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Re: Consolidation of Anti-Discrimination Laws

I am grateful to the Attorney-General and the government for the opportunity to provide information in relation to the consolidation process in regard to anti-discrimination legislation at Federal level and the prospect of the inclusion of sexual orientation and sex and/or gender identity in Federal anti-discrimination legislation.

The comments and information provided in this paper, as well as the information contained in the two attachments refer specifically to the situation of GLBTI (gay, lesbian, bisexual, transgender and intersex) older people and the vital importance of their protection from discrimination, vilification and harassment, including in respect to their circumstances as consumers, or potential consumers, of aged care services. This includes services provided at residential, in-home, community, informal and all other levels of care.

Across Australia GLBTI older people are living in fear of abuse, neglect, forcible outing, denial of service, homophobic vilification, eviction and isolation as they confront or consider the reality of confronting the current aged care sector and rely on that sector for support in the midst of increasing physical or cognitive dependency. In this respect, GLBTI older people, particularly those over 70 years of age, form a uniquely vulnerable cohort within the sexual and gender diverse community, and have received very limited attention and action in relation to protection of their rights.^{1 2}

¹ Harrison, J (2004) 'Discrimination and older gays: surviving aged care' in Equal Time Anti-Discrimination Board of New South Wales, No 61, August pp. 1-3
[http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/vwFiles/ET%20Aug%2004%20.pdf/\\$file/ET%20Aug%2004%20.pdf](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/vwFiles/ET%20Aug%2004%20.pdf/$file/ET%20Aug%2004%20.pdf)

² NSW Anti Discrimination Board (2005) New South Wales Anti Discrimination Board Working Paper on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Ageing and Discrimination
http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_glbt_i_consultation

There is a rapidly growing body of evidence regarding the situation and needs of GLBTI elderly people, and the prospects for baby boomers who are GLBTI in relation to a future interfacing with the aged care sector about which many express grave fears.

While the Federal government has enacted measures to protect the rights of consumers in respect to certain areas of aged care over the past two decades, including the provision of aged care advocacy services across Australia, these measures have not been explicitly and legislatively extended to protection of the rights of GLBTI consumers, which renders older GLBTI people seriously vulnerable to discrimination and potential abuse. Consumers who are GLBTI remain largely invisible and are therefore assumed by service providers to not exist. As my Doctoral research into GLBTI aged care in the USA and Australia identified, this cycle of invisibility entrenches fear of discrimination. It is imperative that legislative protections which serve to address and eradicate this fear and invisibility are operating at the strongest possible level, so that all organisations providing aged care services are included in anti-discrimination requirements and are bound by these to the fullest possible extent. Unless this is the case, GLBTI elderly people remain vulnerable and unprotected.

The attached paper that I co-authored with the Australian Coalition for Equality, also available at <http://www.coalitionforequality.org.au/LGBTI-AgedCareDiscussionPaper.pdf> provides further detail regarding this situation, and outlines the implications for the aged care sector of the 2008 Federal reforms removing discrimination against same-sex couples. The paper has provided a basis for discussion with government about measures which need to be taken to ensure that legislative reforms impact on consumers and the sector in an effective manner.

The impending transfer of all responsibility for aged care to the Federal government under the Health and Hospitals Reform Commission and COAG reforms, and the outcomes of the inquiry into aged care conducted by the Productivity Commission, now under consideration by the Federal government, give greater impetus to the need for the strongest possible anti-discrimination protection at Federal level for GLBTI consumers of aged care services, as well as their partners, significant others and representatives. All providers, including faith-based, religious and charitable organisations in the aged care sector, need to be bound by anti-discrimination regulations and there should be no provision for exemptions from this.

<http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/AgedCareReformInvitation>

<http://www.pc.gov.au/projects/inquiry/aged-care>

Indeed, the transition process taking place towards Federal responsibility for aged care provides a significant window of opportunity for the Federal government to ensure maximum protection from discrimination and well targeted education around certainty and safety for GLBTI aged care consumers. As Raj (2010) points out, Federal anti-discrimination legislation in relation to sexuality and sex and/or gender identity is urgently needed so that consumers of aged care services are protected from discrimination and persecution in a sector which will be coming under Federal control.

