

**Submission in relation to
the Eleventh Session of the Working Group on Ageing**

**Prepared by Kaleidoscope Human Rights Foundation with the
assistance of DLA Piper**



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1. Introduction

Kaleidoscope Human Rights Foundation (Kaleidoscope) welcomes the opportunity to provide a submission to the Eleventh Session of the Working Group on Ageing.

Kaleidoscope is an NGO that works with local civil society organisations to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons in the Asia-Pacific region.

Kaleidoscope commends the Working Group on Aging for focusing its attention on the rights of older persons in relation to social security and education. When considering the rights of older persons, it is important to recognise the specific needs of vulnerable groups of older persons. LGBTI older persons face unique issues when it comes to accessing social security and education, and it is this community that is the subject of this submission.

This submission is based largely upon an analysis of the Australian approach to the human rights of older LGBTI persons; however, it should be noted that the rights of older LGBTI persons are far less protected in many other Asia-Pacific countries. For example, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association, consensual same-sex sexual acts between adults continues to be illegal (or de facto illegal) in 28 countries in the Asia Pacific Region.¹ Accordingly, the following observations and recommendations, which have arisen from the Australian analysis, equally apply (in some cases, with much greater imperative) to each jurisdiction in the Asia-Pacific region.

Kaleidoscope recommends that the following steps should be taken to better protect the rights of older LGBTI people to social security and education:

- legalise same-sex sexual conduct between consenting adults and develop specific legislation to protect the human rights of older LGBTI persons;
- consider the appropriateness of the introduction of a bill of rights;
- enact or amend anti-discrimination laws to account for inter-sectional discrimination;
- conduct further research in relation to risks faced by older LGBTI persons; and
- introduce incentives or requirements for service providers to conduct their business in a manner that is inclusive of older LGBTI people.

2. Social protection and social security including social protection floors

In Australia, an older person's right to social security and protection is recognised and established through various federal legislative statutes and instruments including the rights of users of aged care services;² the right to a non-contributory old-age benefit;³ the right to be free from discrimination

¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State Sponsored Homophobia 2019 Data Set*. Accessed on 28 October 2019 at <<https://ilga.org/maps-sexual-orientation-laws>>, being Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, Iraq, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu.

² *User Rights Principles 2014* (Cth) made under section 96-1 of the *Aged Care Act 1997* (Cth).

³ *Social Security Act 1991* (Cth) Chapter 2, Part 2.2.

based on age generally and within aged care facilities;⁴ and the right to a pension or benefit following the war-caused death of a partner.⁵

Legislative changes were made following the UN Human Rights Committee's decision in *Young v Australia*⁶ where it was found that Australia had violated Article 26 of the ICCPR by denying Mr Young a pension on the basis of his sexual orientation. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) amended a number of different Commonwealth Acts to recognise de facto and registered same-sex relationships.⁷

Under the *Aged Care Act 1997* (Cth) LGBTI persons are defined as a group requiring special needs.⁸

3. Scope of the Right in respect of LGBTI persons

Australia has a growing aged population.⁹ Currently there is no systematic capacity to identify and report on the wellbeing of aged persons who identify as LGBTI,¹⁰ nor is there a way to identify LGBTI older Australians accessing aged care services. It is difficult to know what proportion of the older community identifies as LGBTI due to the lack of data; however, it is clear that the need to access to health care and social assistance is high given that many of the older LGBTI community may not have children or family support.

The current system in place is inadequate given the prevalence of higher mental health concerns¹¹ and higher rates of suicide¹² within the LGBTI community and diseases associated with age such as dementia and its higher impacts on the LGBTI community.¹³

A recent report by the Australian Law Reform Commission argued for the need for extensive research and evaluation in relation to the risks, protective factors and needs of LGBTI aged

⁴ *Age Discrimination Act 2004* (Cth); *Aged Care Act 1997* (Cth).

⁵ *Veterans' Entitlements Act 1986* (Cth).

⁶ *Mr. Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (18 September 2003).

⁷ This includes the *Age Discrimination Act 2004* (Cth), *the Sex Discrimination Act 1984* (Cth), *the Social Security Act 1991* (Cth), *the Superannuation Act 1976* (Cth), *the National Health Act 1953* (Cth) *the Aged Care Act 1997* (Cth), *Defence Service Homes Act 1918* (Cth), *Military Rehabilitation and Compensation Act 2004* (Cth), *Veterans' Entitlements Act 1986* (Cth).

