



The Committee Secretariat

Joint Select Committee on Australia's Family Law System  
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Canberra ACT 2600

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**Submission to Joint Select Committee Inquiry into Australia's family law system**

Dear Hon Kevin Andrews MP

Thank you for the opportunity to make a submission to this inquiry.

Rainbow Families is the peak body for lesbian, gay, bisexual, transgender, intersex, queer and asexual (LGBTIQA+) families in NSW.

Our submission is based on consultation with members of our community, as well as information from previous submissions.

For further information, please contact us on, or by email [info@rainbowfamilies.com.au](mailto:info@rainbowfamilies.com.au)

Yours sincerely

Rainbow Families



## **About Rainbow Families NSW**

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

The mission of Rainbow Families is to build a community that fosters resiliency by connecting, supporting and empowering LGBTIQA+ 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.

## **What is a Rainbow Family?**

A Rainbow Family is a same-sex or LGBTIQA+ 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 LGBTIQA+ community.



## Executive Summary

### **d) The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues.**

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Whilst the financial burden of legal fees isn't an issue unique to the LGBTIQ+ community, it is experienced by LGBTIQ+ litigants in particular ways. Some felt that they were paying a premium for a lawyer who held themselves out as having expertise with LGBTIQ+ clients or legal issues only to fall short in the quality of representation provided.

- *Recommendation: Expand the availability of legally assisted family dispute resolution to ensure that all families have the opportunity to reach a negotiated settlement, whether that is prior to or during court proceedings.*

### **The effectiveness of the delivery of family law support services and family dispute resolution processes.**

Navigating family law support services such as counselling, courses, information, domestic violence support and mediation can be confusing and overwhelming for all separated parents. Newly separated LGBTIQ+ parents encounter barriers in accessing mainstream services that are based on a heteronormative model and not always sensitive or responsive to the needs of their families.

- *Recommendation: Family law service providers should be trained to understand and respond to the diversity of families, including LGBTIQ+ families rather than acting from assumptions that are based on limited knowledge.*

### **Domestic and family violence support**

LGBTIQ+ parents experiencing family violence and abuse face additional barriers in accessing support. Consequently, LGBTIQ+ people seeking domestic violence support may feel that their experience of family violence is not validated, or simply not identify that they are experiencing domestic violence and therefore not seek assistance.

### **Family Dispute Resolution**

Family Dispute Resolution Practitioners (FDRPs) have a vital role in assisting families to reach agreements that are workable and in the best interests of their children. In working with LGBTIQ+ families, FDRPs need to have an understanding of the diversity of family structures and how the law applies to them. They also need to be able to move beyond assumptions about how families function and be open to families making arrangements that work for them.

- a) *Recommendation: FDRPs should be trained to work with LGBTIQ+ families and family diversity generally.*

### **f) The impact of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings:**

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Members of the LGBTIQ+ community experience the impact of family law proceedings in many ways that are similar to the general community. Inevitably, children are affected by the conflict between their parents that is sustained by court proceedings. For some, the effects are far-reaching.



In addition, there are particular ways in which the impact of family law proceedings is experienced by LGBTIQ+ families. The additional legal and factual complexities around determining who is a parent can result in proceedings that are protracted and more costly.

- *Recommendation: There needs to be full legal recognition for families that have been formed through surrogacy arrangements. Legal recognition of parentage ensures that children in these families will be able to access essential services including emergency medical treatment regardless of what parent they are with. It is in the best interests of children to have the stability and security afforded by legally recognising their parents.*

**h) Any avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.**

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Unfortunately, for some LGBTIQ+ parents, the discrimination experienced in other aspects of life continued in the court room with homophobic and outdated views about parenting roles. The experience of discrimination is particularly acute for parents who are trans and gender diverse.

