

**Submission
No 45**

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Rainbow Families

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Mr Clayton Barr MP
Chair of NSW Committee on Community Services
communityservices@parliament.nsw.gov.au
By email

Dear Chair

SUBMISSION TO THE INQUIRY INTO THE EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL

Thank you for the invitation to make a submission to the NSW Committee on Community Services Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill (the Equality Bill) and on related measures for improving the safety and wellbeing of LGBTQ+ communities.

About Rainbow Families

Rainbow Families was formed in 2015 as the peak body for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) families in NSW. 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 membership and includes people from across NSW. 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 a same-sex or LGBTQ+ parented family. At Rainbow Families, we define a Rainbow Family as: any lesbian, gay, bisexual, transgender, queer or intersex 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.

info@rainbowfamilies.com.au
www.rainbowfamilies.com.au
PO BOX 306
Erskineville 2043
0481 565 958

For the community, by the community

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

Introduction

In 2017, Rainbow Families NSW released *Love Makes a Family – a report into experiences of discrimination faced by LGBTQ families when accessing NSW Government Services*. The report, based on the experiences of LGBTQ+ families in our community, indicated widespread discrimination in health, education, adoption and fostering and other government services.

In July 2022, Rainbow Families contributed a submission to a community consultation led by the Member for Sydney, Mr Alex Greenwich MP. We were grateful for the opportunity to highlight ways in which members of our community continue to experience many of the issues raised in *Love Makes a Family*.

We are pleased that the issues of most concern to our community have been addressed by the Equality Bill. Our submission builds on our previous work as outlined above, focusing on the following key areas:

- Protecting LGBTQ+ families from discrimination
- Enabling Trans and Gender Diverse people to obtain birth certificates that match their gender identity
- Access to gender affirming healthcare for young people
- Protection from violence and abuse
- Legal recognition of families created through surrogacy
- Making processes and forms inclusive of LGBTQ+ families

While our submission to the inquiry focuses on the areas of legislation impacting most on LGBTQ+ families in our community, we support the inclusion of additional protections for other communities. We endorse the submissions of Equality Australia and Mr Stephen Page and acknowledge their comprehensive analysis and contribution to reform.

The Equality Bill addresses current gaps in legislative protection from discrimination and disadvantage for LGBTQ+ communities and would signal broad community support for a more inclusive society. However, it is important to acknowledge that discrimination experienced by LGBTQ+ families also results from policies, processes and attitudes, even where formal legal equality exists. Heteronormative assumptions and lack of understanding of family diversity presents a barrier for LGBTQ+ families accessing vital services and needs to be addressed through a range of measures.

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Protecting LGBTQ+ families from discrimination

Currently the NSW Anti-Discrimination Act 1977 does not provide adequate protection to groups within the LGBTQ+ community because the way protections are framed does not reflect the diversity of sexuality and gender identities. The Equality Bill strengthens protections by updating the definitions of homosexuality, transgender status and creating a new stand-alone ground of variation of sex characteristics.

The current ground of *homosexuality* excludes people who identify as bisexual, pansexual, asexual or other sexuality that does not fit within normative boundaries of heterosexuality. Replacing 'homosexuality' with 'sexuality' will address these gaps in coverage. Replacing the current ground of 'recognised transgender person' to 'gender identity' extends protection to those who identify with a gender that does not fit within a male/female gender binary.

The LGBTQ+ community continues to experience discrimination in access to employment, education and a range of other services such as adoption, health, disability services due to broad exemptions enjoyed by religious organisations under the NSW Anti-Discrimination Act. As well as receiving a significant amount of public funding to provide education and other vital services to the public, religious organisations are major employers. Laws that enable religious organisations to discriminate against LGBTQ+ people in the provision of employment, goods and services have no place in an inclusive society.

The Equality Bill will bring NSW into line with other jurisdictions by removing blanket exemptions that allow private education authorities and faith-based organisations to discriminate against employees and students on grounds otherwise protected under the Anti-Discrimination Act.

Having the power to discriminate against teachers and students based on their sexuality or gender identity works against developing a culture of inclusion and support. Addressing discrimination also means providing environments in which LGBTQ+ people feel safe to be themselves. Teachers need to be confident they can support LGBTQ+ students from harassment and bullying and to promote inclusion without being threatened with disciplinary action for going against 'the ethos of the school'.

Currently the Anti-Discrimination Act allows faith-based organisations providing adoption to prevent LGBTQ+ foster parents adopting children even when those children have been in their long-term foster care. While same sex-couples were given the legal right to adopt children in NSW in 2010, the outsourcing of adoption services to religious organisations has been a further constraint to LGBTQ+ people wishing to build a family. Where a child's best interests are served by the stability and security of a permanent family home, this should not be denied on the basis of the sexuality or gender identity of their carers.

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The Equality Bill would narrow the ability of religious organisations to discriminate to the extent necessary to facilitate the performance of religious functions. Religious organisations will still benefit from general exemptions available to all, for example to satisfy a genuine occupational requirement. However, there is no rationale for discriminating against LGBTQ+ people in the provision of vital services, particularly when those services are publicly funded.

