

Review of discrimination laws in New South Wales: Response to Consultation Paper: Unlawful Conduct (August 2025)

Introduction

Rainbow Families welcomes the opportunity to contribute further to the NSWLRC's review of discrimination laws in New South Wales in response to the Consultation Paper on Unlawful Conduct. We have previously made a preliminary submission in 2023, which we draw and expand upon here. We only cover select topics that are most relevant to our community, but fully endorse the submission of Equality Australia where it deals with more technical aspects of the law.

About Rainbow Families

Rainbow Families was formed in New South Wales in 2015 as the peak body for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) parents and their families. The mission of Rainbow Families is to build a community that fosters resiliency by connecting, supporting and empowering LGBTQ+ families. Rainbow Families has a growing community and includes people from across Australia.

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 open-ID), surrogacy (altruistic or commercial), foster care, foster to adoption, adoption (domestic or international), previous heterosexual relationships, or co-parenting.

Rainbow families, like many modern families, come in all shapes and sizes and are formed in many ways. What 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, if not better, than their peers from cisgender heterosexual-parented families.¹ However, stigma and discrimination from the broader society remain key challenges that can negatively impact children's wellbeing.²

¹ Golombok S, The psychological wellbeing of ART children: what have we learned from 40 years of research?, Reproductive BioMedicine Online, Volume 41, Issue 4, 2020, Pages 743-746, Dempsey C. (2013). Same-sex parented families in Australia (CFCA Paper No. 13). Melbourne: Australian Institute of Family Studies.

² Crouch, S.R., Waters, E., McNair, R., Power, J., & Davis, E. (2014). Parent-reported measures of child health and wellbeing in same-sex parent families: A cross-sectional survey. BMC Public Health, 14,635.

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 or relationship status (i.e. single people). This form of discrimination is particularly prolific given a number of the major foster/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. Equality Australia reported that two adoption agencies openly state that they discriminate against our communities.³ We are not aware of such blatant discrimination in other states and territories.
- **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 to becoming parents. 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

³ Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, 25 March 2024) 50.

circumstances. Many members of our community practice religion and their exclusion or the exclusion of their children based on sexual and gender characteristics can be devastating.

The Anti-discrimination Act 1977 (NSW) ('the Act') needs major updates to provide redress to members of the community which, at the time the Act was enacted in 1977, were not appropriately recognised.

Question 3: Discrimination

We defer to Equality Australia on the technical aspects on the question of how to best frame the meaning of direct and indirect discrimination. A robust and inclusive definition of both direct and indirect discrimination is essential to ensure that rainbow families are protected not only from obvious exclusion but also from rules and policies that appear neutral on their face but unfairly disadvantage us in practice.

The law in NSW should be less technical and more accessible to those who need it, especially as most of those people are unrepresented. The Act should make it clearer that there is often an overlap between direct and indirect discrimination, and so a single incident could be argued as both direct and indirect (rather than one or the other).

Direct discrimination

We are acutely aware of the limitations of the comparator model for direct discrimination. Under a comparator-based approach, a tribunal might ask whether a heterosexual couple seeking access to the same service for their child would have been treated differently. This can be artificial and fail to reflect the lived experience of rainbow families.

For example, if a local council refuses to list both mothers on a child's library membership form because the system only recognises "mother" and "father," the comparator test might consider whether a heterosexual couple in the same situation would be treated differently. But there is no directly comparable heterosexual couple, and every family structure is unique and different - e.g. some families have step-parents, some have grandparents as carers etc. This can make it harder to show less favourable treatment on the basis of the protected attribute specifically (sexual orientation in this case), even when the discrimination is very obvious to those affected. A better approach is one that focuses squarely on whether the person was treated unfavourably *because of* the protected attribute, without relying on an abstract comparator who doesn't exist in reality.

Indirect discrimination

For rainbow families, the current test for indirect discrimination can be difficult to satisfy because it requires showing that a person with the protected attribute "cannot comply" with the

condition, requirement or practice, or that a higher proportion of people without the attribute can comply. These elements can be unrealistic and place an unfair evidentiary burden on complainants. For example, a preschool might have an enrolment form that requires information about a “mother” and a “father” before an application can be processed. A child from a two-mother family can technically comply by crossing things out, inserting inaccurate information or leaving sections blank; but doing so erases their family structure and forces them into a false declaration. Under the current wording, the fact that they can fill in the form (albeit inaccurately) may make it harder to prove indirect discrimination, even though the policy clearly disadvantages rainbow families.