- *Recommendation: It is essential that family law system professionals acquire and sustain core competencies that enable them to respond adequately to the issues experienced by a range of families, including LGBTIQ+ families. Development of core competencies in this area should be guided by way of consultation with advocacy services and organisations specialising in service provision to the LGBTIQ+ community. It is also vital for family law professionals employ a trauma informed approach so as to not exacerbate the trauma already experienced by many litigants.*



## Introduction

We thank the Committee for the invitation to provide a submission to the Inquiry into Australia's Family Law System and would like to respond to the following terms of reference:

- d) The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues...**
- e) The impact of family law proceedings on the health safety and wellbeing of children and families involved in those proceedings;**
- h) Any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners ,family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.**

In preparing our response, we surveyed members of our community about their experiences and views on issues as raised in the terms of reference. Rainbow Families NSW made two submissions to the Australian Law Reform Commission Review of the Family Law System in 2018. We note that the ALRC delivered its report in March 2019 and made a number of recommendations. As the current inquiry covers similar ground to the ALRC review, have also drawn on input provided to Rainbow Families NSW in relation to those submissions. Our response to the terms of reference is set out below.



### **Response to the terms of reference**

**d) The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues...**

The financial costs to LGBTIQ+ families in family law proceedings reflect the experiences of the broader community. Private legal services are expensive, sometimes prohibitively so, and access to low cost legal services or legal aid funding is limited. Even where people have been able to negotiate a reduction in solicitor and barrister fees, a significant cost is still incurred. For some, the financial impact continues for years after the proceedings have finished and their standard of living is compromised as a result. The frustration is compounded for people who felt that the other party was unnecessarily prolonging the proceedings or that they weren't getting value for money for the fees that they paid. It is not always possible for people to settle if agreeing to orders would put their children at risk or result in an outcome that is unfair or unworkable.

*It is incredibly expensive, prohibitively so. It can make you feel like you have no choices because not spending the money will mean that you can't protect your children.*

*My cost were over \$120,000 in fees. This placed undue stress on me throughout the process.*

*The fees broke me. If it wasn't for a friend taking me in virtually rent free there is literally no chance I could have afforded to go to court and I would not have been able to get orders and have contact with my son. I paid \$500 per week for 2 years to the solicitor to end up getting orders by consent that should have and could have been done out of court.*

**Whilst the financial burden of legal fees isn't an issue unique to the LGBTIQ+ community, it is experienced by LGBTIQ+ litigants in particular ways. Some felt that they were paying a premium for a lawyer who held themselves out as having expertise with LGBTIQ+ clients or legal issues only to fall short in the quality of representation provided.**

*I chose a legal practitioner who was allegedly the LGBTIQ go to person with the most experience in my area because I simply couldn't face discrimination on top of everything else I was going through. She never knew my name, she had no idea until the morning of court what my matter was about despite me having worked for months with her secretary and I had paid over \$50000 for representation. She sped through it and tried to get me to agree to things to make her day easier. After we finally came to an agreement and orders were made, she forgot to lodge the final agreement at court and that has never been done so there is no official sealed copy.*

For those who were involved in proceedings where there were issues around their legal status as a parent, greater costs were incurred due to protracted proceedings, often requiring judicial determination. The complexity of these issues meant engaging more experienced counsel and in some cases, expert reports writers and witnesses.



The major way in which the financial impact of court proceedings can be reduced or avoided for the vast majority of families is to expand the availability of legally assisted family dispute resolution to ensure that all families have the opportunity to reach a negotiated settlement, whether that is prior to or during court proceedings. This is particularly the case in property matters where the cost of proceedings is often disproportionate to the size of the asset pool. Where there are significant barriers to accessing the court system, the availability of FDR may represent the difference between resolving their dispute or walking away without any outcome. Development of specialised models of FDR can support parents who have experienced family and domestic violence as well as be responsive to family diversity including the LGBTIQ+ community.

### **Recommendation**

**Expand the availability of legally assisted family dispute resolution to ensure that all families have the opportunity to reach a negotiated settlement, whether that is prior to or during court proceedings.**

**The effectiveness of the delivery of family law support services and family dispute resolution processes.**

**Navigating family law support services such as counselling, courses, information, domestic violence support and mediation can be confusing and overwhelming for all separated parents. Newly separated LGBTIQ+ parents encounter barriers in accessing mainstream services that are based on a heteronormative model and not always sensitive or responsive to the needs of their families.**

The perception that this generates among the LGBTIQ+ community can prevent people from seeking much-needed support. Trans and gender diverse (TGD) parents in particular continue to be marginalised within the family law system and some have experienced transphobia, vilification and hostility in accessing support services.

Within the LGBTIQ+ community, families are formed in a variety of ways and the reality of family life raises a set of unique issues. The fact that a number of LGBTIQ+ parents are not biologically related to their children means that it is important that service providers don't devalue the relationship between non-biological parents and their children.

