

YESTERDAY ONCE MORE: DISCRIMINATION AND LGBTI+ SENIORS*

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The rights of LGBTI+ people in Australia have been part of significant public debate in recent times, especially with the marriage equality postal vote. However, little attention has been paid to the experiences of older LGBTI+ people, particularly those entering or already in aged care facilities. LGBTI+ seniors are far more vulnerable to interactions with care-givers than their heterosexual and cisgender counterparts. Lack of education and understanding of how the law operates has resulted in many LGBTI+ seniors being unaware of how the legal system can be used to protect themselves against discrimination. Historical discrimination has also made many LGBTI+ seniors unwilling to engage with the legal system. As a result, information on the unique experiences of LGBTI+ seniors remain scarce, and steps to ensure awareness and implementation of laws that protect LGBTI+ seniors against discrimination have been minimal. This article seeks to address such concerns by providing a detailed outline of the legal protections available to LGBTI+ seniors in accommodation, financial and health issues, and suggesting solutions to ensure the greater protection of LGBTI+ seniors against discrimination. This research is especially pertinent due to consideration of LGBTI+ seniors in the Australian Law Reform Commission Inquiry into Elder Abuse. Education, training, and research will be crucial in empowering LGBTI+ seniors to utilise the legal rights available to them.

With the societal evolution of the past few decades, LGBTI+ people² have enjoyed more acceptance and, as a result, more freedom. Many LGBTI+ people who are now entering mid to older age have had the opportunity to reveal, and openly

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 - 2 The term 'LGBTI+' is referred to throughout this paper, and stands for lesbian (women attracted to women), gay (men attracted to men), bisexual (persons attracted to both men and women), transgender (persons who do not identify with their biological sex, or are beyond the boundaries of gender expression), intersex (persons born with a reproductive or sexual anatomy that does not fit the typical definitions of being exclusively one of either female or male), + (any other persons who are queer, questioning, asexual, pansexual, of diverse sexual orientation, of diverse gender identity, and/or of diverse intersex status who may not fall within the 'LGBTI' acronym). It is important to note that sometimes discussions within the article will be more relevant to some of the groups than others. This is simply because of the nature of particular discussions and the availability of research material in relation to each group. For example, there is a dearth of research on the experiences of older transgender and intersex people. Therefore, at various points in the article there will be more emphasis on the experiences of gay, lesbian and, in some cases, bisexual older people. At all times there has been an effort to include, so far as possible, information pertaining to transgender and intersex seniors but in some cases little or no information was available.

live, their sexuality, gender identity, and/or intersex status.³ A troubling issue remains, however, that the discrimination which impacted upon their formative years may again rear its head. As people age, attention turns to matters such as housing security, estate planning, healthcare and, inevitably, end of life issues. For ageing LGBTI+ people, these matters raise unique issues because the laws, policies and procedures that regulate these considerations are focused on the 'general' population and their associated heterogeneous assumptions. Therefore, the circumstances of many LGBTI+ people, for example reliance on families of choice for care and support, do not always sit well within the prevailing legal regime.⁴

To date, there has been little consideration in Australia as to the way issues important to older people, and law relevant to those issues, may impact distinctly on LGBTI+ seniors.⁵ For example, in-home or residential aged care is a fact of life for many older people. Some older LGBTI+ people express concern that carers and/or other residents may be disapproving of their sexuality, gender identity or intersex status, to the extent that some LGBTI+ seniors may choose to 'go back in the closet',⁶ rather than endure a judgemental environment.⁷ For some, there is

