

Draft Looked After Children (Scotland) Regulations

Submission to the Scottish Government

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The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network's policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us.

We welcome the opportunity to respond to the Scottish Government's consultation on the draft Looked After Children (Scotland) Regulations. Our response covers only those parts of the proposals which we consider to have an LGBT equality impact.

Same-sex couples (consultation question 18)

We strongly agree with the recommendation of the Adoption Policy Review Group, that the exclusion of same-sex couples from acting as foster carers, by regulation 12(4) of the current Fostering of Children (Scotland) Regulations 1996, should be abolished.

We agree that this would assist the recruitment of suitable foster carers by broadening the pool of potential carers. The research evidence indicates that children do as well with a same-sex couple as parents or carers as they do with a mixed-sex couple as parents or carers¹. In addition, there may be certain circumstances where a same-sex couple could be particularly appropriate as foster carers for a specific child. Examples of this might be where an older child to be placed with carers

¹ See, for example, 'A comparative analysis of adoptive family functioning with gay, lesbian and heterosexual parents and their children', S. Erich, P. Leung and P. Kindle, Journal of GLBT Family Studies, vol 1 issue 4, pages 43-60, 2005

is lesbian, gay or bisexual, or where a girl has been abused by male family members, and might be most appropriately placed with a female couple as carers.

The exclusion of same-sex couples as foster carers is more restrictive than the existing law on adoption. Under current adoption law, a same-sex couple (whether civil partners or cohabiting) may in effect adopt a child, although the actual adoption is by one of the partners only. In contrast, all people living in a same-sex couple are excluded from becoming foster carers.

The existing fostering legislation is even more obviously inconsistent with the new arrangements for adoption to be introduced by the Adoption and Children (Scotland) Act 2007, which allows joint adoption applications by civil partners and cohabiting same-sex couples.

Fostering can be an initial step leading to adoption of a child. The Equality Network has been contacted by same-sex couples concerned that, at present, their local council can already make initial assessments of their suitability as joint adopters (ready for commencement of the 2007 Act) but cannot allow them to become foster carers. It would certainly make no sense for the fostering and adoption legislation to continue to be out of step, following commencement of the 2007 Act.

ECHR considerations

We also consider that the rule excluding same-sex couples as foster carers breaches the ECHR – specifically article 14 (prohibition of discrimination) taken in conjunction with article 8 (right to respect for private and family life). The most closely related case is *E.B. v France* at the European Court of Human Rights, in which the judgment is dated 22nd January 2008. This case concerned a woman in a same-sex relationship who sought to adopt a child (as a single adopter) and was turned down because of her sexual orientation.

The Court ruled that while article 8 does not confer a right to adopt, decisions about adoption fall within the ambit of article 8. Article 14 therefore prohibits discrimination, including on grounds of sexual orientation, in those decisions, unless the discrimination is objectively and reasonably justified in pursuit of a legitimate aim. The Court noted that where sexual orientation is in issue, there is a need for particularly

convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8. The Court concluded that the difference in treatment of the applicant was based on her sexual orientation, and that it amounted to discrimination in breach of article 14 taken in conjunction with article 8.

In our view, the same reasoning applies to the sexual orientation discrimination in regulation 12(4), which is therefore almost certainly in breach of the ECHR. If so, it would be outwith the legislative competence of the Scottish Government and Parliament to include any similar discriminatory rule in the new regulations. Failure by the Scottish Government promptly to repeal the discriminatory rule in regulation 12(4) would also, we think, constitute an unlawful breach of the ECHR by the Government.

Further to this point, we believe that local councils which are currently enforcing regulation 12(4) by excluding same-sex couples from consideration as possible foster carers, are acting unlawfully under the Human Rights Act 1998. The Fostering of Children (Scotland) Regulations 1996 are subordinate Westminster legislation. The discriminatory rule in regulation 12(4) is not required by any provision of primary Westminster legislation. The conditions in section 6(2) of the Human Rights Act are therefore not met, with regard to the application by councils of the discriminatory rule, and so that application is unlawful under section 6(1).

We know of same-sex couples who are directly affected now by the application of regulation 12(4) by councils. We do not think that they (or the children they might provide foster care for) should have to wait another year for the breach of their article 14 ECHR right to non-discrimination to be remedied by the new regulations. We ask the Scottish Government urgently to take legal advice on whether (in particular in the light of the very recent *E.B. v France* judgment) the discriminatory rule in regulation 12(4) breaches the ECHR.

If the advice is that regulation 12(4) does breach the ECHR, we ask the Government to inform local councils of that fact, and to advise them that they are therefore required by the Human Rights Act not to apply the discriminatory rule, but immediately to open up consideration as possible foster carers, to same-sex couples. Not only would this be required by law, more practically, it would immediately benefit children, by expanding the pool of potential foster carers.

Schedule 4 – marriage and civil partnership

We note that paragraph 1 of schedule 4 to the draft regulations refers to the marital status, and potential previous marriage, of a prospective foster carer. Clearly, these should be references to marital or civil partnership status, and to previous marriage or civil partnership.

It is particularly important that new legislation does not discriminate on grounds of sexual orientation, and that references to marriage are always accompanied by references to civil partnership. We feel that this is something that should be checked routinely by the Government, as part of the equality impact analysis of draft legislation.