⁸ *Aged Care Act 1997* (Cth), s 11.3.

⁹ Australian Institute of Health and Welfare, *Older Australia at a glance*, Web Report (last updated 10 September 2018). Accessed on 29 October 2019 at <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/older-australians-who-identify-as-lesbian-gay-bisexual-transgender-or-intersex>>

¹⁰ Australian Institute of Health and Welfare, *Older Australia at a glance*, Web Report (last updated 10 September 2018). Accessed on 29 October 2019 at <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/older-australians-who-identify-as-lesbian-gay-bisexual-transgender-or-intersex>>; Department of Health, Australian Government, *Review of the National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy (Final Report, 30 June 2017)*. Australian Law Reform Commission, *Elder Abuse-A National Legal Response (ALRC Report 131) (14 June 2017)* 46-47.

¹¹ Leonard, W., Mitchell, A., Pitts, M., Patel, S., Lyons, A., Smith A., Couch, M., Barrett, A., (2012). *Private Lives 2. The second national survey of the health and wellbeing of LGBT Australians*.

¹² National LGBTI Health Alliance, *The Statistics at a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender And Intersex People In Australia*. Accessed on 29 October 2019: <<https://lgbtihealth.org.au/statistics/>>

¹³ Alzheimer's Australia August 2014. *Dementia, Transgender and Intersex People: Do service providers really know what their needs are?* Accessed on 29 October 2019 at <https://lgbtihealth.org.au/wp-content/uploads/2018/01/130739_LGBTI-Discussion-Paper.2-21.pdf>

persons.¹⁴ The Australian Human Rights Commission noted that the challenges facing the LGBTI community include:

*a lack of awareness of the needs of LGBTI communities in the aged care sector; a mistrust of mainstream services related to histories of discrimination; generic responses that fail to meet the unique needs of LGBTI people and communities; a failure of services to recognise the individual's 'family of choice'; and other risks of abuse, including threats to 'out' a person or of family member denying the individual's LGBTI status.*¹⁵

4. State obligations and special considerations

Australia has no legislation requiring a positive obligation for aged care providers to be inclusive,¹⁶ and obtaining the Rainbow Tick accreditation is optional.¹⁷ The National LGBTI Health Alliance currently estimates that 20% of the aged care sector has made no move to be inclusive.¹⁸ In November 2017, following recommendations that more staff attend training, it was reported that in one aged care centre, that out of approximately 350 staff members, only one employee attended an "LGBTI Awareness training" in 2016-17.¹⁹

As of 1 January 2019, an Aged Care and Quality and Safety Commission was established. Aged persons can lodge a complaint to this Commission regarding an aged care service provider's responsibilities under the *Aged Care Act 1997* (Cth).

Without effective research, reporting and evaluation of the risks facing LGBTI older persons, it is difficult to determine the extent to which aged care providers and other stakeholders are respecting and protecting the right of social security and social protection for older persons. Some aged care providers provide good support for LGBTI older persons, while others fail to support the older LGBTI community to the extent that many individuals have reported feeling like they have been "*forced back into the closet*" when they enter an aged care facility, bringing back all the feelings of discrimination that they experienced when they were younger.²⁰

¹⁴ Australian Law Reform Commission, *Elder Abuse-A National Legal Response (ALRC Report 131)* (31 May 2017), page 99. Accessed on 29 October 2019 at <https://www.alrc.gov.au/wp-content/uploads/2019/08/elder_abuse_131_final_report_31_may_2017.pdf>

¹⁵ Australian Human Rights Commission, *A Human Rights Perspective on Aged Care, Submission to the Royal Commission into Aged Care Quality and Safety*, 18 June 2019, page 21, paragraph 88. Accessed on 29 October 2019, at <<https://agedcare.royalcommission.gov.au/hearings/Documents/exhibits-2019/9-september/exhibit-9-1-melbourne1-general-tender-bundle/AWF.500.00267.0002.pdf>>

¹⁶ SBS Australia, *Elderly LGBTIQ+ Aged Care Residents say they are being forced 'back into the closet'*, updated 6 June 2019. Accessed on 29 October 2019 at <<https://www.sbs.com.au/news/the-feed/elderly-lgbtqi-aged-care-residents-say-they-re-being-forced-back-into-the-closet>>