- 3 Intersex status is recognised as a biological characteristic and not an identity: Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 2. The Explanatory Memorandum notes that '[p]eople who are intersex may face many of the same issues that are sought to be addressed through the introduction of the ground of gender identity.'
- 4 See generally Alexis Dewaele et al, 'Families of Choice? Exploring the Supportive Networks of Lesbians, Gay Men, and Bisexuals' (2011) 41 *Journal of Applied Social Psychology* 312; Arnold H Grossman, Anthony R D'Augelli and Scott L Hershberger, 'Social Support Networks of Lesbian, Gay, and Bisexual Adults 60 Years of Age and Older' (2000) 55 *Journal of Gerontology Series B: Psychological Sciences* 171.
- 5 In relation to the impact of various property and residential tenancy laws on LGBTI seniors see: Aviva Freilich et al, 'Security of Tenure for the Ageing Population in Western Australia — Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?' (Summary, Council of the Ageing Western Australia, November 2014) ch 14 <<http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>>. See also recent research on the concerns of ageing gay men in several jurisdictions, including Australia: Peter Robinson, 'Ageing Fears and Concerns of Gay Men Aged 60 and Over' (2016) 17 *Quality in Ageing and Older Adults* 6.
- 6 There are many references to this phenomenon: Jane Gross, 'Aging and Gay, and Facing Prejudice in Twilight', *New York Times* (online), 9 October 2007 <<http://www.nytimes.com/2007/10/09/us/09aged.html?scp=1&sq=gay+aging&st=nyt>>; Mia Sheldon, 'LGBT Seniors Afraid They Will Have to Go Back in the Closet', *Global News* (online), 26 November 2014 <<http://globalnews.ca/news/1693270/lgbt-seniors-afraid-they-will-have-to-go-back-in-the-closet/>>; Earl Collom, 'End-of-Life Care for an Aging LGBT Population', *The Advocate* (online), 27 December 2013 <<http://www.advocate.com/health/2013/12/27/end-life-care-aging-lgbt-population>>.
- 7 Australian research echoes these views, see particularly the work of Catherine Barrett: Catherine Barrett, 'My People: A Project Exploring the Experiences of Gay, Lesbian, Bisexual, Transgender and Intersex Seniors in Aged-Care Services' (Report, Matrix Guild Victoria Inc, June 2008) <http://www.matrixguildvic.org.au/docs/MyPeople_Exploring-Experiences-2008.pdf>; Catherine Barrett, Jo Harrison and Jane Kent, 'Permission to Speak: Determining Strategies Towards the Development of Gay, Lesbian, Bisexual, Transgender and Intersex Friendly Aged Care Agencies in Victoria' (Report, Matrix Guild Victoria Inc, April 2009) <http://www.matrixguildvic.org.au/docs/MyPeople_Permission-To-Speak-2009.pdf>.

a fear that they will have to relive discrimination experienced in their formative years in older age.⁸

This article seeks to examine two intersecting issues. The first is the often-lasting impact of discrimination experienced by older LGBTI+ people during their formative years and how experiences throughout their lives may undermine willingness to engage with the legal system and avail themselves of an evolved legal framework. The second is a consideration of matters that typically concern older people and how the associated laws impact on LGBTI+ seniors. In summary, this article raises concerns that despite many LGBTI+ people having lived openly — often for decades — and the introduction of legal safeguards to enhance equality and deter discrimination, many LGBTI+ seniors, and in some cases their families and friends, may be at risk of again being adversely affected by discrimination as they age. Furthermore, a reluctance to engage with the legal system as a result of historical discrimination may see older LGBTI+ people, and/or their partners and friends, vulnerable during critical periods in the ageing process such as the diagnosis of a serious illness, the necessity to enter into aged care, or end of life considerations.

Part I of this article considers the (dearth of) statistical information on older LGBTI+ people in Australia and the unique challenges for, and the lack of homogeneity within, ‘LGBTI+ seniors’. Part II focuses on the sources and nature of discrimination encountered by today’s LGBTI+ seniors and the often deleterious, and sometimes lasting, effect of experiences during their formative years. It also examines other types of discrimination affecting LGBTI+ seniors, particularly the legacy of HIV/AIDS, other minority status, ageism, and the effects of living within a heteronormative society. Part III outlines the legal position of LGBTI+ seniors, and their friends and family, in relation to selected accommodation, financial and health issues. Although there has been a considerable amount of legal intervention to deter discriminatory practices, the limited studies available suggest that there is a lack of knowledge by LGBTI+ seniors of the protections available and/or a general reluctance to utilise them.⁹ Part III also examines how existing laws, policies and resultant procedures — or the failure to properly implement them — may have the effect of reinforcing historical discrimination. Finally, Part IV considers some steps that could be taken to minimise discrimination against LGBTI+ seniors and ensure protection of their legal rights. These solutions have the potential to significantly aid the wellbeing of LGBTI+ seniors in Australia.

