



The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: familylaw@alrc.gov.au

Submission in response to Review of the family law system

Dear Executive Director

Thank you for the opportunity to provide a submission in response to the Review of the Family Law System Issues Paper.

Reforms to the Family Law framework in recent years have brought significant developments in the legal recognition of LGBTIQ families.

However, as our submission argues, further reform is needed to properly reflect the experiences of LGBTIQ families and the diversity and complexity of family structures.

For further information, please contact us on [REDACTED], or by email advocacy@rainbowfamilies.com.au

Yours sincerely

Vanessa Gonzalez

Co-Chair Rainbow Families on behalf of the Rainbow Families Advocacy Team



About Rainbow Families NSW

Rainbow Families NSW was formed in 2015 as the peak body for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) families in NSW.

The mission of Rainbow Families is to build a community that fosters resiliency by connecting, supporting and empowering LGBTIQ families. Rainbow Families has a growing membership and includes people from across NSW.

Its volunteer Board consists of committed LGBTIQ members who share the common experience of raising families. Rainbow Families is in the final stages of registering as a charity under the Australian Charities and Not-for Profits Commission Act 2012.

Rainbow Families is an incorporated organisation, governed by a [constitution](#) which provides a structure for how the group operates.

What is a Rainbow Family?

A Rainbow Family is a same-sex or LGBTIQ parented family.

At Rainbow Families, we define a Rainbow Family as: any lesbian, gay, bisexual, transgender 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, co-parenting 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 NSW LGBTIQ community.



Introduction

Reforms to the Family Law framework in recent years have brought significant developments in the legal recognition of LGBTIQ families. This has included recognising same-sex de facto relationships, and more recently, same-sex marriage as well as expanding the definition of 'parent' to enable two lesbian women to be legal parents. However, further reform is needed to properly reflect the experiences of LGBTIQ families and the diversity and complexity of family structures.

Our submission focuses on the following issues identified as being of major concern within the community:

- The heteronormative underpinnings of the family law system and lack of understanding from people working within the system necessary to respond to the experiences of LGBTIQ families
- Particular barriers for transgender parents accessing the family law system
- Current parentage definitions do not accommodate the complexity of LGBTIQ families, with the lack of recognition for families formed through surrogacy arrangements remaining a serious concern.



Rainbow Families response to the review

Rainbow Families NSW is the peak group for LGBTIQ families in NSW.

The recent census tells us that more rainbow families live in NSW than other parts of Australia.

We asked our community respond to 'Question 8' from the issues paper:

How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

In our survey relating to the impact of Federal Government Laws on LGBTIQ families, we asked the community about their experiences with the family law system and invited input on how accessibility could be improved for the LGBTIQ community.

There was a general view expressed that the family law system is not sufficiently inclusive towards LGBTIQ families; that it is heteronormative and not accommodating of diversity. For some, there is distrust of the family law system and a perception that the *Family Law Act* is not relevant. Perceived lack of support available within the system can result in a tendency to make informal agreements to avoid going to court. Some felt that the lack of inclusiveness was reflected in the language used. Whilst there are benefits in resolving family law disputes outside of the court system, in some cases this may result in people agreeing to arrangements that are not in the best interests of their child or that are simply unworkable.

"Very few services specific to same-sex parents going through a separation, it took a lot of online research to work out how we wanted to approach it."

A view was expressed that there is a need for training for judicial officers, court staff and the legal profession to enable them to recognise and respond to the experiences of the LGBTIQ community.

"The family law system has very limited understanding of the socio-political context or the complexities of human relationships. In regard to LGBTIQ families, there is an indisputable assumption of heterosexuality and the impact of marginalisation."

"Judges need training to understand same-sex families and help them overcome unconscious bias, eg in favour of the birth mother"

For some, interaction with the family law system proved traumatic and this included poor treatment from staff. This ranges from being asked inappropriate or invasive questions to outright hostility.



“Horrible experiences, harassment, vilification, vilification. discrimination by staff and they both continually making rude remarks.”

It is a requirement under the Family Law Act for separated parents to attempt mediation prior to applying to the court for parenting orders, and many parents are able to resolve their family law matters without going to court. Many providers of family dispute resolution are funded by the Commonwealth Government through the operation of Family Relationship Centres. It is essential that mediation services are able to understand and respond to the needs of diverse and complex family types. This applies to the models and processes of mediation adopted as well as the issues that are engaged with. Education needs to be made available to ensure that mediators and staff responsible for intake and screening and service planning have sufficient awareness and understanding of the particular issues for LGBTIQ families.

Barriers for transgender parents

Responses to our survey highlighted particular barriers for transgender parents seeking remedies through the family law system. The experience of transitioning may be met with hostility and banishment from the other parent and result in relationship breakdown and the refusal of contact with children. Transgender parents then experience difficulty in engaging the necessary legal and social support to pursue parenting orders that would enable a relationship with their child. Where the transgender parent is having contact with the children, co-parenting brings additional challenges.