Similarly, proving that a “higher proportion” of non-LGBTQ+ families can comply often requires statistical or demographic data that is not available, making the legal test difficult to meet even in cases where the discriminatory impact is obvious. Until 2026, our families haven't been properly counted in the Census, meaning that reliable data about our families, lives and experiences is very limited.

A more accessible and realistic approach would be to focus on whether the requirement imposes a disadvantage in practice, without needing to demonstrate impossibility of compliance or produce comparative numerical data.

Recommendation: *We recommend that NSW adopts the ‘unfavourable treatment’ and ‘disadvantage’ tests for discrimination, and clarifies that a single incident can be both direct and indirect discrimination.*

Question 4: Protected attributes

The government must 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 non-traditional relationships, so it is essential that the Act protects against discrimination by association.

In addition, 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 best way to do this would be to confirm that discrimination can occur, not only because of one or more attributes, but because of the combined effect of more than one attribute.

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.

Sexual orientation

Discrimination on the basis of 'homosexuality' excludes bisexual, pansexual, queer, and asexual people and must be updated as a matter of high priority. The name of the attribute should be 'sexual orientation' which is the preferred term in our community, is wording consistent with the Yogyakarta Principles internationally, and with our national protections under the Sex Discrimination Act. Care should be taken to ensure that asexual people are covered by the definition.

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.

We believe there is merit in combining approaches from the Yogyakarta Principles and the approach of other states like using key well-known terms like "homosexuality, bisexuality and asexuality", as a non-exhaustive list.

Gender identity

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.

Gender identity discrimination is the preferred term which also accords with the Yogyakarta Principles and the Sex Discrimination Act. Any definition will need to ensure coverage of gender expression and also recognise non-binary identities.

Association

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 attribute should be drafted broadly enough to protect all relatives / family members, including our children, and also our allies and supporters.

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 that could be adapted to the New South Wales setting 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:

We recommend:

- *re-naming the attributes for discrimination and vilification to ‘sexual orientation’ and ‘gender identity’, defining them consistently with the Yogyakarta Principles and in such a way that includes non-binary and asexual people*
- *protecting associates (including relatives and non-relatives) of all attributes*

- *clarifying that discrimination may be based on one or more attributes, or on the effect of a combination of attributes.*

Question 6.3: Discrimination in education

We would support additional clarity in the law that 'single-sex' schools must admit students consistently with their gender identity, i.e. that boys schools must accept trans boys. We understand that some schools may misread the Act, and unfairly exclude students on enrolment based on their assigned sex at birth.

Recommendation: *We recommend clarifying that single-sex educational institutions must admit students based on their sex, whether they were assigned/designated that sex at birth, or not.*

Question 7.1: Staff working in religious schools and other workplaces

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 anti 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, pregnancy, gender identity, undergoing assisted reproductive technology or engaging in surrogacy, or relationship status. The use of the term 'body established to propagate religion' is far too broad, meaning that New South Wales is well out of step with most other Australian (and also similar international) jurisdictions. People should not be discriminated against because of who they are, or who their family is, in a wide range of positions that may have nothing to do with maintaining the faith of an organisation.

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 many people.

We understand that many schools operate on the principle of "don't ask, don't tell". Staff in religious workplaces may be able to comply with this when applying for roles or during their early employment. However, life circumstances can change in ways that make a person's sexual orientation or family structure more visible. For example, a lesbian woman may enter a new de facto relationship, or a gay man may come out and separate from his wife.

Parenthood is another point where privacy becomes impossible, for instance, when a woman in a same-sex relationship becomes pregnant, there is no way to conceal that she is the birth parent. Similarly, a gay male couple engaging a surrogate will need to take leave to care for their newborn, making their family structure obvious and apparent.

This ongoing need to conceal or manage identity places an enormous emotional and psychological strain on staff, who often live in a state of hypervigilance. Many live with a persistent fear of being outed unexpectedly; whether by a colleague, a student, or through chance encounters outside work, such as seeing students or families in public spaces like shops or community events. This constant anxiety affects their wellbeing and ability to fully engage in their roles, creating a workplace environment where they cannot be authentically themselves or ever feel totally secure.

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 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 not 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.

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, some of whom are parents. 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.

Children from rainbow families are also indirectly impacted when LGBTQ+ teachers and other staff feel unable to be open about their lives. This silence trickles down to students, sending the message that their parents and families are not welcome topics of conversation. Without visible examples in the school, children may feel they too must hide who their parents are.

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 believe 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 implement exemptions responsibly.