8 Barrett, above n 7, 35; Barrett, Harrison and Kent, above n 7, 67. See also Colleen Cartwright, Mark Hughes and Tania Lienert, ‘End-of-Life Care for Gay, Lesbian, Bisexual and Transgender People’ (2012) 14 *Culture, Health & Sexuality* 537.

9 Lienert T, Cartwright C and Beck K, *The Experiences of Gay, Lesbian, Bisexual and Transgender People around End-of-Life Care: Scoping Study Report* (Southern Cross University, Aged Services Learning and Research Centre, 2010).

I LGBTI+ AGEING IN AUSTRALIA

A Statistical Information

Comprehensive statistics in relation to the size and composition of the present LGBTI+ population are difficult to come by. This is particularly the case with LGBTI+ seniors who grew up during a period when they are likely to have experienced considerable prejudice and when homosexuality was likely to have been criminalised, who are therefore reluctant to be forthcoming about their sexuality, gender identity and/or intersex status.¹⁰ What is generally accepted is that LGBTI+ people constitute a significant minority group in Australia, comprising up to 11 per cent of the population.¹¹

Although census information on the LGBTI+ community remains limited there have been some improvements.¹² For example, statistics have been gathered regarding same-sex couples since 1996,¹³ with the 2011 census and 2016 census refining the question to inquire as to whether the relationship is described by the couple as husband/wife or de facto partner.¹⁴ Moreover, the Australian Bureau of Statistics (ABS) is developing a gender statistical standard to assist in the collection of gender information in accordance with the Australian Government Guidelines on the Recognition of Sex and Gender.¹⁵

- 10 Gary L Stein, Nancy L Beckerman and Patricia A Sherman, 'Lesbian and Gay Elders and Long-Term Care: Identifying the Unique Psychosocial Perspectives and Challenges' (2010) 53 *Journal of Gerontological Social Work* 421, 429; Department of Health and Ageing, 'National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI): Ageing and Aged Care Strategy' (Strategy, Australian Government, 2012) <https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/08_2014/national_ageing_and_aged_care_strategy_lgbti_print_version.pdf> ('LGBTI Aged Care Strategy'); Tarynn M Witten, 'The Aging of Sexual and Gender Minority Persons: An Overview' in Tarynn M Whitten and A Evan Eyler (eds), *Gay, Lesbian, Bisexual and Transgender Aging: Challenges in Research, Practice, and Policy* (Johns Hopkins University Press, 2012) 1, 3..
- 11 'LGBTI Aged Care Strategy', above n 10, 4.
- 12 Australian Human Rights Commission, *Face the facts: Lesbian, Gay, Trans and Intersex people* <<https://www.humanrights.gov.au/education/face-facts/face-facts-lesbian-gay-bisexual-trans-and-intersex-people#fnB1>> referring to Department of Health, Australian Government, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012), 4.
- 13 In 2011, 33 714 same sex couples were recorded nationally. This represents 1 per cent of all couples in Australia. See Australian Bureau of Statistics, *4012.0 — Australian Social Trends, July 2013: Same Sex Couples* (4 March 2014) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013>>.
- 14 Australian Bureau of Statistics, *Fact Sheet: Counts of Same-Sex Couples in the 2011 Census* (20 September 2016) <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetssce?opendocument&navpos=450>>. The phrasing of this question was carried into the 2016 Census. The 2016 Census revealed that there were just under 46,800 same-sex couple living together in Australia: Australian Bureau of Statistics *Same sex couples in Australia 2016* <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852016>>; Australian Bureau of Statistics *Same Sex Couples in Australia* (18 January 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852016>>.
- 15 Australian Government *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) <<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>>