Enabling Trans and Gender Diverse people to obtain birth certificates that match their gender identity

NSW is the only state that still requires trans and gender diverse people to undergo reproductive surgery before they can update their gender on their birth certificate. Few people can meet this requirement due to the cost and complexity of these processes or do not believe these measures are necessary to affirm their gender.

"I am a transgender man - I have been living as a man for 2 years and have had chest surgery and hormone replacement therapy. I have not been able to amend my birth certificate because I have not had reproductive surgery. I do not believe I should have to have a medically unnecessary hysterectomy to access a birth certificate that reflects my gender."

Not having a birth certificate that aligns with their gender identity has far-reaching implications for trans and gender diverse people. They are exposed to intrusive questioning, humiliation and distress every time they have to produce identification in the course of their day-to-day lives. Mismatch between birth certificate and identification obtained in other jurisdictions presents a barrier to obtaining employment and accessing services. Not having control over how and when they disclose their person information can result in forced outing, the risk of harassment and abuse. Everyone deserves to be able to access services with dignity, respect and safety.

The Equality Bill amends the Births Deaths and Marriages Act to bring NSW in line with other jurisdictions. A person over 16 will be able to apply to have the record of their gender altered without undergoing a surgical procedure. They will be able to nominate a descriptor that accurately reflects their gender identity beyond male/female binary categories.

Providing a pathway for people under 16 to update their gender marker with parental consent or approval by NCAT recognises young people's autonomy while safeguarding their best interests. In the event that a person under 16 is required to go through the NCAT process it is important that they are able to access legal and other support.

The Equality Bill will also allow consequential amendments to marriage certificates and children's birth certificates. Trans and gender diverse parents will be able to amend their

parental role to be identified as mother, father or parent.

A streamlined change of name application will also be available to anyone amending their gender record. Ideally, applicants would access these options through a co-ordinated and supportive process.

It is crucial that any changes to the law are supported by updated administrative processes and comprehensive staff training to ensure they are implemented smoothly. Changes to the Births Deaths and Marriages Act in 2008 provided for lesbian couples to include both parents on their child's birth certificate. However, legislative change was slow to filter through because application forms had not been updated and staff lacked awareness of the changes. This situation must be avoided so trans and gender diverse people are not subjected to unnecessary discomfort and distress and equality before the law is experienced in reality.

Access to gender affirming healthcare for young people

The Equality Bill will amend the Children and Young Persons Care and Protection Act to enable young people aged 16 and over to consent to gender affirming medical treatment. Young people under 16 will be able to access treatment if a doctor assesses them as competent to provide consent or with the consent of a parent. Disputes between parents regarding treatment will be resolved by NCAT rather than requiring more onerous Family Court proceedings. Timely access to gender affirming care will go a long way towards improving mental health outcomes and general wellbeing for trans and gender diverse young people.

Protection from violence and abuse

LGBTQ+ people experience difficulty accessing support to address domestic and family violence due to lack of understanding of how abuse presents in LGBTQ+ relationships.

"I really felt that I was treated unfairly by police and lawyers when going through legal proceedings with regards to a [domestic violence] relationship. I frequently found myself justifying my position as the victim, as they seemed to have the attitude 'but [partner] is just a physically small GIRL, how could you feel threatened?'"

The Equality Bill recognises unique forms of violence experienced by LGBTQ+ people by expanding the examples of coercive behaviour to include disclosing a person's sexual orientation, gender history, variation of sex characteristics. It is important that legislative change is accompanied by efforts to understand the dynamics of violence in LGBTQ+ relationships so that support is provided when and where it is needed.

Legal recognition of families created through surrogacy

The Surrogacy Act 2010 prohibits commercial surrogacy arrangements in NSW and extends application to other states and territories and overseas. The criminalisation of overseas surrogacy has presented a substantial impediment to families obtaining legal recognition of their children born via such arrangements.

A member of our community explained how the ban has impacted on his family:

“My children were born overseas through compensated surrogacy. Because altruistic surrogacy is so rare in Australia and at the time fostering and adoption was against the law for gay men, our only option to create a family was to engage in international surrogacy. Australian parentage laws define a legal parent as the person who gives birth and their partner at the time of conception. This means that a stranger overseas that my child has never met (and her husband) are the legal parents of my children. My husband and I could apply for a parenting order however we have not done this as we are fearful of being prosecuted for engaging in commercial surrogacy. This leaves our family in a legal limbo in regard to the legal parentage of our children. We would like a simple transfer of parentage process for babies being born through international surrogacy now, as well as a mechanism to transfer parentage retrospectively to protect our family and families like ours.”

Lack of legal recognition in relation to children born through surrogacy is a barrier to accessing services and impacts on entitlements such as superannuation and inheritance. Living in the shadow of the law also constrains families from accessing remedies through avenues such as the family court. Inconsistency between Australian jurisdictions where there is no overarching ban at the Commonwealth Level adds to the uncertainty.

According to Mr Stephen Page in his submission to this inquiry, the ban on overseas commercial surrogacy has been ineffective, with no prosecutions taking place in NSW since the commencement of the Surrogacy Act in 2010 while the number of children born through these arrangements remains steady.