### **Recommendation**

**Family law service providers should be trained to understand and respond to the diversity of families, including LGBTIQ+ families rather than acting from assumptions that are based on limited knowledge.**

### **Domestic and family violence support**

**LGBTIQ+ parents experiencing family violence and abuse face additional barriers in accessing support.** The experience of family violence is different for people in same sex relationships and mainstream services tend to be based on a model that assumes a male perpetrator and female victim. There can be misunderstanding about the nature of domestic



and family violence in LGBTIQ+ relationships, for example that it is mutual or 'equal' rather than about power and control or that it just doesn't exist. Patterns of control and coercion can be just as damaging in same sex relationships but less recognisable if viewed through the prism of a conventional understanding of family violence.

**Consequently, LGBTIQ+ people seeking domestic violence support may feel that their experience of family violence is not validated, or simply not identify that they are experiencing domestic violence and therefore not seek assistance.** For some people, seeking support at the time of separation may be compounded by fears associated with coming out if they were not out during the relationship and a lack of family and other support. Barriers are even more pronounced in regional areas due to isolation, low availability, concerns about privacy and confidentiality and fear of discrimination. LGBTIQ+ parents need to be confident that they can obtain the support necessary to leave abusive relationships and ensure that their children are protected from exposure to family violence.

### **Family Dispute Resolution**

LGBTIQ+ families who access Family Dispute Resolution (FDR) services may do so through a private mediator or through a community or government organisation. The initial interaction with the provider, whether in person or through a website, is key in a parent's decision about engaging the service. Some LGBTIQ+ parents have reported attempting to access FDR services which were not inclusive and did not feel relevant. Often this message is initially conveyed by promotional material and information resources.

*Family Law mediation was horrendous, useless. They gave me a pamphlet for my child called "my Mummy and Daddy aren't friends any more".*

*All I could find were books like "mummy and daddy are sad". Apart from the gender, this wasn't us anyway. I was happy we separated. It was for the best for us.*

*Mediation providers need more outreach to regional areas with resources that are inclusive not based on hetero model.*

*We did mediation designed for high conflict parents but it was based on a heterosexual model so it didn't help us.*

*Model of one primary carer that characterises many heterosexual relationships doesn't fit many LGBTIQ families*

*I encountered a lot of assumptions about what each parent's role was*

**Family Dispute Resolution Practitioners (FDRPs) have a vital role in assisting families to reach agreements that are workable and in the best interests of their children. In working with LGBTIQ+ families, FDRPs need to have an understanding of the diversity of family structures and how the law applies to them. They also need to be able to move beyond assumptions about how families function and be open to families making arrangements that work for them.**

Roles of parents in LGBTIQ+ families tend to depart from the traditional heterosexual parenting model and it is more likely that the parenting is shared equally between both parents. This can be challenging to family law professionals who are more familiar with a single primary carer model of parenting, particularly when this remains entrenched in the orthodoxy of the court system.



Understanding LGBTIQ+ families is also relevant to the assessment of whether mediation is suitable. The dynamics of family violence in same sex relationships may differ from those of heterosexual relationships and inability to recognise them may place vulnerable parents at risk. The assessment of suitability is ongoing and extends from initial screening to the mediator's role during the mediation process.

*It's important for mediators to be able to see the patterns of domestic violence in LGBTIQ+ relationships and not make assumptions based on the signs in heterosexual relationships.*

In the context of court proceedings, FDR is more likely to involve conflictual relationships between the parties. Where mediation is court ordered, parties do not necessarily attend in a spirit of goodwill and willingness to resolve the dispute. Some parents felt that FDR could be used by a party as a delaying tactic or a means of manipulation.

The issues outlined above do not diminish the value of FDR in providing many separating couple with a cost-effective and safe means of resolving their parenting and property disputes. Rather, they highlight the need for core competencies that equip FDRPs to work with LGBTIQ+ families and family diversity generally. Legally assisted mediation with appropriate safeguards is a viable alternative to court proceedings, particularly in circumstances of family violence. FDR also has an important role to play in property matters where the cost of proceedings would be disproportionate to the value of the asset pool.

