



27 February 2022

Email to: adareview@qhrc.qld.gov.au

Dear ADA Review team

Improving discrimination laws in Queensland

Thank you for the opportunity to provide a submission in response to the Discussion Paper. Our submission is made on behalf of rainbow families across Queensland, with a focus on representing the voices of the LGBTQ+ community as well as those of our children.

About Rainbow Families Queensland (RFQ)

RFQ supports, celebrates and advocates on behalf of LGBTQ+ parents and carers and their children, across Queensland. RFQ has a vision of a community where every family is included, respected and valued. As a community organisation run on a volunteer basis by LGBTQ+ parents, we act as a support network for parents and carers as well as their children. We advocate on behalf of our community and are a strong and consistent voice for LGBTQ+ families to address discrimination, raise awareness and promote acceptance.

Families in which one or more parents or carers identify as LGBTQ+ are known as *rainbow families*.

Impact of discrimination on families

In 2016 there were 10,500 children in Australia living in same-sex coupled families in Australia. However, because of exclusionary data collection in the ABS this did not include the many children living with single parents who identify as LGBTQ+, and couples with children where one or both parents are trans or gender diverse. These statistics also do not include the many rainbow families who may not have self-identified as part of the LGBTQ+ community due to social stigma and fear of discrimination. Our community is growing substantially every year, but we face significant barriers to inclusion.

Based on the latest health data, the mental health of our communities is in crisis. Lesbian, gay and bisexual people are twice as likely to be diagnosed and treated for mental health disorders in Australia and are 5 times more likely than those in the general population to attempt suicide. Transgender people are at substantially higher risk of suicide attempts (at 11 times the general population). As is the case for other marginalised communities, a major contributing factor to the poor mental health of our communities is the ongoing impact of stigma and discrimination.¹

As parents, we naturally are most concerned about the impact on children in our families who experience their own kind of minority stress. While in the Dempsey study (2013) it was found that some measures of wellbeing for children in rainbow families were more positive

¹ Perales, F. (2019) The health and wellbeing of Australian lesbian, gay and bisexual people: a systematic assessment using a longitudinal national sample. Australian and New Zealand Journal of Public Health.

compared with other children,² the study by Crouch in 2014³ found that experiences of stigma related to being in a rainbow family, which might include bullying or social exclusion, can be a risk factor for the wellbeing of children.

Response to Part C:

RFQ endorses the recommendations in the 10-point plan developed by Community Legal Centres Queensland but will also provide commentary on issues specific to our communities.

Direct and indirect discrimination and combined grounds (Q1-3)

RFQ supports simplified legal tests for discrimination to make the laws easier to understand and enforce. Some of our families experience multiple layers of discrimination, particularly those from First Nations and CALD backgrounds.

Recommendation:

Clarify that direct and indirect discrimination are not mutually exclusive. Change the test for direct discrimination to unfavourable treatment, and the test for indirect discrimination to the disadvantage approach.

Recommendation:

Recognise intersectionality by adopting the approach of Canada or the UK in acknowledging that discrimination can happen based on one or more prohibited grounds or on the effect of a combination of prohibited grounds.

Reasonable accommodations (Q5-6)

RFQ supports extending the concept of 'reasonable accommodations' to all attributes including sexuality, gender identity, sex characteristics, and association. Including the 'association' attribute will be necessary in situations where our children are discriminated against because of their association with us as LGBTQ+ people.

In many situations rainbow families experience systemic discrimination because they do not fit the mould of a one mother/one father family. For example, forms and databases often refer to terms like 'pregnant woman', 'mother' or 'father', 'husband' or 'wife' in a way that excludes our families. Sometimes all that is required to achieve an equitable outcome is an update to incorporate neutral terms such as 'parent 1' and 'parent 2' etc.

Indirect discrimination is a challenging concept to grasp, but we anticipate simply asking for a 'reasonable accommodation' to meet the needs of our family will be easily understood by schools and service providers.

Recommendation:

Change the law to include a stand-alone requirement to make reasonable accommodations based on all attributes, including in the areas of Goods and services, Education and State laws and programs.