Rather, the effect of the ban has been damaging, resulting in children born through overseas commercial surrogacy being deprived of the security and certainty of legal parentage. Children should be equal before the law regardless of the circumstances of their conception. Criminalising the actions of parents for bringing their children into the world is not in children's best interests. It should also be noted that some of these families entered into overseas commercial surrogacy arrangements prior to the commencement of the ban.

Under the Surrogacy Act, legal parentage can only be transferred to from the surrogate and/or their partner and to the intending parents by the court making a declaration of parentage which is then registered with Births, Deaths and Marriages to enable the issue of

a birth certificate. This is currently only available in relation to altruistic surrogacy arrangements.

The Equality Bill provides a way forward by making a distinction between commercial surrogacy arrangements carried out in NSW and those carried out in overseas jurisdictions. Removing the ban on overseas commercial surrogacy arrangements would empower the court to dispense with the requirement that the surrogacy is altruistic in exceptional circumstances and make a parentage order if it is in the child's best interests.

While the proposed amendment would provide a pathway to legal recognition, we share the view expressed by Mr Page that rather than framing the court's discretion to depart from the altruistic surrogacy requirement in exceptional circumstances, that the court's primary consideration should be whether making a parentage order is in the best interests of the child. This would provide greater clarity and certainty and align more closely with Australia's international obligations under the 1989 UN Convention on the Rights of the Child.

The Equality Bill also strengthens protections for surrogates to manage pregnancy and birth and the requirement for their consent to a parentage order will be retained. The court will also be able to give weight to any views expressed by the subject child.

Amendments to the Surrogacy Act will require consequential changes to the NSW Status of Children Act 1996 and the Births, Deaths and Marriages Act 1995 in order to establish the administrative pathway for the transfer to parentage from birth parents to intending parents. As with other birth certificate changes discussed above, it will be crucial that implementation of changes is supported by the development of co-ordinated processes and adequate staff training.

Making processes and forms inclusive of LGBTQ+ families

We welcome the focus on ensuring the processes of organisations providing services to families are inclusive. Forms must enable families to record information that accurately reflects gender and relationships without having to take steps or engage in cumbersome workarounds that are not required of other families.

Being required to complete forms that do not reflect their family is an ongoing source of frustration and distress for the LGBTQ+ community, particularly in health and education settings. Many forms still provide 'mother' and 'father' as the only options, rather than gender neutral 'parent 1' and 'parent 2' and only provide binary male/female categories for gender.

"Often forms will ask for mother and father and we have to change the forms or the staff have to try and adjust the systems in order to record our family on the system."

“The admission forms offered by RPA hospital use the terminology of mother and father rather than parent 1 and 2... the latter would better reflect our family structure where we have two dads.”

“Department of Education needs to improve their processes too - school forms still force us to put ourselves and our kids in gender binary boxes.”

Even in the public education and health systems, communication channels are based on a single parent contact. LGBTQ+ families are less likely to divide the care of their children based on binary gender roles. However, the primary/secondary carer paradigm is embedded in educational administrative systems and does not accommodate parents who wish to equally share responsibility for their children, particularly after separation.

“Plenty of times - most forms have a female parent (mum) as primary parent and male (secondary). Even where parent 1 and 2 exist it's still really hard to access the same level of information/status for both parents.”

“My children were born overseas. When we returned to Australia and connected them in with NSW health and the local family health clinic, I was asked which one of us wanted to be the mother in the system. I explained that we are a 2 dad family and our children don't have a mother, but was told that the NSW health system only has space for mother and father, so one of us would have to be the mother in the system. This was over ten years ago and alarmingly is still the case! The NSW health system needs to be updated to include the diversity of Australian families.”

Even when legislative protections are in place for families accessing government-run services, LGBTQ+ families continue to experience discrimination due to prevailing attitudes and processes based on heteronormative assumptions about family structure.

“When we had our youngest daughter we were treated differently by the staff at the hospital. They tried to tell me to leave the hospital immediately after the birth stating that it was past visiting hours and didn't think to ask if I was the partner.”

“People always make assumptions in front of the children. Usually it's that only one of us is mum, and the other is a relative. An explanation is ALWAYS required.”

“Schools do not use appropriate language with children, it's always mums and dads. Both of my children have suffered at times as a result of the lack of inclusive language.”

We welcome the strengthening statutory interpretation rules to ensure people aren't disadvantaged on the basis of gender and the commitment to work towards the long-term project of making language in legislation more inclusive.

The following measures will help build a culture of inclusion to support legislative reform:

- Conduct an audit of systems, processes and forms in government organisations providing services to the public to ensure inclusion of LGBTQ+ people.
- Ensure that government agencies providing services to families are adequately trained to implement changes to law and policy administratively and about family diversity more generally.
- Consult with the LGBTQ+ community to obtain input on lived experience and ongoing feedback as part of the process of implementation changes.
- Require religious organisations providing services to the public to undertake government-approved training where necessary to build capacity to comply with their new legislative obligations.

We recommend that the Equality Bill be passed by the NSW Parliament. Rainbow Families would be happy to assist further if required and to extend our assistance to the implementation stage of the Bill should it become legislation.