<http://www.theage.com.au/opinion/politics/samesex-couples-deserve-a-fair-go-too-20100726-10s06.html>

In this respect, the Consolidation Process and the development of anti-discrimination legislation need to explicitly include reference to GLBTI aged care and the steps which will be taken to prevent and eliminate discrimination across the sector. It is imperative that in conjunction with legislative change targeted education and information programs that impact on service providers and consumers, as well as their representatives and advocates take place.

Anti-discrimination awareness in relation to GLBTI aged care is vitally important if any legislative reform is to be effective or relevant. There is a need for specifically targeted resources to enable education, information and advocacy to be provided across the sector. Without this element of any process of developing and implementing anti-discrimination legislative measures, GLBTI consumers and potential consumers of aged care services will remain invisible, silent and afraid. Consequently, most consumers would regard legislative and administrative mechanisms established to enable them to make formal complaints as impossible to utilise.

As has been expressed to the Federal Minister for Ageing, Mark Butler, by GLBTI community elders and carers as well as GLBTI organisations and experts at his recent national round of conversations regarding the Productivity Commission report, the aged care sector is particularly important and somewhat unique in relation to the matter of exemptions, given the 'hidden' and 'invisible' nature of the client group that may be experiencing discrimination. GLBTI elders have lived lives of persecution and discrimination and this seriously impacts on their vulnerability in relation to the aged care sector.

The second attachment to this paper, also available at <http://www.lgbthealth.org.au/sites/default/files/Summary-Report-22Nov11.pdf> is the Summary Document from the National LGBTI Ageing Roundtable held in Sydney in October 2011. The document includes reference to the session at the Roundtable at which discussion between the LGBTI representatives present and the Minister for Ageing, Mark Butler, took place. The matter of the lack of aged care related anti-discrimination protections and the importance of there being no exemptions applied in relation to aged care were raised with the Minister. The Roundtable, in similar fashion to GLBTI participants at the Minister's many recent national conversations on aged care, reinforced the need to recognise that faith-based providers in both residential and community based care organisations are expressing a strong desire to be understood and seen to be actively not discriminating on the grounds of sexual orientation and sex and / or gender identity. Such organisations are actively participating in Federally funded GLBTI cultural awareness in aged care training, and are recipients of Federal funding for GLBTI targeted aged care packages to provide services to people living at home.

The fact that religious organisations are expressing and displaying a strong commitment to non-discrimination runs counter to any notion of providing mechanisms by which such organisations would seek exemptions from anti-discrimination measures. This embracing of non-discrimination by the aged care sector is a relatively recent development, and is still at an early stage. The Productivity Commission inquiry final report recognised GLBTI older people as a diverse consumer group with specific special needs. We are at a significant point in the history of the recognition of GLBTI aged care needs in Australia in this respect. Allowing exemptions from anti-discrimination provisions could serve to jeopardise a vitally important and effective process which is successfully taking place and is serving to enforce the protection of GLBTI elderly people from discrimination itself.

Exemptions on any basis, including religious grounds, will only serve to further increase GLBTI invisibility and compound the vulnerability and fear that currently exist for consumers and their carers. I am aware of instances where elderly GLBTI aged care consumers, particularly in residential care facilities, establish a trusting confidential relationship with one member of staff who is openly GLBTI or GLBTI-friendly in approach. Often this provides a lifeline from complete isolation, withdrawal and depression. It may also provide the only avenue through which a consumer or resident feels able to raise concerns or issues that relate to discrimination.

Allowing exemptions that may enable faith based organisations to exclude GLBTI people from employment by their organisations would seriously compromise the safety and well-being of consumers, as well as GLBTI aged care staff themselves. Discrimination that creates a heteronormative environment in an aged care setting leaves an already vulnerable group of consumers in a seriously grave situation. It is strongly recommended that no exemptions apply in relation to aged care, and the special nature of the need to protect an invisible population be recognised.