Recommendation: *We recommend limiting the circumstances in which schools and other educational institutions can discriminate against teachers or other staff to roles where having a particular religion is a genuine occupational requirement, and where it is reasonable and proportionate, and not on the basis of sexual orientation, gender identity, pregnancy, or relationship status.*

Question 7.2: Other acts and practices of religious bodies

Section 56(d) is an incredibly broad exemption that allows any body “established to propagate religion” to discriminate where *either* it conforms to the doctrines of religion, or is necessary to avoid ‘injury to the religious susceptibilities of the adherents of that religion.’ The fact that the religious bodies can argue either limb, and not have to satisfy both (such as is the case in Queensland) makes it even more disproportionate to the aim of ensuring religious freedom.

The reality is that many of our families have no choice but to rely on social services delivered by faith-based organisations, including hospitals (both public and private), religious foster care agencies, religious schools, parenting programs, and disability support services. For example,

parents may have no option but to give birth and receive perinatal care in a Catholic hospital if they live within its catchment area. This lack of choice, combined with the fear of discrimination, causes significant anxiety for parents, particularly those with non-traditional family arrangements such as surrogacy or co-parenting. In these circumstances, it is unjust to allow publicly funded service providers to retain such a broad licence to discriminate against our families.

An example provided in the Issues paper is directly relevant to our communities – the foster carer service provided by Wesley Mission.⁴

While one option might be to limit discrimination to a smaller range of attributes, we are concerned that this would specifically target LGBTQ+ attributes in particular. We would recommend an approach of limiting the ability to discriminate to only the grounds of religious belief or activity (presuming it will be a new protected attribute), requiring reasonableness and proportionality to be proven by the religious body seeking to rely on the exemption. Another safeguard would be to require that both limbs of 56 (confirming to doctrines, and injury to adherents) have to be satisfied.

***Recommendation:** We recommend limiting the circumstances in which religious bodies can discriminate in the area of goods and services or accommodation to only where the conduct conforms to the doctrines, tenets, or beliefs of the religion, and where the conduct is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion, where reasonable and proportionate, and on the basis of religious belief/activity/affiliation only.*

Question 7.4: Exceptions for providers of adoption services

Pursuant to the Act, it is unlawful to discriminate against individuals or couples seeking to foster or 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.

⁴ OW v Wesley Mission Council [2010] NSWADT 293 [35].

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.

We have heard of instances involving discrimination against foster carers, such as in one case a woman was accepted as a carer as a single person, but then entered a new relationship with a woman. As a result, she was told that she could no longer be a foster carer. Since many instances of adoption involve the fostering to open adoption pathway, we consider that this provision may be discouraging appropriate carers to come forward, ending pathways to parenthood for some people, and encouraging outdated, entrenched discriminatory eligibility criteria.

Adoption agencies should prioritise the best interests of children. The suggestion that a child being cared for by LGBTQ+ people (whether single, de facto or married) 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: *We recommend repealing section 59A from the Act and not introducing a similar provision in any future NSW anti-discrimination law.*

Question 7.6: Discrimination against students and prospective students

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. Unfortunately, some schools will simply refuse to enrol our children because of who their parent/s are, and those who accept our children's enrolment might not affirm and support the family during their schooling.

Other states and territories that prohibit discrimination against students have continued to operate effectively, and in fact, the private school sector is expanding. In 2025, there is no justification for the continued discrimination and exclusion of children and young people.

Children do not choose the school they attend, and suggesting they can simply “go elsewhere” ignores both this reality, and the fundamental rights to equal treatment, and children’s rights, including the right to education.

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. Religious exemptions are having a chilling effect by preventing teachers from taking decisive action to prevent and address homophobic and transphobic bullying, or bullying of children because of the sexuality or gender identity of the staff.

Recommendation: *We recommend that religious educational institutions should no longer be able to discriminate against students or prospective students in order to maintain the ‘religious ethos’ of a school. Neither should students be discriminated against because of their own sexuality or gender identity or expression, nor because of the sexuality or gender identity of their parents or other family members.*

Question 8.2: The test for vilification

Demonstrating the need for stronger protections

Rainbow Families recently made a submission to the concurrent independent review into criminal responses to hate speech. The examples used in that context are also relevant to the civil vilification laws in examination by this review. We provide the same information below that illustrates how hate speech manifests for our communities specifically.

Hatred expressed against trans parents

Community views about same-sex couples have greatly evolved,⁵ but there is intense stigma still against trans and gender diverse members of our community, and trans people having or raising children is a particular focus of anti-trans individuals or groups.