While inclusion of same-sex couples has many benefits including broadening of national data sets and therefore consideration in future planning,¹⁶ there is still a gap in statistical information, with no data regarding LGBTI+ single people and those who do not live with a partner. There is also the possibility that some same-sex partners, particularly older people, will be reluctant to disclose information about their partnership status due to concerns about revealing their sexuality, gender identity and/or intersex status and, in some cases, the financial consequences of being in a de-facto relationship for Centrelink purposes.¹⁷

Another concern is that the ABS statistics seem to capture a discrete, affluent section of the population that does not coalesce with anecdotal evidence nor broader studies of same-sex partnerships elsewhere.¹⁸ ABS statistics taken in 2013 and confirmed in the 2016 census¹⁹ concluded that same-sex couples were predominantly well educated, were most likely to work in professional or managerial occupations and thus earn a higher than average income, and tended to reside in urban inner city dwellings.²⁰ While this may be heartening information for the LGBTI+ community, it is what is left unsaid that is troubling. There is little to no reference in such statistics to older people,²¹ those in lower socio-economic circumstances, or those residing in rural and regional areas.²² There is certainly no information about same-sex couples where one or both is experiencing other potential causes of discrimination such as being from a culturally and linguistically diverse ('CALD') or Indigenous background. Crucially, there is no information regarding same-sex couples occupying aged care facilities nor those in more marginal forms of accommodation. There is hardly any data collection at all regarding gender identity and intersex status.²³

Goal 6 of the Commonwealth Department of Health and Ageing's National LGBTI Ageing and Aged Care Strategy ('LGBTI Aged Care Strategy') includes: engagement 'with the Australian Bureau of Statistics to include LGBTI indicators in the Australian Census and the Survey of Disability, Ageing and Carers';

16 Anne Mitchell, 'Same-Sex Couples Counted in the Census ... But Some Stay Hidden', *The Conversation* (online), 22 June 2012 <<https://theconversation.com/same-sex-couples-counted-in-the-census-but-some-stay-hidden-7851>>.

17 Ibid.

18 See, eg, studies undertaken by Karen L Fredriksen-Goldsen: Karen L Fredriksen-Goldsen et al, 'The Physical and Mental Health of Lesbian, Gay Male and Bisexual (LGB) Older Adults: The Role of Key Health Indicators and Risk and Protective Factors' (2013) 53 *Gerontologist* 664, 668.

19 Australian Bureau of Statistics, *Same Sex Couples in Australia* (18 January 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852016>>

20 Australian Bureau of Statistics, *Australian Social Trends*, above n 13.

21 Unlike in the United States: see Soon Kyu Choi and Ilan H Meyer, 'LGBT Aging: A Review of Research Findings, Needs, and Policy Implications' (Report, The Williams Institute, August 2016) <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf>>.

22 The experience of older LGBTI people in rural areas has been examined elsewhere: see generally Michael Lee and Jean Quam, 'Comparing Supports for LGBT Aging in Rural versus Urban Areas' (2013) 56 *Journal of Gerontological Social Work* 112.

23 The Sex Standard utilised by ABS has been the subject of review: Australian Bureau of Statistics, *Review of the Sex Standard / Potential New Gender Standard* (16 January 2014) <<http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Review+of+the+Sex+Standard>>.

inclusion of LGBTI indicators within aged care data sets; and the inclusion of LGBTI-related data in research by the Australian Institute of Health and Welfare.²⁴

The consequences of the lack of demographic information in relation to LGBTI+ seniors are obvious. First, in planning for the ageing population, it is essential that policy makers are aware of the composition and geographical distribution of the cohort. Second, such information could assist in better-targeted implementation of health, accommodation and other necessary services. For example, accurate demographic information about LGBTI+ seniors in rural and regional areas would ensure that sufficient numbers of aged care and health workers receive appropriate awareness training. Third, planning for new housing developments could be informed, such that social housing providers could consider the needs of LGBTI+ clients in placement and services.²⁵ Developers may be persuaded to construct more LGBTI-friendly retirement villages if accurate data identified a body of potential residents.