² Dempsey, D. (2013). Same-sex parented families in Australia.

³ 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.

Representative body complaints (Q16)

RFQ supports allowing representative bodies to make complaints on behalf of a group of community members. RFQ is an organisation that acts on behalf of the interests of LGBTQ+ parents and their children and anticipates significant benefits in this approach.

For example, almost all our families experienced systemic discrimination when filling out the Census this year as many of the questions were exclusionary and discriminatory. However, our families are hesitant to make complaints, particularly where it involves putting forward their child as a complainant. RFQ considers this to be a key way to reduce the burden on marginalised individuals, while bolstering the role of the Act in achieving systemic rather than individual outcomes.

Recommendation:

Include representative body complaints into the Act.

Special measures and Tribunal exemptions (Q20)

RFQ generally supports moving special measures (equal opportunity and welfare measures) into the definition of discrimination consistent with a human rights approach but would prefer an alternative term such as 'affirmative measures'. However, RFQ urges caution in ensuring that affirmative measures are not misused to advance the rights of one group to the detriment of another. RFQ is concerned about a lack of consultation and transparency even in the current system and processes.

One such example is in the matter of *Re The Women's Legal Service Inc [2019] QIRC 060*, where an exemption was granted to the applicant service allowing discrimination on the basis of sex and gender identity without any consultation whatsoever with the LGBTQ+ community. Stronger protections mandating consultation prior to an adverse exemption decision are needed.

Consultation

Under section 113(2)-(3) of the Act, the Commissioner may include in their submission to the Tribunal whether there are affected persons, whether public consultation is required, and recommend the way that public consultation should be conducted. RFQ is concerned that consultation failed to take place in the above instance which resulted in clear disadvantage to our community.

RFQ suggests that the provision be changed to require the Commissioner to identify a suitable representative body to consult where there is potential disadvantage to an identifiable group. The representative body could be given an opportunity to respond to the Commissioner, who can incorporate this information into their submission to the Tribunal. A copy of the representative body's submission could also be provided to the Tribunal to consider in determining the matter. There may need to be some discretion not to engage this step if a suitable representative body cannot be ascertained.

A further option could be setting up consultative system where relevant entities can sign up to receive notice of exemption applications relating to a particular attribute. A comparable system is how non-government organisations sign up for Consultative Status to the United Nations Economic and Social Council (ECOSOC).⁴ This would create further benefit by providing an educative function.

⁴ See <http://csonet.org/index.php?menu=17>

Meaning of special (affirmative) measures

We would also support creating an expansive definition of a special (affirmative) measures, in line with the approach in the Victorian legislation, which incorporates a proportionality approach.⁵ The key considerations should include that:

- There is a relevant group with an attribute or attributes
- The purpose of the measure addresses inequality
- The purpose of the measure will actually remedy inequity for the relevant group
- The measure is being undertaken in good faith to help promote or achieve substantive equality
- The measure is reasonably likely to achieve its purpose
- The purpose is proportionate, that is it doesn't go 'too far' (particularly considering how it will impact on people outside the group the measure is seeking to advance)
- The measure is justified because the group has a particular need for advancement or assistance.

The Act should confirm that once the purpose of achieving equality has been achieved, the measure ceases to be an affirmative measure.

Recommendation:

Include special measures in the definition of discrimination, clearly define these measures as per the approach in Victoria and provide the Commission with discretion to engage and consult with representative bodies where necessary and practicable.

Positive duties and a regulatory approach (Q19-22)

RFQ considers that a shift from a reactionary to a preventative approach is essential to achieve the purpose of the Act in eliminating discrimination. However, a positive duty approach must be enforceable to be an effective option. RFQ anticipates that there would be significant benefit in the Commission having own-motion investigatory powers, but only if the Commission is appropriately resourced to carry out this work. The Commission also needs resourcing to be better connected with communities in order to understand what the key systemic issues people are experiencing. RFQ would support the publication of further resources like Trans@school, Trans@work and the LGBTI section of the QHRC website, which provide practical and specific guidance.