We are aware of examples of severe backlash against trans parents through violent and hateful language, online trolling, misgendering, deadnaming and doxxing. One specific flashpoint is the use of gender-affirming language (like chestfeeding for trans men) or the visibility of trans women or non-binary people feeding their babies, which becomes a lightning rod for disinformation and online abuse. Transphobic actors may refer to tropes like that trans people are inherently unsafe to be around children (e.g. confusing, grooming kids), that their bodies are somehow unnatural or harmful to children (e.g. references to mutilation), that trans parents aren't real parents (e.g. men pretending to breastfeed, using lactation aids is not 'real feeding').

For example, in 2022 - 2023 many right-wing US and Australian commentators picked up on a 2018 case of trans women breastfeeding her child with support from a medical team through induced lactation. Australian social media pages mirrored this discourse, linking it to broader conspiracy theories about child abuse, medical malpractice, and social collapse, often folded into anti-trans, anti-drag, and anti-vaccine narratives. These posts often go viral within extremist communities. Once a group of people latch on to a particular victim, the online trolling can be relentless and often escalates over time.

These narratives about trans parents are not only false, but profoundly damaging. They undermine the safety and legitimacy of trans parents and their children, who may already face elevated levels of social exclusion. Trans parents feel forced into invisibility, worried that any public expression of their parenthood will invite backlash or abuse. Health professionals or government agencies may also hesitate to support or document trans-inclusive parenting practices for fear of being targeted themselves, and so overall this conduct has a harmful chilling effect.

Drag Storytime events

Another recurring target is events like Drag Storytime, which aim to celebrate diversity and inclusion for children and families. These events are frequently mischaracterised by opponents and 'sexualised', using slurs such as 'groomer' or 'paedophile', echoing historic homophobic tropes. Such rhetoric spreads rapidly online and has led to coordinated harassment, protests, and threats directed at families, performers, and organisers.

⁵ Australian Institute of Families Studies, Same-sex couple families in Australia, September 2016 <<https://aifs.gov.au/research/research-snapshots/same-sex-couple-families-australia>>.

A report by ISD⁶ examining the period from late 2022 through early 2024, identified a transnational network of actors - including COVID-era conspiracy theorists, far-right groups, fringe politicians, Christian nationalist influencers, and neo-Nazi collectives - began deliberately targeting Drag Queen Story Hours and- drag events across Australia, often importing narratives developed in the US and UK. This mobilisation included at least a dozen events subjected to online harassment, doxxing, and offline protest. Notably, public venues and councils received coordinated intimidation campaigns: call-outs, hate posts, and attempts to enter libraries where these events were being held.

Unfortunately, people drawn into this false narrative believe they are 'saving' our children and will go to great lengths to disrupt or deter events. For instance, an event at Manly Library in 2023 was subject to a bomb threat, and protesters attended the event (alongside larger counter protests).⁷ In Marrickville in 2024, police were called after protesters attempted to enter the Marrickville Library during an event. Even after they were turned away, they continued to bang on the windows.⁸

Aside from the obvious safety concerns for Rainbow Families Australia (including volunteers, staff and our kids), these incidents create a climate of fear and hesitation, restricting opportunities for our families to gather and celebrate our lives in community. As some of these protestors are observed by our children, this is highly damaging to their sense of safety, wellbeing and pride in their unique families.

Anti-surrogacy sentiment

Anti-surrogacy sentiment is also increasingly being used as a vehicle for hate speech against LGBTQ+ people, especially gay men who become parents through surrogacy. Opponents often frame surrogacy as exploitative, unnatural, or morally corrupt; language that quickly escalates into vilification when directed at queer families. Gay fathers are frequently targeted online with accusations that they have “bought” or “stolen” children, or have “exploited” their surrogate. This rhetoric circulates on social media platforms, and in comment sections, contributing to a hostile environment in which queer parents and their children feel unsafe, overly scrutinised, or shamed simply for existing.

Associates need to be covered too

As discussed in relation to Question 4, vilification of associates also needs to be covered by the Act. Again, we support changes to the law that would clearly cover hate speech based on all kinds of association, including through a person’s job or public support — not just close

⁶ Elise Thomas, ISD Global, *A year of hate: Anti-drag mobilisation efforts targeting LGBTQ+ people in Australia*, available at <https://www.isdglobal.org/wp-content/uploads/2024/04/A-Year-of-Hate_Anti-Drag-Mobilisation-Australia.pdf>.

⁷ Ibid, 5.

⁸ Ibid, 6.

relationships. The gap at present puts people in our communities and their supporters at real risk, including:

- Children with same-sex, trans and/or gender diverse parents being targeted because of who their parents are
- Librarians, teachers, or council staff supporting Drag Storytime or Pride events
- Business owners or staff at inclusive venues, book stores or cafes
- Health professionals or staff at government agencies who take steps to affirm, include and support our families
- Politicians who support our families and push for law reform for the benefit of rainbow families.