“As a trans woman I have been denied to know my children or see them by their mother. There is nothing I have been able to do to see them. I have been so down, I have lost work and find it hard to get employment. I have had to do sex work to make ends meet sometimes and I have lost friends along the way. Transitioning was a life and death thing, I had to be free. But losing my children has in some ways killed me.”

“If services or the court offered me support or if there was a way to see my children. But they are out of my life and I feel depressed about that.”

“I have no rights. My ex wife took the children from me when I told her about being trans. She moved without telling me and I did not find any help from police. They were uncomfortable with me and just told me to go to court.”



Court wants me to find her and I don't know where they are. Then I learnt that she moved overseas, but there's nothing I can do about that. She has told me that she prefers I be dead than be a woman. She has told my children that I am dead."

Definition of 'parent'

Members of the LGBTIQ community have called for the definition of 'parent' under the *Family Law Act* to be broadened. The two-parent model on which the *Family Law Act* is currently premised does not reflect the diversity and complexity of family forms within the LGBTIQ community. For example LGBTIQ families may comprise two mothers and a known donor who has taken on a parenting role, or a lesbian couple and gay male couple who are co-parenting. However, in both cases, only the lesbian couple will be recognised as legal parents to the exclusion of the male donor/parent.

"Although I wouldn't take advantage of it myself, I do think that laws that recognise three or four parents can also be beneficial to some families (as long as this doesn't lead to donors being recognised as parents when that is not the intent.) I also know if a number of male couples when only one is legally recognised as a parent. Also, people need more protection that their LGBTIQ status won't be used as a weapon against them in court"

It is noted that prospective parents and donors in LGBTIQ families often enter into contracts which express the intentions of each party in terms of parenting roles and the level of involvement in the child's life. Whilst such contracts are limited in their enforceability, greater weight placed on such documents by courts would assist in resolving the disputes that ensure when these complex relationships break down. Clearer laws would prevent many families having to resort to the court system.

"Our donor took us to court and was requesting 50% custody even after a parenting plan. He wanted to move the goal posts so we were forced into the court system. We spent \$250k fighting for our family and went to a 4 day trial. We won but it cost us dearly financially and sucked the life out of us for 3 years."

...

"Make the laws clearer so that you are not forced into the family law court"

Non-biological mothers are given legal status by s60H of the *Family Law Act* where children are born as a result of artificial conception procedures. However, where the non-biological



mother is not on the child's birth certificate in accordance with the relevant state and territory law, she is considered a legal parent only where conception occurred during a de facto relationship or marriage and where there was consent to the procedure. This may exclude non-biological mothers where there is difficulty in proving a de facto relationship, or where there is not clear evidence of consent to the procedure (most likely where the procedure did not take place through a fertility clinic).

"Non-bio mums are still nervous about getting involved in the family law system because the system often favours bio mums. Also, having a known donor is still a huge risk as family law cases can come down to who the judge is, and a conservative judge can treat a donor like a father. There needs to be less room for discretion and personal judgment, and honour parents equally."

Such requirements in satisfying the definition of 'parent' present a barrier to many LGBTIQ parents having their role as parent properly recognised and thereby being able to obtain appropriate parenting orders. Where a person is not recognised as a legal parent, they may apply for parenting orders under the *Family Law Act* on the basis that they are concerned with the care, welfare or development of the child. However, the scope of such orders is much more limited than legal parentage, ceasing to have effect when the child turns 18 and not necessarily involving parental responsibility orders which confer decision making power in relation to the child.

Obtaining parentage orders for children born through international surrogacy

Many LGBTIQ families are formed through surrogacy arrangements and the lack of legal recognition of parentage remains a significant concern in the community. Rainbow Families provided a submission (March 2016) about experiences shared by community members for that submission are set out below.

For many couples, Australian law means that the surrogate is listed on a child's birth certificate, along with the husband of the surrogate if they are married. This creates an absurdity where virtual strangers effectively have legal rights that supersede those of parents.

"It is terribly disconcerting to know that I am the legal guardian of only one son and not the other. Yet we are one family, we look upon both sons equally and make no distinction in our minds as to which partner fathered which son. They are both our sons, and we pray that one day NSW law will also see our situation in the same light as we do."



"I think about what might happen if the one of us who is the biological dad dies. What would happen to our son since the other is not his legal parent in Australia? Would he be able to stay with his family?"

While the Australian Government, through DFAT, facilitates the granting of citizenship to children born overseas through surrogacy, it is the responsibility of parents to seek parentage orders under the *Family Law Act*. 60HB of the Act gives legal status to parents only where an order has been made under State or Territory legislation. However, the operation of these laws is inconsistent and uncertain. In New South Wales, commercial surrogacy is illegal and therefore legal recognition of parentage under the *Family Law Act* is only available in cases of altruistic surrogacy.

Not only do families face significant hurdles in being recognised as legal parents but the threat of criminal prosecution in states including NSW is a deterrent to seeking parenting orders. This creates unacceptable problems and risks for families and children.