### **Recommendation**

**FDRPs should be trained to work with LGBTIQ+ families and family diversity generally.**

#### **f) The impact of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings:**

We note that the Australian Law Reform Commission Report on the review into the Family Law System (at p 248) stated that *accounts provided by individuals indicated significant dismay, even despair, about the high costs of litigation, its adversarial quality, and the adverse impact this has on them and their children in financial and wellbeing terms.*

**Members of the LGBTIQ+ community experience the impact of family law proceedings in many ways that are similar to the general community. Inevitably, children are affected by the conflict between their parents that is sustained by court proceedings. For some, the effects are far-reaching.**

*The impact of that process continues today 13 years on. It would be impossible for me to articulate just how much that process affected me & my children*

*My children were involved in a court report process. They were caught up in adults inappropriate conversations.*

*Immeasurable stress and financial strain. It had a significant negative affect on my work, relationship and mental health.*



*Financial, homelessness, trauma, stigma, reduced impact to physical health care.*

Some parents felt that the finalisation of the proceedings did not result in an outcome that was optimum for their children. Orders can impact on children in unforeseen ways and the way in which they are structured can have the effect of sustaining conflict between parents. Where circumstances change, there can be limited options for parents where the other parent is unwilling to be flexible and is unwilling to attend mediation to vary orders. Parents may "breach" the orders if they feel they are doing so in the child's best interest. On the other hand, parents feel that there are no consequences for a parent who repeatedly fails to comply with orders. Understandably parents are reluctant to return to court and may have difficulty meeting the threshold for a material change in circumstances that must be met prior to the court considering a variation of orders.

*Because the orders were made when he was 5 they no longer 'fit' and I am co-parenting with a person who chooses to use coercive control and abuse, this stress has never ended and is exacerbated by poorly constructed orders with no consideration for the age of the child and no capacity to revise them. Because the orders are so poor and out of date there have been many occasions where they have been breached and are not suiting my son now he is older. I have repeatedly tried to go to mediation to address this and other issues such as our son having 12 transitions from house every month but she simply refuses and there is nothing I can do about it. My ex breaches the orders or just changes them randomly to suit herself knowing full well that there is nothing that can be done and there is no repercussions. My son is crying after school saying that he needs less transitions and wants equal time at each home as he is exhausted all the time but my ex won't agree and won't mediate and I paid for legal advice (again) and was told that I can't take that back to court as it isn't a serious enough reason to change the orders.*

**In addition, there are particular ways in which the impact of family law proceedings is experienced by LGBTIQ+ families. The additional legal and factual complexities around determining who is a parent can result in proceedings that are protracted and more costly.**

- **For some parents, separation may have coincided with changes in their expression of sexuality or gender identity.**

Parents who are TGD face additional obstacles due to lack of awareness and discrimination. In circumstances where a parent's transition has been a factor in the separation, that parent may experience efforts by the other parent to restrict their relationship with the child.

- **The definitions of parentage under the Family Law Act do not reflect the ways in which families are formed in the LGBTIQ+ community, particularly if a child is conceived through surrogacy or where couples conceiving through donor conception were not in a de facto relationship.**

A person has to focus on proving that they are a parent before the court considers to what extent and how the parent should be involved in the child's life.



- **Even where a parent satisfies the legal definition of parentage, one parent may attempt to use their biological status as a way of restricting the involvement of the non-biological parent in the child's life.**
- **A family may include more than two people with a parenting role.**

For example, a lesbian couple may be in a co-parenting arrangement with a known donor (and possibly his partner). Children may have been born from a previous heterosexual relationship and one of the separating parents is a step parent. The role of other people who are significant in the child's life needs to be taken into account in court proceedings.

Quotes from the community:

*At the time I was not recognised under law as a parent this meant a long & at times soul destroying family law process for me personally for my children it meant a lot more.*

*Having to prove that I was my children's mother had a significant and long lasting effect on me*

*My ex partner has tried to argue that because she is the biological parent she has more 'decision making' rights than I do as his non-biological parent.*