Given the particular history of fear of prejudice and discrimination that older GLBTI people have lived through, their invisibility within the aged care sector, and the current lack of specific aged care advocacy for these consumers, it is strongly recommended that the consolidation process give consideration to their situation as unique and requiring tailored responses so that legislative protections will be effective and understood within the aged care sector.

The unique and particularly vulnerable situation for older GLBTI consumers of aged care services also necessitates that there be no exemptions provided to charitable, religious or any other provider organisations in relation to anti-discrimination measures. It is vitally important that all providers across the aged care sector are consistently included in all compulsory measures for protection and educated about the rights of aged care residents and consumers in relation to sexual orientation and sex and/or gender identity.

Preferably, no exemptions should be provided under any circumstances. Even in circumstances where a provider organisation were to be granted an exemption that provider must be legally obliged to publish the detail of the exemption in all their publications, documents and public information, as well as in all recruitment and human resources documents. The exemption information also needs to be published on the Aged Care Standards and Accreditation Agency web site and in all Agency reports.

The special invisibility of older GLBTI people also necessitates that grounds for discrimination are broad, and include both perception and assumption regarding sexual orientation and sex and/or gender identity. In this respect, those GLBTI elderly people who experience vilification, abuse, harassment or discrimination despite not being 'out' in the aged care environment, will still be entitled to protection. It is thus critically important that a Commissioner with responsibility is empowered to not only act or investigate in relation to specific 'complaints' from individual consumers, but is able to initiate and conduct an investigation where it is deemed that the matter of concern is viable and warrants investigation.

It is vital that anti-discrimination protections contribute to ensuring that consumer rights are protected while not seeking to force GLBTI elders out of the closet. Certainly, this fear of being forced out of the closet was one of the most emphatic fears expressed by GLBTI elders and their representatives in relation to the Centrelink reforms which

resulted from the Federal reforms in relation to same-sex couples.
<http://www.acon.org.au/advocacy/news/centrelink-changes-update>

The Federal government needs to consider the means by which this 'outing' will not be imposed on GLBTI elderly people, but rights will be protected and understood by all those involved in aged care.

As previously mentioned, many of the matters raised here are canvassed in greater detail in the discussion paper which is attached as an extension of this paper:

Harrison, J and Irlam, CB, 2010. The removal of same-sex discrimination: Implications for lesbian, gay, bisexual, transgender & intersex (LGBTI) aged care. Discussion Paper. Australian Coalition for Equality and Diversity Futures, Adelaide.

The paper is also available online at: <http://www.coalitionforequality.org.au/LGBTI-AgedCareDiscussionPaper.pdf>

The Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 amended the Aged Care Act 1997 so that same sex couples would be given equity of treatment when assessment for residential care fees and charges takes place. The Discussion Paper was developed in response to the far-reaching implications of the amendment of the Aged Care Act. The eradication of discrimination at Federal level is the essential bedrock that underpins action in relation to these implications.

Doctoral research which I conducted investigated the lack of recognition of gay, lesbian, bisexual, transgender and intersex (GLBTI) issues in all areas of gerontology, including government policy and programs in Australia and the USA. The research revealed a serious lack of attention to concerns related to sexuality and gender identity in the Australian context. In the US context, a history of recognition of GLBTI concerns at all levels of aged care was apparent. The thesis is available online at <http://arrow.unisa.edu.au:8081/1959.8/24955>

The deficit in Australian gerontology is reflected in an almost complete lack of mention of GLBTI elderly people in aged care policy, education and training, research priorities, program guidelines and consumer related initiatives, including advocacy. This absence of mention of or attention to the special needs of GLBTI elders and their carers and advocates reinforces invisibility and avoids the need to address whether standards of care are culturally appropriate to GLBTI needs. This reinforces fear of discrimination for consumers and a lack of awareness of obligations and responsibilities for providers.

