gay foster parents. To be clear: the point here is not a gay rights argument. Rather, the point is that if Australian foster care systems solicit lesbian and gay applicants, it is important that such applicants (and when subsequently approved, registered carers) are protected from discrimination so that they can best direct their energies to providing for the needs of the children in their care (rather than combating discrimination within the child protection system). In other words, and in a context of ongoing homophobia and heteronormativity, lesbian and gay foster carers require protection against discrimination in ways that heterosexual foster carers are unlikely to, and that failing to provide such protection will fail to ensure the safety and stability of placements. Further, explicitly providing protection on the basis of sexual orientation sends a clear message to all working in the child protection sector in Australia, namely that discrimination against lesbians and gay men is both unacceptable and illegal.

An examination of legislation governing foster carer registration in each of the four states involved in the project reveals that only NSW explicitly includes a ban on discrimination on the basis of sexual orientation. The New South Wales *Children and Young Persons (Care and Protection) Act, 1998* states that “Children's services must also have regard to the provisions of the *Anti-Discrimination Act, 1977*”. The Act referred to here (one that is New South Wales-specific) expressly prohibits (in Part 4C) ‘discrimination on the grounds of homosexuality’. As

such, the foster care legislation in New South Wales clearly states that discrimination against lesbian and gay foster parents and applicants is illegal.

The relevant foster care legislation in the other three states included in the present research do not explicitly include reference to relevant anti-discrimination or equal opportunity legislation. However, as foster care agencies provide a service, they are therefore bound by the anti-discrimination and equal opportunity legislation within each state. Yet despite this, it is argued here that without clearly referencing the relevant equal opportunity/anti-discrimination legislation in the Acts relevant to foster care in the other three states included in this research, social workers governed by the Acts may fail to comprehend the injunction upon them to provide equal treatment to all applicants. Further, it is important to note that the Acts in South Australia, Victoria and Queensland which govern the registration of foster carers all implicitly appear to allow for discrimination against lesbian and gay applicants through the inclusion of an 'out clause' (even if using such an out clause would contravene relevant equal opportunity laws). The Queensland *Child Protection Act 1999* is a good example of this implicit endorsement of discrimination. Its criteria for approval of an individual as a carer includes the catch-all requirement that both "the applicant is a suitable person to be an approved foster carer" and "all members of the applicant's household are suitable persons to associate on a daily basis with children". As social and individual opinions on 'suitability' often shift, it could be suggested that individual workers who assess applications from lesbians or gay men, and who are not aware of the relevant equal opportunity legislation, may use these out-clauses to legitimate the refusal of registration to such applicants. Of course if applicants were aware that they were excluded on the basis of their sexual orientation, they could make a complaint to the relevant equal

opportunity/anti-discrimination body. However, because they would carry the burden of proof of demonstrating that discrimination on the basis of sexual orientation had indeed occurred, a successful outcome could not be guaranteed.

Of course it is not simply the existence of these out-clauses in three of the states and their potential misuse by workers unaware of relevant equal opportunity legislation that can result in discrimination. South Australia, Victoria and Queensland also largely exempt religiously-orientated organisations from complying with anti-discrimination and equal opportunity laws (see for example s 75 of the *Equal Opportunity Act 1995* (Vic)). This may mean that religious based foster care agencies can legally refuse to assess lesbian or gay applicants.

In addition to these issues at law in regard to the protection of lesbian or gay applicants, two of the states also fail to explicitly state on their websites that non-heterosexual people are eligible to apply to become foster carers, and these two states also have ‘out clauses’ similar to that described above. In regards to the two states that *do* explicitly state that non-heterosexual people are able to apply, the Victorian Government foster care recruitment website states that ‘heterosexual and homosexual couples’ can apply, and the NSW Government website states that ‘you can be single, married or in a de facto or same-sex relationship’. The other two states only include broad (though not necessarily inclusive) statements about eligibility, such as that included on the South Australian Government information website for potential carers, which states ‘you can be single, married couples or partners’. However, and similar to the ‘out clause’ suggested above in relation to legislation in states other than New South Wales, the South Australian website includes a provision which may potentially lead to the exclusion of lesbian or

gay applicants from consideration. This appears in the statement that ‘your maturity, health and lifestyle will also be considered’. (The notion of sexual orientation being a ‘lifestyle choice’ was found by Hicks, 2000, to be a rhetorical tool used to refuse registration as foster carers to lesbian and gay applicants in the UK).