B Lack of Homogeneity

The limitation of the census to only collect data on same-sex couples in the LGBTI+ community brings those *not* included into stark relief. While it may be easy to use the acronym LGBTI+, it is essential to acknowledge that, as with seniors generally, older LGBTI+ people are not a homogenous group. Sexuality, gender identity and intersex status are just some, albeit important, aspects of a diverse population made up of individuals shaped by unique experiences and characteristics.

1 Who Makes up the ‘Older’ LGBTI+ Cohort?

Professor Knauer notes that although older LGBTI+ people are ‘united in a single generation because they all share the common experience of coming of age when the notion that one should be open and proud about her or his sexual orientation was unthinkable’, there are significant differences within the various generations that have entered, or are entering, older age.²⁶ A person described as ‘older’ may be anything ranging from 60 (born in 1958) to over 100 (born in 1918 or before).

Those born in the period from World War I to the end of World War II bore the brunt of society’s lack of acceptance and, as discussed above, were reluctant and fearful of disclosure. This group also, no doubt, experienced confusion and a

24 LGBTI Aged Care Strategy, above n 10:

This Strategy aims to ensure that LGBTI people have the same opportunities and options in aged care that are available to all Australians. It is designed to not only raise awareness of the issues but also, in a very concrete way, improve the ageing and aged care experience of LGBTI people, recognising and valuing the diversity of this group.

25 As is the case in the United Kingdom through the Stonewall Housing Association: see generally Paul D S Ross, ‘Learning from International Experiences — Developing Older LGBT Affirmative Housing and Care Options in England’ (2016) 17 *Quality in Ageing and Older Adults* 60.

26 Nancy J Knauer, ‘LGBT Elder Law: Toward Equity in Aging’ (2009) 32 *Harvard Journal of Law and Gender* 1, 17.

lack of understanding of their circumstances, fear of being cut off from families, or the threat of allegations of criminality or a mental disorder. For many, lives were led in the shadows with ‘passing as heterosexual’ being a ‘lifelong survival strategy’.²⁷

Those born in the post-World War II, baby-boomer era reached their teens and early twenties in an environment of greater awareness and, in limited quarters, some degree of acceptance.²⁸ Of course, there was still a considerable amount of discrimination associated with sexuality and gender identity that was not regarded as the ‘norm’ and the comments above in relation to the pre-war cohort are equally applicable. Societal changes emanating in the 1960s, and developments elsewhere such as the Stonewall Riots in the United States, gave cause for optimism but change was slow to reach Australia in a meaningful way. Indeed, the now famous Sydney Mardi Gras commenced in a hostile environment in 1978,²⁹ the HIV/AIDS hysteria of the 1980s saw old prejudices re-emerge,³⁰ and meeting places for the LGBTI+ community were the subject of police surveillance and ‘over-policing’.³¹ Some in this cohort may have ‘come out’ early, and risked the worst of society’s discrimination, while others may have come out much later. Many married a partner of a different sex and had families due to societal expectation, only to reveal their sexuality or gender identity at a later time.

What is important is the acknowledgement that each group will likely share a history of discrimination but the nature of that discrimination may differ across generations.³² In older people, such experiences are likely to cause distrust of the legal system and other institutions and the desire not to ‘stand out’ or draw attention to one’s self.³³ It must be acknowledged that as a group, LGBTI+ seniors are likely to have experienced discrimination throughout their lives and that services, including legal services, provided as these seniors age need to be

27 Ibid 16; Nancy J Knauer, ‘“Gen Silent”: Advocating for LGBT Elders’ (2012) 19 *Elder Law Review* 289, 290, each quoting Funders for Lesbian and Gay Issues, *Ageing in Equity: LGBT Elders in America* (2004) 5 <<http://www.workinggroup.org/files/AgingInEquity.pdf>>.