Recommendation:

Implement a positive duty and create a regulatory role for the Commission that is properly resourced for education and enforcement during implementation and on an ongoing basis.

Role of the tribunals (Q23)

RFQ supports the need to create a specialist list because of the importance of tribunal members understanding human rights issues. This could potentially facilitate better training of members on LGBTIQ+ awareness, and lead to fairer outcomes. Previous cases such as

⁵ Section 12 *Equal Opportunity Act 2010* (Vic), see also *Waite Group (Human Rights) [2016] VCAT 1258* which sets out requirements for a special measure and raises questions that may be asked to assess whether it is a bone fide special measure.

Tafao v State of Queensland [2018] QCAT 409⁶ indicate poor levels of cultural knowledge about our communities.

Recommendation:

Create a specialist list at the tribunals and require members who make decisions about LGBTIQ+ people to hold knowledge and understanding of our communities.

Response to Part D:

Gender identity (Q26 and 35)

The definition of gender identity has fallen well behind community understanding and expectations of this term. Our primary concern is that non-binary people are not covered. However, we also consider that the definition in the Yogyakarta Principles more broadly explains the concept of gender identity based appropriately on self-expressed gender regardless of sex assigned at birth. In addition, sometimes cisgender people are discriminated against because of their gender expression. Expanding the definition would mean, for example, that a lesbian woman with a masculine gender expression would also be covered if that were the basis on which the discrimination occurred.

Including the term 'gender' along with 'sex' would ensure coverage for trans people who experience discrimination because of their gender, rather than their gender identity. For example, if a transwoman experiences misogyny it's not because of her gender identity but rather because of her experience as a woman (her gender).

Recommendation:

Replace the current definition with the definition in s213G *Public Health Act 2005* and add the attribute of gender to the Act.

Sexuality (Q27)

Community understanding and descriptions of sexual identities has expanded significantly in the last 20 years and the terminology also requires updating. Because there are number of ways that people identify themselves, and this is always evolving, RFQ considers a definition that does not refer specifically to identities is preferable because it may need updating less frequently. RFQ considers that any definition should incorporate asexual and aromantic identities by clarifying that the definition includes a lack of attraction.

Recommendation:

Replace the current definition with the definition of sexual orientation in s213E *Public Health Act 2005* but also incorporate asexuality, as follows:

Sexuality means the person's capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender, more than one gender, *including not having an emotional, affectional and sexual attraction to any person.*

Alternatively, this could be achieved by way of a legislative note that explains that sexuality also includes a lack of emotional, affectional and sexual attraction.

⁶ While this case has been appealed, the Member in this original decision made misconceived and offensive comments that a transwoman who had identified and lived as female since a teenager was not a woman, but rather a man.

Sex characteristics (Q36)

RFQ cannot speak on behalf of people born with variations of sex characteristics but supports and endorses the Darlington Statement along with submissions by Intersex Human Rights Australia and Intersex Peer Support Australia. RFQ acknowledges the importance of separately protecting people born with variations of sex characteristics in the Act, removing references to 'indeterminate sex' from the current definition of gender identity.

Religious bodies providing services and accommodation (Q41-43)

The Act should be updated to create a fairer balance between the right to religious freedom and the right to be free from discrimination.

RFQ considers that the religions exemptions under section 109 and 90, which allow for discrimination based on *all* attributes are overly broad, and discrimination should not be permitted in the delivery of Goods and services or Accommodation areas. Where services are offered on a commercial basis or on behalf of the state, discrimination should not be allowed. Many of our families rely on health and other service providers run by religious bodies – essential services run by religious bodies could include family support and counselling, adoption and foster care services and health care services.

Recommendation:

Repeal the religious accommodation providers exemption (s90) and limit the general religious exemption (s109) to not include accommodation or services offered to the public.

