

**RAINBOW FAMILIES' SUBMISSION TO THE NSW
LAW REFORM COMMISSION'S REVIEW OF THE
*ANTI-DISCRIMINATION ACT 1977 (NSW)***

September 2023

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About Rainbow Families

Rainbow Families was formed in 2015 as the peak body for lesbian, gay, bisexual, transgender, and queer (“**LGBTQ+**”) families. The mission of Rainbow Families is to build a community that fosters resilience by connecting, supporting and empowering LGBTQ+ families.

Rainbow Families has a growing membership and includes people from across Australia. Rainbow Families is an incorporated organisation, governed by a constitution which provides a structure for how the group operates. Rainbow Families is a registered charity and DGR status from the ATO.

What is a Rainbow Family?

A Rainbow Family is an LGBTQ+ parented family. At Rainbow Families, we define a Rainbow Family as: any lesbian, gay, bisexual, transgender, or queer person who has a child or children; or is planning on having a child or children by way of donor insemination (known or unknown), surrogacy (altruistic or commercial), foster care, foster to adoption, adoption (domestic or international), opposite sex relationship, coparenting or other means.

Rainbow families, like many modern families, come in all shapes and sizes and are formed in many different ways. But the thing we all have in common is that our families are created through love. Over thirty years of peer reviewed research into same-sex parented families shows that children from these families do as well as their peers from heterosexual-parented families.

For the community, by the community

Rainbow Families is a volunteer-led organisation, providing a network of support to children and families within the LGBTQ+ community.

Language is a powerful tool for fostering inclusion (or exclusion) of families. In the context of this review, it is important to acknowledge that language is constantly evolving. Rainbow Families recognises that one label or description may not be able to capture the diverse nature of LGBTQ+ families given their varying compositions throughout the community. Our intention is to succinctly and broadly advocate for LGBTQ+ families while remaining inclusive of everyone.

Introduction

Rainbow Families supports an overhaul of the *Anti-Discrimination Act 1977* (NSW) (“**Act**”). As drafted, the Act is fragmented, outdated and fails to adequately safeguard rainbow families against discrimination, harassment, and vilification. To align the Act with contemporary standards, we support the expansion of protected attributes to include people of diverse sexualities and genders.

The object of the Act is to promote an inclusive society by prohibiting discrimination and harassment. Attributes currently protected by the Act including sex, marital or domestic status, sexual orientation, pregnancy, and transgender status are directly applicable to the experiences of rainbow families. However as currently defined, these attributes fail to acknowledge the diversity of our community and their experiences of discrimination. The language used in the Act is archaic and inconsistent with current social standards.

The consideration of any further exemptions to the protections afforded to religious organisations and private institutions should be avoided. Exemptions need to be strictly limited to what is necessary to maintain the core function of those organisations as they often seek to promote values and practices that are discriminatory towards the LGBTQ+ community. The framing of such exemptions must also be unambiguous to prevent them being taken advantage of or circumvented.

Rainbow Families broadly recommends that the NSW Government:

- Broaden protections by expanding protected attributes and their definitions to encompass all members of the LGBTQ+ community who encounter discrimination including gender diverse people. Such protections also need to be afforded to associates of members of the LGBTQ+ community. Rainbow Families inherently involve untraditional relationships. It is essential that the Act protects against discrimination by association.
- Minimise exemptions to the extent that they are only necessary to maintain the core functions of private institutions or religious organisations.
- Address discrimination against LGBTQ+ individuals particularly as it arises throughout the adoption process (including processes facilitated by religious based organisations) and in the context of the provision of health care services.
- Impose positive obligations to prevent discrimination.

Discrimination against rainbow families

Discrimination against rainbow families can take various forms and occurs in a broad range of circumstances. Discrimination against rainbow families is often rooted in conservative and religious bias.

Forms of discrimination which are experienced by rainbow families include:

- **Adoption and Foster Care:** Rainbow Families encounter barriers when trying to adopt or become foster parents, including biased assessments based on discriminatory criteria and denials of applications based on sexuality and/or gender. This form of discrimination is particularly prolific given a number of the major adoption service providers are associated with religious institutions. In circumstances where these organisations receive public funding, they should not be permitted to discriminate based on their own values and practices when they should be focussing on positive outcomes for children.
- **School Discrimination:** Teachers and students of Rainbow Families encounter discrimination in schools and other educational institutions due to their sexuality and gender. This can include blatant exclusion from institutions, loss of employment, the imposition of harmful curriculum and the promotion of socially conservative or religious values.
- **Healthcare Discrimination:** Some healthcare providers exhibit bias or provide substandard care to members of Rainbow Families leading to disparities in healthcare access and outcomes. Access to healthcare is a critical issue for transgender and gender-diverse individuals. Members of the Rainbow Families community report experiencing discrimination from medical staff and other service providers. Proper access to reproductive medical services is particularly important to the experience of Rainbow Families as it allows members of the community to overcome biological barriers. In order to create a family, access to assisted reproductive technologies can be essential. Members that are discriminated against in a medical or therapeutic environment may decline to engage professional services.
- **Discrimination based on Religion:** Religious institutions deny services and support to rainbow families based on religious beliefs and practices. The exemptions which should apply to religious institutions need to be carefully managed against the harmful impacts which the imposition of conservative religious values and practices can have in many circumstances. Many members of the Rainbow Families community practice religion and their exclusion or the exclusion of their children based on sexual and gender characteristics can be devastating.

The Act needs to recognise the intersectionality of the experiences of rainbow families and members of the LGBTQ+ community. Individuals and their associates experience discrimination based on multiple aspects of their identity, such as race, sexual orientation and gender identity. The Act need to be updated to provide redress to members of the community which, at the time the Act was enacted in 1977, were not appropriately recognised.

Additional protected attributes

The Act in its current form fails to protect gender diverse individuals against discrimination. For example:

- The Act's definition of '*recognised transgender persons*' is out-dated and narrow and does not adequately protect transgender people;
- The Act fails to protect non-binary people and the diversity of gender identity; and
- The Act does not have a stand-alone protected attribute covering people born with intersex variations.

Language relating to sexual and gender diversity refers to the terminology used to describe a wide range of sexual orientations and gender identities beyond the traditional binary. To ensure adequate protection against discrimination, the NSW Government needs to adopt language which fosters understanding, respect, and inclusivity. It is acknowledged that such language is constantly developing and definitions of protected attributes need to take this into consideration. The Act should take into consideration the fluidity of expression of the LGBTQ+ community and broadly provide relief against discrimination for individuals of the community, however they identify. It is crucial to address the discrimination faced by the various subgroups within the community.

Rainbow Families is aware of at least one instance where a young person was being harassed and vilified due to their sexual identity and was unable to make a complaint of discrimination because the Act did not recognise their individual attribute.

RECOMMENDATION #

Rainbow Families recommends amending the Act or ensuring that any future NSW anti-discrimination law protects all LGBTQ+ people from discrimination by including protected attributes based on:

- sexual orientation;
- gender identity and expression;
- sex characteristics or variations of sex characteristics;
- irrelevant medical history/record;
- genetic characteristics;

RECOMMENDATION #

In respect of all amendments to the Act or in any future NSW anti-discrimination law, ensure:

- inclusive terms are used wherever protections are intended to apply to all people or relationships regardless of gender (e.g. terms such as ‘sibling’ instead of ‘brother or sister’)
- terms such as ‘different sex’ are preferred over language importing a gender binary such as ‘opposite sex’.

Discrimination by association

Rainbow Families encompass a wide spectrum of diversity, reflecting the varied identities and relationships and ways that families are formed. In particular:

- Rainbow Families can consist of parents that identify in diverse ways.
- The composition of rainbow families challenges traditional notions of gender roles and parental responsibilities. Family members may be the donors of genetic material or surrogates and their own families. Families may consist of a couple, a single parent or a co-parenting arrangement.
- The children of rainbow families can be biological children, adopted children, or children from other relationships.
- Not all members of Rainbow Families may identify as members of the LGBTQ+ community. Different members of a Rainbow Family may identify in various ways.

Discrimination by way of association is particularly harmful to members of rainbow families. Understanding and acknowledging diversity within rainbow families is essential for protecting discrimination against its members. The Act needs to safeguard individuals from being discriminated against because they are associated with someone who belongs to a protected attribute.

The NSW Government should have regard to the legalisation in other jurisdictions which extends the protection against discrimination to associates of a person who has, or is believed to have, any of protected attributes. Examples include:

- Section 6 of the *Equal Opportunity Act 2010* (VIC) includes protected attributes relevant to LGBTQ+ families of breastfeeding, gender identity, marital status, parental status or status as a carer, pregnancy, sex, sex characteristics, sexual orientation, an expunged homosexual conviction. Section 6(q) extends protections to: “*personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes*”.
- Section 16 of the *Anti-Discrimination Act 1998* (TAS) comprehensively deals with the protection against discrimination based on sexual orientation, lawful sexual activity, gender identity, intersex variations of sex characteristics, marital status, relationship status, pregnancy, breastfeeding, parenting status and family responsibilities. Section 16(s) extends protections to: “*association with a person who has, or is believed to have, any of these attributes*”.