28 Knauer, ‘Gen Silent’, above n 27, 290–3.

29 See generally Eloise Flanagan, ‘Change and Continuity: The Sydney Gay and Lesbian Mardi Gras Through Tradition and Postmodernism’ (2012) 4(1) *Ideas in History* <<http://eprint.lib.uts.edu.au/studentjournals/index.php/iih/article/view/1362>>; Gavin Harris, John Witte and Ken Davis, *New Day Dawning: The Early Years of Sydney’s Gay and Lesbian Mardi Gras* (Pride History Group, 2008).

30 Peter J Smit et al, ‘HIV-Related Stigma within Communities of Gay Men: A Literature Review’ (2012) 24 *Aids Care* 405; Lienert, Cartwright and Beck, above n 9.

31 For example, in 1994 the Tasty nightclub in Melbourne was raided and LGBT clientele were stripped, searched and beaten. The Victorian Police issued an apology 20 years later. See Tony Nicholls, ‘Victoria Police Apologise for 1994 Raid on Tasty Nightclub to “Make up for Sins of the Past”’, *ABC News* (online), 5 August 2014 <<http://www.abc.net.au/news/2014-08-05/victoria-police-apologise-for-1994-tasty-nightclub-raid/5649498>>; see generally Angela Dwyer and Matt Ball, ‘Policing Sexualities’ in Roderic Broadhurst and Sara E Davies (eds), *Policing in Context: An Introduction to Police Work in Australia* (Oxford University Press, 2009) 89.

32 See generally Knauer, ‘Gen Silent’, above n 27.

33 Ibid; Jill Stark, ‘Study in Older LGBTI Australians Finds Fear, Discrimination and Pain’, *The Sydney Morning Herald* (online), 1 March 2015 <<http://www.smh.com.au/national/study-in-older-lgbti-australians-finds-fear-discrimination-and-pain-20150228-13pur5.html>>.

moulded to exhibit a lack of bias, and display understanding and care.³⁴ Another major barrier is a lack of research in this area. Too often older LGBTI+ people are ‘overlooked ... in legislation, policy, research, guidance and practice’ with the assumption that all stakeholders are heterosexual, cisgender, and of a defined sex.³⁵

II GREY AND GAY: DISCRIMINATION REVISITED

A *One Step Forward, but Sometimes Standing Still*

At the outset, it should be emphasised that there is much ‘good news’ in relation to LGBTI+ ageing. Many LGBTI+ seniors are ageing well and do not feel the need or pressure to disguise their sexuality, gender identity or intersex status. Indeed, Friend notes that, ‘by challenging heterosexism and by minimizing homophobia, older lesbian and gay people experience a successful aging process.’³⁶ Despite adversity, much of the cohort display ‘remarkable resilience’,³⁷ and have built communities, formed family groups and seamlessly interact with the broader society.³⁸ Several high profile organisations, for example GLBTI Rights in Ageing (‘GRAI’) in Western Australia, have been formed to provide support, advice and advocacy by and on behalf of older LGBTI+ people. While the health and social work disciplines have been attuned to the circumstances of LGBTI+ seniors for some time, the law is only starting to acknowledge some of the issues facing older LGBTI+ people. For example, the *Living Longer, Living Better* reforms recognised older LGBTI+ people as a special needs group due to their history of inequitable treatment.³⁹ The six Goals of the LGBTI Aged Care Strategy provide for greater awareness, consultation and implementation of LGBTI+ issues and

34 Knauer, ‘Gen Silent’, above n 27.

35 Richard Ward, Stephen Pugh and Elizabeth Price, ‘Don’t Look Back? Improving Health and Social Care Service Delivery for Older LGB Users’ (Report, Equality and Human Rights Commission, 30 November 2010) 5 <<https://www.equalityhumanrights.com/sites/default/files/research-paper-dont-look-back-improving-health-and-social-care-service-delivery-for-older-lgb-users.pdf>>.

36 Richard A Friend, ‘Older Lesbian and Gay People: Responding to Homophobia’ (1989) 14(3–4) *Marriage and Family Review* 241, 241.

37 Karen L Fredriksen-Goldsen et al, ‘Creating a Vision for the Future: Key Competencies and Strategies for Culturally Competent Practice with Lesbian, Gay, Bisexual and Transgender (LGBT) Older Adults in the Health and Human Services’ (2014) 57 *Journal of Gerontological Social Work* 80, 81.