Genuine occupational requirements – religious (Q44)

Community sentiment has dramatically shifted in the 20 years since the exemption for 'Genuine occupational requirements' was amended to allow an educational institution or other religious organisation to discriminate against their staff because they express who they are at work [section 25(2)-(8)].⁷ This exemption requires that employees not 'openly act' as themselves if who they are is contrary to their employer's religious beliefs.

RFQ believes that this exemption overly intrudes into the private lives of employees and encourages conduct that is contrary to the *Human Rights Act 2019* by failing to balance religious rights with the right to equality and right to privacy.

The exemption is blatantly homophobic and transphobic, but also may disadvantage pregnant workers, separated or divorced workers and workers who are living in a de facto relationship, since it can apply to situations where a religious employer does not approve of other aspects of a person's private life.

A particular impact is felt by rainbow families where a parent is a teacher in a religious school. For trans and gender diverse teachers, they may feel they cannot affirm their gender identity and lesbian, gay and bisexual teachers may need to remain in the closet at school. Hiding or suppressing sexuality and gender identity causes significant psychological harm and can lead to ongoing mental health issues and suicidal ideation.

⁷ A recent survey found that only 19% of people agreed that Conservative Catholic, Anglican, Jewish, and Muslim schools should be allowed to refuse to employ a teacher because they are LGBT+, and only 35% of Christians agreed.

Such a facade can be extremely challenging to maintain when a teacher or their partner becomes pregnant. At this point, it can become impossible to continue to hide one's gender identity or sexuality and who their family is. Remaining in the closet can lead to huge stress and anxiety and contribute to feelings of shame and ostracism for the parents and their child. Another unfortunate outcome may be social isolation because a family is fearful about going out in public places where teachers, students or parents may see them together. A parent or their child should never be made to feel ashamed of their family.

Not talking about diversity in sexuality, gender identity, relationships and families can also lead to prejudicial views in the study body as children do not get an opportunity to learn about the different kinds of people and families that make up our society. Another consequence is that LGBTQ+ children in religious schools are deprived of positive role models at a time they may be most vulnerable.

Religious employers may argue that they need to retain their religious ethos, but this should not come at such a high expense to employees. Being LGBTQ+ and religious are not mutually exclusive, and many of our families practice the same faith as the place they work.

RFQ believes that a reasonable compromise would be to permit discrimination in relation to hiring teachers in religious schools but with respect to their religious or ethical beliefs only when it is an inherent part of the role. By limiting this exemption to only apply to religious belief or activity, religious bodies and schools will continue to be able to choose who they hire based on religious belief but not discriminate based on unrelated attributes such as sexuality, relationship status, pregnancy, or gender identity.

The reality is that along with shifting community attitudes, most religious schools and other organisations are becoming more inclusive places for LGBTQ+ staff. But those few organisations creating a harmful environment for staff and their families should not be given a continued licence to discriminate.

Recommendation:

Amend sections 25(2)-(8) to limit the scope to apply only to the religious belief or activity attribute.

Working with children (Q45)

This provision perpetuates offensive stereotypes about trans people being a risk to children and clearly must be removed from the Act as a high priority. RFQ is aware of transgender teachers who have expressed fear of discrimination due to this provision.

Recommendation:

Repeal the working with children exemption.

Assistive reproductive technology services (Q46)

This section was introduced following the case of *JM v QFG [1998] QCA 228* where QFG was allowed to discriminate against a single lesbian. QFG and other clinics no longer discriminate against the LGBTQ+ community, in practice RFQ is not aware of any fertility service providers who are currently utilising this exemption. For IVF clinics this would be an illogical step where significant profits are achieved from providing services to our community. In fact, RFQ hosts an annual Making Rainbow Babies seminar which is attended by fertility service providers, which take the opportunity to market their services to our community.

The exemption infers that in some way our children should not be born into single parent or rainbow families, which is highly offensive and inaccurate.

This exemption is on the one hand redundant, and on the other does not meet current community expectations.

Recommendation:

Repeal the assisted reproductive technology services exemption.

Thank you for considering this submission, and our team would be pleased to discuss any aspects of the submission further.

Yours sincerely

Rainbow Families Queensland Steering Committee