- Section 7(1) of the *Discrimination Act 1991* (ACT) includes protected attributes relevant to LGBTQ+ families of breastfeeding, gender identity, genetic information, parent, family, carer or kinship responsibilities and record of a person's sex having been altered. Section 7(1)(c) extends protection to: “*association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute*”.

RECOMMENDATION #

Consistent with laws in other states and territories (and, to an extent, in NSW), all protected attributes should have the following extensions of protection ensure discrimination protections based on protected attributes extend to the personal associates of a person with a protected attribute.

Positive obligations to prevent discrimination and vilification

The existing legal framework primarily focuses on addressing the consequences of discrimination rather than emphasising proactive measures to promote equality. The Act should clearly outline positive obligations which prevent the occurrence of discrimination. For example, part 3 of the *Equal Opportunity Act 2010* (Vic) imposes a positive duty on employers and certain other entities to take proactive measures to eliminate discrimination, sexual harassment, and victimisation. Employers are required to create inclusive workplaces, prevent discrimination, and respond effectively to complaints. Such legislation imposes responsibilities on employers to prevent and address harassment and provides remedies for victims. Proactive measures represent a commitment to promoting equality.

RECOMMENDATION #

Imposing a legislative positive duty to take steps to eliminate discrimination, harassment, vilification and victimisation.

Removing exemptions – religious and private education institutions

The Act contains exemptions that specify certain contexts where discrimination is allowed at law.

Religiously affiliated schools employ a substantial portion of the Australian educational workforce. These institutions are exempt from Australian state-based anti-discrimination legislation to varying degrees. The exemptions curtail the effectiveness of the protections afforded by the Act. Permitting religious schools to terminate employment of staff members from the LGBTQ+ community due to their identity when it has no impact on their ability to meet their employment obligations is unacceptable.

Rainbow Families broadly supports a reduction in the scope of the exemptions afforded to religious educational institutions under existing anti-discrimination law. Exemptions to discrimination against students and teachers on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy should be avoided.

Discrimination against students in religious educational institutions

For many parents in our community, formal education brings the first experiences of discrimination, often in the form of enrolment practices that exclude children because of the sexual orientation or gender identity of the parents. Those who send or are considering sending their children to religious schools need to be confident that their children will be able to learn and thrive in an inclusive environment that accepts and supports them. This comment from a community member demonstrates the need to protect rainbow families against discrimination in the context of religious educational institutions:

We are a same sex female couple with a daughter who just started school at a catholic primary school and I support legislation that will enforce our daughters right to be free to express her family situation and for us to be accepted within the school community.

Discrimination extends beyond enrolment to encompass a range of conduct that would limit students' access to any benefit or subject students to detriment. The comment by this community member demonstrates the nature of school-based discrimination that permeates everyday life for LGBTQ+ families:

My daughter has been inadvertently discriminated against at her Anglican school, as her School is not inclusive of her non-traditional (same-sex) family. My daughter

has also heard repeated use of the terms 'lesbian' and 'gay' as slurs. The school does not challenge homophobia. My daughter refuses to discuss her family in the school community.

Educational institutions should have an obligation to take steps to prevent and appropriately respond to bullying and harassment that targets a student's sexuality or gender identity or that of their parents.

Discrimination against teachers

There are parents within our community who are also teachers, have family members and friends who are teachers or simply feel strongly about supporting teachers in their role. Parents need to be confident that teachers are able to prioritise the needs of students. This comment from a community member demonstrates the pressures teachers in religious schools face:

I teach in a Catholic High School and I almost lost my job last year for reprimanding a student who was yelling out homophobic things in class. I had to get help from the union, write a formal letter and have an interview with the Principal to argue that I wasn't promoting ant Catholic Views.

Existing exemptions have enabled religious organisations running schools and other service providers to refuse to hire or to dismiss employees based on their sexuality or relationship status.