38 Ibid.

39 Australian Government, *Living Longer Living Better: Aged Care in Australia is Changing* (2012) Department of Social Security, Canberra. This initiative was discontinued after the election of the Coalition government in 2013.

programs throughout the aged care sector.⁴⁰ Recent amendments to the *Sex Discrimination Act 1984* (Cth) have seen protection under that Act extended to LGBTI+ people, including in relation to aged care.⁴¹

However, although times have changed, many LGBTI+ seniors do not have an easy path. Older LGBTI+ people experienced a very different environment to that experienced by younger LGBTI+ people today. Although discrimination and stigma still persist and there is little doubt that problems remain, LGBTI+ people now experience — compared to that of their predecessors — unprecedented levels of social protection and legal acceptance in Australia.⁴² Despite this it is difficult, and sometimes impossible, for older people to detach themselves from the norms and the resultant experiences of their formative years. For many years society was hostile to ‘unconventional’ expressions of sexuality, gender identity and intersex status, which were the subject of suspicion, innuendo and fear. In such circumstances, revealing one’s sexuality, gender identity or intersex status could see a person subjected to medical intervention, criminal conviction and/or imprisonment, or result in them losing employment or being rejected by family and friends.⁴³ Although research is limited, studies consistently reveal that, as young people, this older cohort overwhelmingly experienced isolation, confusion and a lack of belonging. For many there was a fear of adopting or even acknowledging their sexuality, gender identity or intersex status, thus leading them to live a heterosexual life to avoid detection in many cases.⁴⁴ Those who did ‘come out’ often experienced a considerable amount of heartache and discrimination. In many cases the discrimination associated with being LGBTI+ made a deep and lasting impression on the rest of their lives. Indeed, it has been

40 ‘LGBTI Aged Care Strategy’, above n 10, 12–17. Strategic Goals and Actions:

- GOAL 1 — ‘LGBTI people will experience equitable access to appropriate ageing and aged care services’;
- GOAL 2 — ‘The aged care and LGBTI sectors will be supported and resourced to proactively address the needs of older LGBTI people’;
- GOAL 3 — ‘Ageing and aged care services will be supported to deliver LGBTI-inclusive services’;
- GOAL 4 — ‘LGBTI-inclusive ageing and aged care services will be delivered by a skilled and competent paid and volunteer workforce’;
- GOAL 5 — ‘LGBTI communities, including older LGBTI people, will be actively engaged in the planning, delivery and evaluation of ageing and aged care policies, programs and services’; and
- GOAL 6 — ‘LGBTI people, their families and carers will be a priority for ageing and aged care research’.

41 This is discussed later in this article.

42 Although the developments have not, of course, reached the point of equality in all sectors: see Barrett, Harrison and Kent, above n 7. In relation to the situation in the United States, see Knauer, ‘Gen Silent’, above n 27; Nancy A Orel, ‘Investigating the Needs and Concerns of Lesbian, Gay, Bisexual and Transgender Older Adults: The Use of Qualitative and Quantitative Methodology’ (2014) 61 *Journal of Homosexuality* 53.

43 Barrett, above n 7, 13.

44 Indeed, Barrett et al note the divide between those who ‘came out’ in to an era of discrimination and often difficult consequences or adopting a heterosexual life to avoid detection: Catherine Barrett et al, ‘No Need to Straighten Up: Discrimination, Depression, Anxiety and Older Lesbian, Gay, Bisexual, Transgender and Intersex Australians’ (Report, La Trobe University, July 2014) 13 <<https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0263-no-need-to-straighten-up---full-report---pdf.pdf?sfvrsn=2>>.

recently noted that ‘this history is not incidental but part of the weight that defines their [LGBTI+ seniors’] sense of personal and collective identity’.⁴⁵