Only one state or territory in Australia currently has a set of practice guidelines specifically about working with lesbian and gay foster carers. The Victorian Centre for Excellence in Child and Family Welfare *Guidelines for Recruiting and Supporting Lesbian and Gay Carers* (2009) provides information to workers about the unique needs of lesbian and gay carers, appropriate ways of undertaking recruitment, and the need to understand the effects of homophobia and heteronormativity. While this is an important development in Australian foster care, these guidelines were only released in 2009, and are pitched as best practice guidelines, not policy or ethical guidelines, and they carry no legislative weight.

In summary, while it is often claimed by foster care agencies that lesbians and gay men are welcomed as foster carers, the legislative, policy and recruitment contexts within Australia suggest otherwise. Indeed, the very fact that certain (religiously-orientated) foster care agencies are still able to state to interested parties that they will not consider lesbian or gay applicants highlights the tenuous position of potential lesbian or gay foster carers. In other words, and as a result of being refused eligibility to apply to religiously orientated agencies, lesbian or gay applicants have more limited options for becoming foster carers than do heterosexual applicants. Also, given the fact that only one state (Victoria) has a specific set of guidelines (and that these carry very little weight), it is important to recognise that notions of liberal inclusivity (where

everyone is presumed to have equal access) fail to truly grasp the ongoing effects of homophobia and heteronormativity and their impact upon lesbian or gay foster carers.

Findings: Australian Lesbian or Gay Foster Carers Negotiating Pragmatic Imbalances

All of the persons interviewed as part of this research spoke about the need to weigh up their own beliefs, needs or rights against those of the children in their care, and emphasised what are termed here 'pragmatic imbalances'. This term was coined by the author to capture the fact that whilst the majority of the sample were relatively politically active and left-leaning in their political views and ideas about what constitutes justice for lesbians and gay men in Australia in general, they seemed very mindful of the responsibility they have to the children in their care who may have needs or past experiences that conflict with their own needs or experiences. It would be fair to state that the majority of participants would likely have wished for policy change to better support lesbians and gay men as foster carers (in terms of the current shortfalls identified previously in this chapter). Nonetheless, they were willing to, in a sense, to sacrifice their own political positions as lesbians and gay men in order to prioritise the needs of the children in their care, rather than resorting to a child fundamentalist account that would conflate children's rights with gay rights. This is illustrated by the following extract from an interview with Cara and Kate (all names are pseudonyms), a lesbian couple who have cared for two children together for the past two years following Cara taking them on by herself initially for two years before meeting Kate.

Cara: We became partners after I took on care of the kids and until then I had played it pretty low key with me being a lesbian, but especially so after having the

kids because I know that things around here aren't all that great in terms of people's attitudes.

Kate: And initially it did bother me because coming from being a long time politically active lesbian and having all my friends being lesbian I was like 'no, I want the whole world to know, there's two mums here'

Cara: Yeah she wanted a billboard up! But I said I think we need to leave it to the kids to decide how they want to represent us to the world, even if personally now I would be happy to be as open as Kate would like for us to be as a couple.

In this extract Kate states clearly that her preference is for them to be visible as a two mother family to anyone they come into contact with ('I want the whole world to know'), and further that this desire is grounded in her identity as a 'politically active lesbian'. By contrast, Cara certainly does not report being closeted about her lesbian identity, but rather that she came to recognise, after taking on care of the two children, that the impact of other people's attitudes upon the children could be detrimental. Importantly, Cara doesn't attempt to presuppose what the children might want or need (i.e., whether disclosure to others would necessarily be inherently good or bad or a combination of both), but rather that it is up 'to the kids to decide how they want to represent us to the world'. That Cara notes her own willingness to be 'open' indicates the pragmatic imbalance she is willing to negotiate where she and Kate place in the children's hands the capacity to determine how their family will be represented. A similar approach is seen in the extract of an interview with Ben, a single white gay man who at the time was caring for an Indigenous child:

Ben: This one day [the child] saw me kiss my then partner and he was disgusted. He harassed me about it for weeks. It wasn't a pash just a firm kiss on the lips and

he jumped up and said “you are boy, he not a girl you no kiss him”. He wouldn’t stop saying that like he was just disgusted for the whole day. Later I told someone else about it and they gave me this look which suggested I shouldn’t have kissed my partner. At the time I was really stung about that because I am weary of the scrutiny that gays get and think it is totally unacceptable, particularly within the foster care sector. Yet over time, and for me, what became more important was [the child’s] safety and that if they were willing for me to still care for him then I was willing to be managed around that.