We've seen first-hand how people are harassed, doxxed, or threatened simply for creating welcoming spaces for our families, and they deserve protection too.

Harm-based approach

We support the addition of a harm-based test for vilification in New South Wales, framed in either way it is posed in 8.82 of the Issues Paper. However, we wouldn't support it replacing the incitement-based test, since they might apply in different circumstances or it would allow them to be argued in the alternative.

Reasonable third-party observer tests have their limits when it comes understanding and interpreting the experiences of marginalised communities. We also know that, based on the escalating scale of the problem of hate speech in New South Wales, that something more must be done as a high priority to protect our communities.

We also support the idea of drawing on Victorian legislation to confirm that vilification might occur through a course of conduct – this reflects real-world experiences of harm and would avoid Tribunals getting too caught up in assessing individual instances of speech rather than considering the conduct as a whole.

The Issues Paper has not addressed one concern we have which is that characteristics of attributes should not only apply to discrimination, but also to vilification. This would remedy an issue that arose in a Queensland case where the perpetrator was able to argue that drag queens aren't linked to either the attribute of sexuality or gender identity.⁹ As noted above, anti-drag mobilisation is a major concern for our communities, so this needs to also be addressed in the reforms to the Act.

Recommendation:

We recommend:

⁹ Valkyrie and Hill v Shelton [2023] QCAT 302.

- *adding a new harm-based provision based on section 102D of Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025 (Vic)*
- *ensuring that associates are protected from vilification*
- *clarifying that vilification can occur because of a characteristic of a protected attribute (that people with a protected attribute either generally have or are presumed to have)*
- *clarifying that vilification can involve individual incidents, or a course of conduct.*

Question 10.4: The exceptions for liability

As noted in the Issues Paper, the Act provides both a defence where a liable party can show they took 'all reasonable steps' to prevent it, as well as allowing them to argue that they did not authorise the act by an agent or employee. Of the two, the latter is greatly concerning as the only jurisdiction in Australia to have such a defence available to a vicariously liable party.

The idea that an employer could ever 'authorise' an act like sexual harassment seems implausible. There is no justification for retaining such a broad defence for employers when proving claims is already so difficult, there are significant power differentials at play, and when every other state, territory, and the Commonwealth limit the defence to the 'reasonable steps' test only.

Recommendation: *We recommend repealing the defence to vicarious liability that an employer did not authorise the unlawful treatment.*

Question 11.3: A positive duty to prevent or eliminate unlawful conduct

To shift from a system that merely responds to discrimination to one that actively prevents it, the Act should clearly outline broad, positive obligations to eliminate discrimination that apply across all protected attributes and all areas covered by the legislation, and not just workplaces. These obligations should require organisations and individuals with responsibilities under the Act to take reasonable and proportionate measures to identify and eliminate the causes of discrimination, harassment, and victimisation before they occur.

An example of this approach exists in the *Equal Opportunity Act 2010 (Vic)*, which imposes a positive duty on employers and certain other entities to take proactive steps to eliminate discrimination, sexual harassment, and victimisation. This duty compels employers to create inclusive environments, prevent discriminatory conduct, and respond effectively to complaints. Such legislation recognises that equality is best achieved not through punishment after harm is done, but by embedding fair treatment, respect, and inclusion into policies, practices, and cultures from the outset.

A positive duty shifts the conversation from “don’t discriminate” to “actively include,” which would help normalise rainbow families in public life. It encourages institutions to publicly demonstrate their commitment to equality, which can influence broader social attitudes and reduce stigma. As example of how a positive duty would benefit rainbow families are as follows:

- Schools would be required to take proactive steps to ensure that children from rainbow families are treated equally and respectfully, and anti-bullying measures would specifically address stigma or harassment based on family structure, sexual orientation, or gender identity.
- Healthcare providers, housing services, sporting organisations, and community programs would need to review and adjust their policies to ensure rainbow families are welcome, visible, and safe.
- Service providers could no longer rely on outdated forms, gendered assumptions, or exclusionary practices, instead, they would be obliged to identify and remove these barriers.

We think that there is also a strong justification to include vilification as well within the scope of the positive duty, since it may address the need for social media platforms to take more of a responsibility for posts on their forums.

In conclusion, we urge the Commission to recommend strengthening the law in the ways we have suggested, so that it not only responds to discrimination when it occurs, but actively contributes to a New South Wales where every family, and every child in a rainbow family, can live free from prejudice, thrive and celebrate their diversity.

Thank you for considering our submission.

Yours faithfully,

Ashley Scott
Executive Officer
Rainbow Families