"I am frightened to take out a parenting order in NSW to become the legal parent of my children – for fear of being prosecuted for engaging in commercial surrogacy. So far there has been no test case, and I do not want to be an example to other families, and thrown in gaol... Because of the criminalization of commercial surrogacy technically I have no legal rights over my children. I fear they will feel less Australian because I am not their legal parent."

"We have not applied for a parenting order for our child because we have been warned not to alert the authorities to the fact that we have engaged in commercial surrogacy overseas. We are very wary of the consequences."

The result is that children are denied their right to have their legally recognised parents be those they live with. These children are denied the permanency and certainty of legal parenthood; can experience difficulty accessing basic services; and can grow up feeling their parents and stories of origin render them illegitimate or illegal. Children without parenting orders are effectively stripped of the permanency and security of family that is a basic human right. Parents worry that if something happens to them, their children will be left in legal limbo. Children have the right to have both parents legally recognized when both parents live together, take responsibility for children, and love and care for them as parents in traditional family relationships would.



The lack of legal recognition of parentage is clearly not in the best interests of the child, with the potential for far-reaching consequences. A lack of parenting orders can impact enrolment for Medicare and health funds, medical treatment, clarity of wills and inheritances, and applications for passports, school documents etc. that require parent signatures. The legal uncertainty not only impacts on day to day life but can have serious implications in the event of an emergency.

The ability for courts to retrospectively authorise commercial arrangements with surrogates – as is the case in the UK – would provide children born through surrogacy arrangements an opportunity to obtain parentage orders that accurately reflect the legal, financial and emotional circumstances of their family.

Access to Domestic and Family Violence support

Members of the LGBTIQ community are just as likely to experience domestic violence as the wider population but less likely to find support services that meet their needs. It was clear from our survey responses that there was difficulty accessing appropriate domestic violence support services. Mainstream services tend to be based on a heterosexual model assuming a male perpetrator and female victim. Violence between LGBTIQ couples involves different dynamics, often linked to issues around sexuality and gender, such as threatening to out someone. What services are available are limited, with some reporting only being able to obtain telephone counselling or referrals. There is a need for more support in assisting people to leave abusive relationships.

In particular, the lack of appropriate services for women in same sex relationships may stem from a reluctance to accept that women experience domestic violence from other women and perception of domestic violence as being confined to heterosexual relationships. Where services are available, fear of stigma and of reinforcing negative stereotypes can prevent people who are experiencing domestic violence from seeking support. Some women who seek support feel that their experience of domestic violence is not validated because services providers have limited understanding of domestic violence in same sex relationships.

“I think people don't think to ask you about domestic violence if you separated from a woman. It's taken lots of services to find someone that has understood what I am going through and validates the experience me and my children.”

“I have a friend who is separating from an abusive girlfriend. There are barriers to escaping domestic violence but it's been even harder for her. She has such shame about it and fears being discriminated or it will reinforce negative stereotypes about lesbians.”



Additional barriers preventing LGBTIQ people experiencing domestic violence from obtaining appropriate support can have far reaching consequences such as attracting the involvement of child protection agencies. Conversely there may be limited consequences for the perpetrator of violence.

“When I did get help and told them all about the things she did, the worker told me that it's domestic violence. But she then reported me to child protection and I had to see the mental health team. No one sends authorities to her place. I end up feeling like it's my fault or that telling more will just mean I risk losing my children”

Transgender women experiencing domestic violence have particular difficulty in accessing support services.

“Domestic violence services for trans women are non existent and there is a culture amongst frontline services cis gender women do not abuse and trans women are just men... Further police re traumatise through dismissing violence”

Some called for more early intervention services to respond to the particular needs to LGBTIQ families when problems first arise.

“More funding should be given to earlier intervention child, family and relationship services and these services should be required to demonstrate their capacity to respond to the particular needs of LGBTIQ families.”

“Access early intervention relationship services for support in ending relationships with grace, wisdom and respect. This will also assist the transition co-parenting in the midst of the pain of separation”

“I think there has to be some better way for people who are leaving abusive partners and some security of care arrangements for children quickly. Allowing them to defer things again and again is hurtful and I feel like giving up.”



Recommendations:

- More education for people working within the family law system including mediation providers to enable better understanding and responsiveness to the needs of LGBTIQ families.
- Enhanced efforts to reduce the barriers to the family law system for transgender parents.
- Broadening the definition of 'parent' under the Family Law Act to expand the legal recognition available to non-biological mothers and to recognise the diversity and complexity of families beyond the two parent model.
- Provide legal certainty to families formed through surrogacy arrangements, for example giving the Family Court the power to retrospectively authorise commercial surrogacy arrangements.
- Funding and establishing appropriate support services for separating LGBTIQ families, particularly those experiencing family and domestic violence.
- Removal of funding from organisations that has exemptions from Anti-discrimination legislation to and continue to discriminate against LGBTIQ people.