¹⁷ The Rainbow Tick standards is a framework designed by Rainbow Health Victoria to help organisations become safe and inclusive for the LGBTIQ community. Accessed on 29 October 2019 at <<http://www.rainbowhealthvic.org.au/rainbow-tick>>

¹⁸ Royal Commission into Aged Care Quality and Safety, *Statement of Samantha Ruth Edmonds from the National LGBTI Health Alliance*, 27 September 2019. Accessed on 29 October 2019 at <<https://agedcare.royalcommission.gov.au/hearings/Documents/exhibits-2019/7-october/WIT.0396.0001.0001.pdf>>

¹⁹ Victoria Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre November 2017*, page 97-99. Accessed on 29 October 2019 at <<http://www.austlii.edu.au/au/other/VicOmbPRp/2017/10.pdf?stem=0&synonyms=0&query=Transgender%20Victoria%20aged%20care>>

²⁰ SBS Australia, *Elderly LGBTIQ+ Aged Care Residents say they are being forced 'back into the closet'*, updated 6 June 2019. Accessed on 29 October 2019 at <<https://www.sbs.com.au/news/the-feed/elderly-lgbtqi-aged-care-residents-say-they-re-being-forced-back-into-the-closet>>

5. Implementation

The LGBTI community is desperate for an overarching framework that includes legislative measures and protections in order to provide adequate support to the LGBTI aged sector. This should include repercussions for providers who fail to provide the necessary support for LGBTI aged persons.

6. Education, training, lifelong learning and capacity-building

When considering access to education, it is important to recognise the diversity of older persons. Although at present there is little data regarding the older Australian LGBTI community, the 2016 census identified:

- 46,700 same-sex couples, with 5% aged 65 or over; and
- 1,300 people identified as gender diverse, with 6% aged 65 or over.²¹

In Australia, no overarching legislation codifies the right of older persons to education, training, lifelong learning and capacity-building. Instead, protections are set out in:

- anti-discrimination legislation at the Commonwealth and State and Territory level;²² and
- Commonwealth workplace relations legislation, which prohibits employers from taking adverse action against employees (including prospective employees) on the basis of certain attributes (including sexual orientation and gender identity).²³

Education for older persons is generally carried out through vocational education training centres and community colleges. While federal and state funding may apply, such services are generally provided for a fee. More importantly, there is a no single legal and regulatory framework to secure access to such opportunities. This reflects the fragmented approach to the rights of older persons.²⁴

There are additional legal hurdles for the older Australian LGBTI community in accessing educational opportunities. For example, previous laws that criminalised male homosexuality²⁵ mean that some older gay men have criminal records (and in some cases, were registered as a sex offenders), making it difficult, to pursue training or employment opportunities. This was only resolved in November 2018, when all States and Territories passed laws to allow such convictions to be purged.²⁶

²¹ A number of notes to the census suggest that these numbers are under-representative of older Australian LGBTI community, and those who are gender diverse.

²² *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Australian Human Rights Commission Act 1986* (Cth); *Anti-Discrimination Act 1997* (NSW), *Equal Opportunity Act 2010* (VIC), *Anti-Discrimination Act 1991* (QLD) (as rebranded by the *Human Rights Act 2019* (QLD)), *Equal Opportunity Act 1984* (WA), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (TAS), *Discrimination Act 1991* (ACT) and *Anti-Discrimination Act 1996* (NT).

²³ *Fair Work Act 2009* (Cth), s 351.

²⁴ For example, the *International Covenant on Economic Social and Cultural Rights* contains articles protecting various rights but does not reference older persons; the *International Covenant on Civil and Political Rights* prohibits discrimination but does not specifically mention 'age'; and while the *Covenant on the Rights of Persons with Disabilities* is applicable, not all older persons have disabilities.

²⁵ The last State to remove male homosexuality as a crime was Tasmania, through the *Criminal Code Amendment Act 1997* (TAS).

²⁶ The last Territory to establish a regime to purge convictions for male homosexuality was Northern Territory on 14 November 2018 through the *Expungement of Historical Homosexual Offence Records Act 2018* (NT).