Being discriminated against on the basis of their sexuality, gender status or relationships impacts staff at schools who must hide who they are for fear of losing their job. Living with a constant fear that you could lose your job weighs heavily on some. The following comments give insight into the experience the rainbow families community:

I taught at catholic high schools for 25 years. I was a year co coordinator for the last 13 years. When my partner and I decided after 18 years together to have a child I knew that I had to resign my position. I lived a professional life in the don't ask don't tell. It was made clear to me by a friend who was worked for the CEO that I could not remain. It would get messy and I would never be able to acknowledge my daughter, access caregivers leave without maintaining an elaborate lie. No I was no removed , I resigned realising I could no longer maintain the double life and care

for my family. I knew that even though a practicing catholic, the up holding of catholic ethos in my contract would be held against me. I gave up my career to raise my beautiful daughter and now work as an art therapist. I suffered a great loss of identity in not being able to continue my career.

...

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I previously worked as part of the executive team in a faith based school where I was never comfortable to share about my relationship. I lasted 6 months as I felt so stifled in the role. I have looked into applying at other faith based schools and the application form at one asked for your husband's name and occupation and church references.

...

I have been supported by so many wonderful colleagues while working at Catholic schools, but have always known, and felt threatened by the knowledge that, I could be sacked at any time due to my sexuality.

...

I've had to be closeted since my employment as a teacher in a Catholic School. My closest work colleagues and friends know I'm gay but I'm acutely aware that I could lose my job if I were outed. This became very difficult when I was going through the process of having children. I needed to appear to be straight in order to not lose my job.

Termination of employment has a devastating impact on the lives of LGBTQ+ teachers and staff. Teachers and staff members in religious schools should be able to do their jobs free from discriminatory treatment based on their sexuality and gender identity. They should also be able to

address discrimination against students (and other staff members) on these grounds without fear of disciplinary action or other negative consequences.

We acknowledge that there is a legitimate basis for religious educational institutions to be exempt from anti-discrimination law in limited circumstances that are integral to their operation as religious bodies. We agree that the right to preference staff based on religious belief or activity should be linked to genuine occupational requirements and should not amount to discrimination on those grounds.

It is important that the right to preference staff or prospective staff on the basis of religious belief or activity is strictly circumscribed to ensure that it doesn't act as a cover for other types of discrimination. In determining the extent to which the religious belief or activity is a genuine requirement of the role, there needs to be reference to a more objective standard than simply taking into account the religious ethos of the school.

The tendency for religious institutions to prioritise their religious ethos above individual rights does not give us any confidence that they do not implement exemptions responsibly.

RECOMMENDATION #

All exemptions only available to private educational authorities should be removed from the Act and not included in any future NSW anti-discrimination law.

RECOMMENDATION #

The Act should be amended and any future NSW anti-discrimination law should ensure that:

- there are no exemptions that allow religious bodies to discriminate on the basis of sexual orientation, gender identity and variations in sex characteristics/sex characteristics in employment, education or the provision of goods, services, facilities or accommodation to the public;
- if religious belief or activity is added as a protected attribute, then any exemption applying to religious bodies should be limited to where religion is relevant to a role or the service in question and where it would be reasonable and proportionate in the circumstances of the case;

- targeted religious exemptions for religious leaders, the education of religious leaders, and for the purposes of participation in religious practice or observances are consistent with international human rights law.

Adoption services

Pursuant to the Act, it is unlawful to discriminate against individuals or couples seeking to adopt a child on the basis of certain protected attributes. Section 59A of the Act however provides a general exemption that affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the *Adoption Act 2000* or anything done to give effect to any such policy or practice.

The receipt of public funding by religious-based adoption services raises concerns about discrimination against LGBTQ+ individuals and couples who wish to adopt. Many religious organisations hold conservative views on issues like same-sex marriage and LGBTQ+ rights, which influence their adoption policies. The issue of whether religious-based adoption services should receive public funding while holding discriminatory policies is the subject of ongoing debate in Australia.

Access to adoption services is of significant importance to rainbow families and the community generally for a number of reasons including:

- For the fulfilment of parenthood. Some members of the LGBTQ+ community experience desires to become parents. Access to adoption services allows them to realise these aspirations.
- The preparedness of members of the LGBTQ+ community to care for disadvantaged and vulnerable children through a system which is reportedly overwhelmed and inadequately funded.

Adoption agencies should prioritise the best interests of children. The suggestion that a child being born to parents that do not align with hetero-normative standards correlates with poorer outcomes for that child is antiquated and not supported by research. Many LGBTQ+ individuals are capable of providing stable, loving, and nurturing homes for children.

RECOMMENDATION

Repeal section 59A from the Act entirely and not introducing a similar provision in any future NSW anti-discrimination law.