Throughout the interview Ben was very mindful not to present a reductive image of Indigenous cultures where all Indigenous people are homophobic. Rather, he went to great lengths to note the considerable support and inclusion he had received from many Indigenous people and communities, but that nonetheless at times he had to negotiate differences between how he would, for example, treat his own nieces and nephews (with whom he would, and had, challenged homophobia) and the way he engaged with the Indigenous child in his care. Ben’s narrative exemplifies the challenge of matching up (or otherwise) best practice with non-indigenous lesbian and gay carers with best practice for Indigenous children. While in another context it would be entirely inappropriate to ask a lesbian or gay foster carer to hide their affection for their partner, in this instance it was important for Ben to prioritise the needs of the child in his care (needs which Ben reported related to the child’s connections to community and the practicing of culture). As such, caring for an Indigenous child as a non-indigenous gay man meant for Ben the need to prioritise the child’s needs in ways that at times may have conflicted with his own needs or with his beliefs about social justice issues for lesbians or gay men.

Fallon (2007) makes a similar point about having to weigh up her own politics as a white lesbian against the demands of the State in relation to her care for an Indigenous child. While she speaks

of the negative effects of having to hide her relationship with a woman from the State when she first fostered the child, she nonetheless recognises the necessity of doing so in order to be able to foster an Indigenous child who, she was told, was “profoundly retarded... there’s no hope” and that someone should have “put him out of his misery” (p. 11). Here again, non-indigenous lesbian or gay carers are at times required to place the needs of Indigenous children above their own through the striking of pragmatic imbalances. Of course not all such imbalances directly involved children in the care of participants. Participants also spoke of negotiating pragmatic imbalances to ensure that children *could* be cared for, such as in the following example:

Anne: We have worked with lots of other carers to support them in getting a placement and negotiating the system, and whilst I certainly think we are known amongst our friends as being pretty political, in many instances we try and steer clear of making things too political. One time a gay couple we were talking to weren’t having any luck getting a placement after being approved and they suggested that it was due to homophobia and wondered if we could help them challenge that. In the end we helped them get a placement but we didn’t run with homophobia as an issue because we felt that if we made that the issue it would become the main issue and either they wouldn’t have still got a placement or they would have and by then the focus on the kids and their needs would have been sidetracked.

It is clear from this excerpt that Anne discouraged a gay couple from making an accusation of homophobia because of the potential for such an assertion to have ‘sidetracked’ the needs of children. Importantly, and again like Kate earlier, Anne states that she and her partner are ‘known amongst our friends as being pretty political’, yet here she advises steering clear of making what could become a politicised argument. Of course, in so doing Anne is making a political decision: to avoid an accusation of homophobia in order to best facilitate a resolution of

the situation. As such, her actions are not apolitical, but rather are aimed at avoiding the attribution of the label ‘political gay foster carer’ being appended to the couples’ challenge to the lack of children being placed with them. Certainly in the context of ongoing homophobia within Australian foster care systems (see Riggs and Augoustinos, 2009, for a discussion of this), Anne’s suggestions to the couple would seem to be a wise political move. In this example, the pragmatic imbalance not only keeps the focus on the needs of any children potentially placed with the gay couple, but also the need to make strategic political decisions that while appearing apolitical, or indeed regressive, (i.e., ignoring, rather than challenging homophobia), actually prevent the further politicisation of lesbians or gay men on terms *not of their making*.

The final example of pragmatic imbalance illustrates the need to moderate political opinions and behaviours not only for the sake of children, but also for the sake of lesbians and gays who do not yet have children in their care:

Rosemary: I think we need to let the community move with us. I think if we are seen to be too outrageous and too political that will throw the baby out with the bathwater ‘cos we need to be mindful of the current carers who have kids in their care who are walking very careful lines to get their orders through so if any one of us went out there and started waving rainbow flags we actually could be jeopardising the current status of families and most importantly children and we wouldn’t do that. Instead, I think it’s about what we do: we share resources, expertise, experience.

Rosemary indicates that being ‘too outrageous and too political’ can be detrimental to other carers as well as to the children in placements that are not under permanent (or long-term) orders. It is, of course, important to note that Rosemary does not simplistically advocate for the

closeting of lesbian or gay foster carers. Rather, she acknowledges the grassroots work that is done (sharing ‘resources, expertise, experience’) that is epitomised in the extract from the interview with Anne, above. For Rosemary, what must be central to any decisions about being political are the current placements and the children that are in care, who could be harmed by too much ‘rainbow flag waving’. This presents the crux of the paradox highlighted in this chapter, namely that whilst policy and legislative change (in terms of preventing religiously-orientated organizations from applying exemptions) is necessary to better support lesbian and gay foster carers, this cannot come at the expense of current placements. As discussed below, Rosemary’s statements along with the others presented above indicate the need for particular types of arguments for policy change that protect current placements but do not rely upon notions of child fundamentalism.