As a gerontologist with thirty years experience in direct care, policy development, research, training and advocacy, I am acutely aware of the strong history of recognition of special needs groups which has underpinned Australian aged care policy. As founder of a remote area aged care advocacy service, I am cognisant of the Federal government's commendable role in the recognition of residents' rights, particularly those of Indigenous residents of residential aged care facilities. The development of the Aboriginal and Torres Strait Islander Aged Care Strategy was evidence of this commitment to

ensuring that Indigenous people receive special consideration and culturally appropriate intervention, care, and service provision. A similar national strategy or plan in relation to GLBTI aged care is urgently needed.

The continuing almost complete lack of mention of GLBTI aged care in government documents and procedures at Federal level stands in stark contrast to the commitment to Indigenous aged care, and requires urgent attention and redress. GLBTI consumers remain almost completely invisible within aged care services and across the aged care sector. This invisibility, due to lifetimes of fear of persecution and discrimination, is itself reflected in the absence of GLBTI issues in Federal aged care policy and ongoing programs. Federal anti-discrimination legislation is essential to the process of redressing this imbalance.

The lack of attention runs counter to the rapidly increasing recognition of GLBTI aged care concerns across Australian gerontology and the GLBTI community, including representative organisations. Research, policy development, advocacy and other initiatives are occurring across Australia in relation to GLBTI ageing, and this is reflected in gerontology and in GLBTI organisations' platforms, strategic plans, managerial structures, investigative projects, publications, internal discussions, research processes and information dissemination. The attached Discussion Paper outlines these initiatives in detail.

Submissions to the Federal reviews of the Aged Care Complaints Investigation Scheme and Aged Care Accreditation Processes, the latter which has yet to release its report, highlight matters connected to GLBTI aged care and the process of compliance and quality improvement. In particular, submissions from the LGBTI Health Alliance, ACON, The GLBTI Retirement Association, Associate Professor Mark Hughes, Matrix Guild Victoria and the Victorian Gay and Lesbian Rights Lobby, Lesbian and Gay Solidarity Melbourne and myself highlight these concerns. Professor Walton highlighted privacy and sensitivity matters related to GLBTI concerns in her final report regarding the Complaints Investigation Scheme. I would urge the Attorney-General's Department to access the GLBTI related submissions and the final reports where possible given that they raise serious matters connected to discrimination and fear of discrimination in relation to a special needs group which has received almost no attention in past deliberations around consumer rights.

I would also urge reference to the Senate Community Affairs References Committee report *The Hidden Toll: Suicide in Australia*, which makes particular mention of the matter of depression, anxiety and suicide as they impact on older GLBTI Australians who fear or experience discrimination.

http://www.aph.gov.au/senate/committee/clac_ctte/suicide/report/index.htm

There is evidence that GLBTI people postpone seeking help and approaching service providers due to fear of discrimination and persecution, both in the area of mental health and in relation to health and aged care matters generally.

Two reports from a four stage Foundation funded GLBTI aged care project conducted by the Matrix Guild Victoria, investigated and revealed discrimination and abuse on the basis of sexuality and sex or gender identity.

The reports are also available online at <http://www.matrixguildvic.org.au/project.html>

As baby boomers who are out (open regarding sex, sexuality and gender identity) begin to access aged services, including residential facilities, the aged care sector will be increasingly need to take GLBTI concerns into account. Ideally, the process of incorporating GLBTI aged care needs into legislative protections prior to this future scenario.

The prospect of legislative anti-discrimination reform which includes sexual orientation, sex and/or gender identity-based discrimination at Federal level is a positive indicator in relation to urgently needed change that will impact on the processes of aged care provision as well as the safety of consumers. I commend the Attorney-General and the government for undertaking this consolidation process and urge that the special need for protection of GLBTI elderly people and consumers of aged care services be given serious consideration.