*We were recently granted Parenting Orders under the Federal Court Circuit of Australia for our Son after a nearly three year journey through completely uncharted legal territory. Upon arrival back to Australia after our son was born, we discovered that (despite being granted citizenship, and despite me being on the birth certificate) under our current family law legislation, neither me or my husband were recognised as our sons 'legal parents' - That is under the current law, we had no legal rights if something 'was to go wrong'!... This also extended to simple things like changing his last name to ours (as the birth certificate included the surrogate mothers last name as well as mine, which was a cultural tradition where he was born) or being able to apply for passport renewal without the surrogate mothers permission etc. Given the law/legislation we were up against was untested, no legal professional we encountered had experience with a case like ours, and all of us were learning as we went... we had no idea what the outcome would be in terms of how to secure parenting orders without incriminating ourselves by admitting to the fact we accessed international surrogacy, which (whilst legal in the country it took place) was technically illegal in terms of the act itself here in our home state. It was a very complicated, stressful two and a half years. To be honest, despite being successful, we're still not quite over the stress of it.*

Amendments to parentage provisions to provide greater clarity would reduce uncertainty for many parents and in some cases remove the need to commence court proceedings. As this involves state and territory legislation, cooperation between jurisdictions is necessary to bring about change. Provisions that reflect the diversity of LGBTIQ+ family structures are necessary to bring about optimum outcomes for children.



## Recommendation

**There needs to be full legal recognition for families that have been formed through surrogacy arrangements. Legal recognition of parentage ensures that children in these families will be able to access essential services including emergency medical treatment regardless of what parent they are with. It is in the best interests of children to have the stability and security afforded by legally recognising their parents.**

**h) Any avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.**

Most comments were directed at judicial officers and their treatment of litigants and capacity to understand the issues faced by them as LGBTIQ+ families. On a positive note, some felt judges and court staff demonstrated compassion towards parents who had to work within outdated legislation in their attempt to be recognised as parents. Parents were also appreciative of judicial officers who understood the importance of the continued involvement of parental figures in a child's life. However, lack of continuity of judicial officers meant that experiences were variable. Some parents called for more judges to be employed to take pressure off the system and for judicial officers and other court professionals such as family report writers to receive training to better equip them to work with family diversity.

**Unfortunately, for some LGBTIQ+ parents, the discrimination experienced in other aspects of life continued in the court room with homophobic and outdated views about parenting roles. The experience of discrimination is particularly acute for parents who are trans and gender diverse.**

*He stated that children should be with their mother even though they were with either my former partner or when not with her they were with me their other mother*

*Constant false allegations, vilification from police, ex partners, solicitors, barristers, fighting every step of the way in the Family Court (though hoping it will be a positive outcome)... it's been a huge learning experience to see the immense prejudice transgender women receive*

*I'm a transwoman...I'm very lucky...I'm petite and very feminine...children look more like me...the biggest challenge is when some people find out you're the father...I've learnt now to never mention I'm trans.*

Many people find the court system intimidating in circumstances when they are feeling at their most vulnerable. Those who have experienced violence, abuse and control in their relationship can feel re-traumatised by the conduct of judicial officers and the court environment more broadly. A comment was also expressed about court security staff abusing their power.

*Judges should learn to treat people with mutual respect. They need to understand that their controlling and authoritarian attitude is re-traumatising to victims of coercive control.*

It was also considered that parents feel constrained in being able to communicate their concerns in circumstances where their behaviour and parental credentials are under intense scrutiny.



*The system they function in is prohibitively difficult for many to communicate in at very difficult periods in their life. All of this is stacked against parents not wanting to harm their legal case, and have their children removed, or time restricted unnecessarily. This does not make them bad parents. The system seems stacked against the more emotionally responsive parent to prove themselves cool calm and collected in all areas of life.*

One parent expressed frustration with the actions of a judicial officer who did not appear to have an appreciation for the impact of orders on the child.

*He removed my PR and reduced my care. Of course my former partner enforced those orders giving copies to my daughters school & my son's day care. This had a huge impact on my daughter particularly who was 8 at that time. She was no longer allowed to take class notes home to me to be signed. She was singled out by the teachers when asked whose care she was going home to. This was incredibly upsetting for my daughter at that time and I was unable to maintain the relationship with the school I had enjoyed for many years. The teachers were placed in a very difficult situation.*

**Recommendation:**

**It is essential that family law system professionals acquire and sustain core competencies that enable them to respond adequately to the issues experienced by a range of families, including LGBTIQ+ families. Development of core competencies in this area should be guided by way of consultation with advocacy services and organisations specialising in service provision to the LGBTIQ+ community. It is also vital for family law professionals employ a trauma informed approach so as to not exacerbate the trauma already experienced by many litigants.**