Conclusion

The intention of this chapter has not been to justify the social or legal exclusion of any lesbian or gay parent, nor to advocate for relegating lesbian and gay foster carers to the closet. Rather, the aim of this chapter has been to acknowledge, as has previous Australian research on lesbian-parented families in schools (e.g., Lindsay et al., 2006), that such families negotiate visibility on the basis of a range of often conflicting needs. This stands in contrast to comments made in many lesbian and gay parenting books, which suggest that visibility and being ‘out’ is the best way to parent, and that doing otherwise models shame to children (e.g., Brill, 2001). The findings presented in this chapter suggest that such an injunction is perhaps in and of itself a form of child fundamentalism, where blanket statements about what is supposedly best for children are advocated to all parents. If we truly wish to put children first, there needs to be a recognition that parents’ and children’s desires and rights may not always neatly match up. While for some

this may seem like fodder for traditionalists (who could use it to argue, for example, that no child desires to have two mothers or two fathers), this is perhaps a necessary risk, for to do otherwise would be to, yet again, assert that adults (of any sexual orientation) always know what is best for children.

In light of the findings presented here, which highlight that lesbian and gay carers are often faced with having to negotiate pragmatic imbalances (i.e., being willing to sacrifice their own ideals or needs to best meet those of the children in their care), it is important to consider what changes are desirable. The clearest issue requiring attention across all states and territories across Australia is to amend legislation governing foster care to bring it in line with New South Wales (i.e., legislation that explicitly states that anti-discrimination legislation which references sexual orientation applies to those working in the child protection sector). This would make it clear that ‘out-clauses’ in the relevant Acts cannot be used to exclude lesbian and gay applicants). It is again important to note, however, that just because this *could* be used by some lesbian or gay applicants to challenge discrimination does not make this a gay rights issue *per se* (though this was used as such in a case recently in New South Wales, see McDougall, 2008). Rather, the point is that enshrining anti-discrimination requirements in the legislation pertaining to foster care sends a clear message that fair assessment is vital to ensuring the ongoing viability of the foster care system (i.e., sufficient registered carers), and to highlight the fact that equal opportunity Acts apply to the provision of services to foster care applicants and carers. Further, recognising the considerable contribution that lesbian or gay carers can potentially make to a foster care system in which children abused by members of the opposite gender may benefit

from being placed in a same-gender household requires that such carers be adequately protected to ensure the wellbeing of all parties.

Related to this is the need for agencies that target and accept lesbian or gay applicants to develop policies that clearly state this, and to provide clear consequences for homophobia (something that would be further backed up by the aforementioned legislative change). Again, this is not a gay rights issue, but rather is about protecting the foster care system from unnecessary attrition resulting from homophobia. Addressing this particular potential cause of attrition requires a system-wide response to ensure that all workers, birth parties, foster carers and other stakeholders understand that homophobia (like any form of discrimination) holds a considerable potential to negatively impact upon children. Obviously, and as indicated above, refusing registration to lesbian or gay carers will potentially disadvantage children who may benefit from such placements. But furthermore, allowing homophobia to continue in foster care systems holds the potential to school children as to its machinations and thus perpetuate it. This would suggest, then, that not only does anti-discrimination legislation need to be expressly cited in all legislation relevant to the registration of foster carers so that all workers are aware of it, but that all Australian states and territories need to give considerable thought to the implications of allowing exemptions for religious organisations. Not only do such exemptions potentially contribute to the low levels of registered foster carers (i.e., by turning away eligible carers solely on the basis of sexual orientation), but they also affirm the acceptability of homophobia, albeit under the guise of respecting religious freedom. Rather than curtailing such freedom, however, governments may instead reconsider who they grant tenders to in regards to the provision of foster care services and how this impacts upon the registration (or otherwise) of certain groups.

Finally, what is required are continued conversations about how those involved in the child protection system understand ‘children’: what assumptions do all parties bring to understanding this category, and how does it negatively impact upon all care arrangements? This is most pertinent if we consider the presumed asexual heterosexuality attributed to all children, an attribution that fails to recognise the specific needs of same-sex attracted youth in the care system, for example. Thus Polikoff (1996) argues that undertaking adequate assessments of lesbian and gay applicants and ensuring they remain in the system is not a gay rights issue, but rather is about creating placement options for actual lesbian or gay youth who would likely otherwise be placed in a home that could potentially be homophobic. To make this claim is not to resort to child fundamentalism. Rather, it is to question the very terms on which we define ‘children’, and to recognise the incredible diversity subsumed by this category, and the ways in which it typically operates to perpetuate a very narrow and idealised image of childhood. To recognise the diversity of children likely to live their lives in foster care is thus to move beyond child fundamentalism and instead to challenge the operations of normativity in all its forms and to develop policies and more clearly directive legislation that encourages the inclusion of all people, rather than relying upon the willingness of lesbian and gay foster carers to negotiate pragmatic imbalances in order to best support children.

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