Additional relevant reports and publications are available at the following sites:

http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_glbt_i_consultation
[NSW Anti-Discrimination Board report on GLBTI aged care discrimination]

<http://www.rainbowvisions.org.au/resourcesAgeing.html>
[Links to full text documents on GLBTI ageing in Australia]

<http://www.acon.org.au/about-acon/Strategies/ageing>
[Ageing Strategy; ACON (AIDS Council of NSW)]

<http://www.acon.org.au/womens-health/ageing/lesbians>
[ACON Lesbians and ageing information]

<http://www.acon.org.au/about-acon/Strategies/ACON-Strategic-Plan-09>
[ACON organisational plan with ageing as a priority area]

<http://www.qahc.org.au/seniors>
[Queensland LGBT Ageing Action Group]

<http://glhv.org.au/node/557#attachments>
[Alzheimer's Australia publication on dementia and gay men and lesbians]

<http://glhv.org.au/taxonomy/term/40>
[Gay and Lesbian Health Vic. Resources on ageing]

<http://www.grai.org.au>
[GLBTI Retirement Association Inc – including recent research into residential provider attitudes and the development of practice guidelines]

<http://www.lgbthealth.org.au>
[National LGBT Health Alliance – ageing as a priority]

The recent Federal decision to provide a one-off grant to a pilot project to provide education around GLBTI issues to residential aged care staff in specific sites in NSW is a welcome development:

<http://www.smh.com.au/national/back-into-the-closet-gays-find-few-friends-in-aged-care-20100416-skqc.html>

<http://www.smh.com.au/national/federal-grant-to-protect-gays-against-stigma-in-aged-care-20100627-zc2c.html>

Additional References and Resources in relation to the comments made in this paper

Age Concern UK (2009) Later Life as an Older Lesbian Gay and Bisexual Person.

<http://www.ageconcern.org.uk/AgeConcern/after-life-for-lesbian-gay-bisexual-over-60.asp>

http://www.ageconcern.org.uk/AgeConcern/Documents/Later_life_as_OLGB_ACIG18.pdf

Barrett, C Harrison J and Kent J (2009) Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in Victoria. Matrix Guild Victoria Inc. Melbourne.

<http://www.matrixguildvic.org.au/project.html>

Harrison, J (2010) 'Nothing About Us Without Us': GLBTI Older People and Older people Living with HIV – Prospects, Possibilities and Self-Determination' in HIV Australia Vol 8 No 3 pp 10-12

<http://www.afao.org.au/library/hiv-australia/volume-8/number-3/glbt,-hiv-and-ageing>

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An Insider's Perspective on LGBT Aging Issues in Australia

http://www.asaging.org/networks/LGAIN/outword_online/2006/nov.cfm

Harrison, J (2006) Coming Out Ready or Not! Gay, lesbian, bisexual, transgender and intersex ageing and aged care in Australia: Reflections, contemporary developments and the road ahead in Gay and Lesbian Issues and Psychology Review Vol 2 No 2 pp. 44-53

http://www.psychology.org.au/units/interest_groups/gay_lesbian/8.7.22_10.asp#currentissue

Harrison, J (2005) Pink Lavender and Grey: Gay, lesbian, bisexual, transgender and intersex ageing in Australian gerontology in Gay and Lesbian Issues and Psychology Review Vol 1 No 1 pp.11-16

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<http://www.library.unisa.edu.au/adt-root/public/adt-SUSA-01042005-134827/>

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Online at: <http://www.dhs.vic.gov.au/phd/macglh/difference.htm>

- Harrison, J (2002) 'What are you really afraid of? Gay, lesbian, bisexual, transgender and intersex ageing, ageism, and activism' in Word is Out No 2, March pp. 1-11
http://www.rainbowvisions.org.au/resources/wordIsOut_by_JoHarrison.pdf
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<http://www.coalitionforequality.org.au/LGBTI-AgedCareDiscussionPaper.pdf>
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<http://sxnews.e-p.net.au/opinion/road-to-equality-corey-irlam-5794.html>
- NSW Anti Discrimination Board (2005) New South Wales Anti Discrimination Board Working Paper on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Ageing and Discrimination (includes Harrison keynote presentation delivered on February 15th)
http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_glbt_i_consultation
- Rainbow Visions Ageing Resources Online
<http://www.rainbowvisions.org.au/resourcesAgeing.html>
- The National Gay and Lesbian Task Force – Outing Age - Aging Issues (2009)
<http://www.thetaskforce.org/issues/aging>
<http://www.thetaskforce.org/downloads/reports/reports/OutingAge.pdf>