Many challenges faced by older persons stem from prejudicial attitudes. 33% of persons aged 50 or above have experienced age discrimination, with 22% of such cases being in the workplace, or while seeking employment.²⁷ 60% of persons who have experienced age discrimination have affected self-esteem, mental health or stress-levels, and 33% gave up looking for work entirely. Research also shows that most existing educational and training programs are not suitable for many mature age people, especially those with low levels of prior qualifications and low formal education (along with significant cost).²⁸

These issues are escalated for older LGBTI persons. Having likely experienced discrimination their entire lives²⁹ and being "*shaped by the dominant medical, religious and legal discourses of the 1950s and 60s that defined them as sick, immoral or criminal*",³⁰ older LGBTI persons have comparatively fewer employment opportunities, lower percentages of family support, and higher rates of disability, depression, anxiety and loneliness. Research also shows that older LGBTI people are less likely to access services they need, due to fear of discrimination and a return to institutional control and prejudice.³¹

7. State obligations

As a result of a report on elder abuse by the Australian Legal Reform Commission in 2017, a process has commenced between all levels of government to develop and implement a National Plan to prevent the abuse of older Australians.³² This will facilitate much needed research into the elderly community and unify the approach of the States and Territories.

8. Special Considerations

Australia's equality and non-discrimination regime is distributed across five separate pieces of legislation. This has been criticised as failing to recognise inter-sectional nature of discrimination, and potentially deterring complainants who have experienced discrimination on multiple grounds.³³

²⁷ Federation of nine Councils on the Ageing (COTA), *State of the (older) nation*. December 2018, accessed on <<https://www.cota.org.au/wp-content/uploads/2018/12/COTA-State-of-the-Older-Nation-Report-2018-FINAL-Online.pdf>> .

²⁸ Productive Ageing Centre, 'Barriers to Mature Age Labour Force Engagement in Australia: Report on the 2011-12 National Survey on the Barriers to Employment for Mature Age People' (August 2012) accessed at <https://nationalseniors.com.au/uploads/201208_PACReport_Research_BarriersMatureAgeEmployment_Full_1.pdf>.

²⁹ Ibid, p 186.

³⁰ Barrett, C; White, C Leonard, W and Comfort J (2014). No Need to Straighten Up: Discrimination, depression and anxiety in older lesbian, gay, bisexual, transgender and intersex Australians. *Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne Australia*. Accessed at <https://www.latrobe.edu.au/__data/assets/pdf_file/0003/814791/Theres-No-Need-to-Straighten-Up.pdf>.

³¹ Bramer P; Barrett C, Latham JR and Whyte C (2015) , 'Innovation and Translation. It is more than sex and clothes: Culturally safe services for older lesbian, gay, bisexual, transgender and intersex people' *Australian Journal on Ageing, Vol 34 Supplement 2 October 2015, 21-25*. Accessed at <https://www.latrobe.edu.au/__data/assets/pdf_file/0008/814769/Culturally-safe-services-for-older-LGBTI-people.pdf>.

³² Council of Attorney-Generals, 'National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019' accessed at <<https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf>>.

³³ Diversity Council Australia, 'Submission to the International Human Rights and Anti-Discrimination Branch Attorney-General's Department on Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper of September 2011' 1 February 2012. Accessed at <<https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%2020081%20-%20Diversity%20Council%20of%20Australia%20-%202031%20January%202012.PDF>>.

In 2012, an exposure draft of the *Human Rights and Anti-Discrimination Bill (Bill)* was released, which amongst other things, included provisions to:

- combine Australia's anti-discrimination legislation into one consolidated Act;
- prohibit discriminatory conduct against "*a particular attribute, or a particular combination of 2 or more protected attributes*".

Unfortunately, the Bill was not introduced to Parliament, and issues of inter-sectional discrimination remain unaddressed. Shortly thereafter, the UN Committee for the CRPD have recommended that Australia *strengthen anti-discrimination laws to address intersectional discrimination*".³⁴

Private educational institutions should provide a safe and inclusive environment for the education and training of older LGBTI persons. This can be achieved, by, for example, acquiring accreditation with the Rainbow Tick standards.³⁵ The Government could promote such accreditation through conditions attached to funding or other initiatives.

9. Conclusion

It is vital that the output of the Working Group on Aging specifically acknowledges the diversity of older persons and pays particular attention to vulnerable sectors of the aging population. Such vulnerability may arise because of a person's sexual orientation, gender identity, intersex status, Indigeneity, disability or socio-economic status. Thus, the Working Group should avoid a 'one size fits all' approach to addressing the intersectional discrimination that older persons may experience when endeavouring to access social security or education.

³⁴ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session* (21 October 2013) [CRPD/C/AUS/CO/1], para 1.5.

³⁵ See, <https://www.qualityaging.com.au/rainbow-tick-standards/>.