In recent research from the United States (‘US’), such older adults were identified as an ‘at risk’ population due to the considerable ageing and health disparities they experience.⁴⁶ A United Kingdom (‘UK’) study by Keogh, Reid and Weatherburn found that LGBTI+ seniors are two and a half times more likely to live alone, twice as likely to be single and four and a half times as likely to not have children than those in the broader community.⁴⁷ A US study found similar results, with around 75 per cent of LGBTI+ people living alone,⁴⁸ whilst also being less likely to have children than their heterosexual counterparts.⁴⁹ This often leads to greater loneliness and fewer familial support structures.⁵⁰

LGBTI+ seniors experience additional ‘stressors’ to those felt by other elders.⁵¹ These mainly stem from discrimination, fear of disclosure of sexuality, gender identity or intersex status to health care providers, lack of recognition of partnerships and isolation from other older LGBTI+ people.⁵² Moreover, despite advances in health and longevity, it is likely that even the most robust individuals are ‘slowing down’ and may require more medical care and assistance from healthcare providers. There is also a greater likelihood of the onset of conditions associated with age, such as dementia, and there is likely to be concern regarding legal and medical issues.⁵³ For example, if there is a family of choice and/or a person is in a partnership, there may be concerns about the legal standing of their partner, the allocation of property, healthcare directives and the role of the biological family if they disapprove of the relationship. As discussed in Part III of this article, there is still a considerable void in the understanding of older people themselves and healthcare professionals and staff as to who the appropriate person is to make decisions in the event of illness. Older LGBTI+ people may be reluctant to pursue appropriate legal avenues to ensure that their wishes are carried out. This can leave the older person, their partner and other close friends in a precarious situation in regards to legal, financial and healthcare rights and

45 Ibid.

46 Fredriksen-Goldsen et al, above n 18, 668.

47 Peter Keogh, David Reid and Peter Weatherburn, ‘Lambeth LGBT Matters: The Needs and Experiences of Lesbians, Gay men, Bisexual and Trans Men and Women in Lambeth (Original Research Report, Sigma Research, October 2006) 6 <<http://www.sigmaresearch.org.uk/files/report2006c.pdf>>.

48 Marcy Adelman et al, ‘Openhouse: Community Building and Research in the LGBT Aging Population’ in Douglas Kimmel, Tara Rose and Steven David (eds), *Lesbian, Gay, Bisexual, and Transgender Aging: Research and Clinical Perspectives* (Columbia University Press, 2006) 247.

49 Brian de Vries, ‘Aspects of Death, Grief and Loss in Lesbian, Gay, Bisexual, and Transgender Communities’ in Kenneth J Doka and Amy S Tucci (eds), *Living with Grief: Diversity and End-of-Life Care* (Hospice Foundation of America, 2009) 243, 247–8.

50 Ibid. Yet, once more, it is pivotal to recognise that these are generalisations and not applicable to all members of the LGBTI+ community.

51 See Ilan H Meyer, ‘Prejudice and Discrimination as Social Stressors’ in Ilan H Meyer and Mary E Northridge (eds), *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual and Transgender Populations* (Springer, 2007) 242.

52 Ibid.

53 See the discussion above in relation to dementia.

procedures in the event of illness or death. In some cases, in the event of an emergency, long estranged families have been contacted by medical staff and the input of a long-term partner ignored.⁵⁴

This group is also particularly vulnerable because they are at an age when they may need care either in the home or in a residential environment. This results in additional problems for LGBTI+ people. For example, in relation to care in the home, older LGBTI+ people are often concerned that they cannot live openly and must ‘degay’ their homes for the visits by care staff.⁵⁵ In other cases they may experience discrimination from care workers who do not approve of, or are fearful of, their LGBTI+ status.⁵⁶ As discussed below, anti-discrimination laws may protect LGBTI+ people from such discrimination, however an older person who is in need of care — and who has grown up in an environment where discrimination in relation to sexual orientation, gender identity or intersex status was the norm — is unlikely to want to lodge a formal complaint. Furthermore, in relation to residential aged care facilities, there are concerns as to whether partners can share time together, whether they can be upfront about their relationship, and whether their sexuality will be revealed due to visits by friends. Although the *Aged Care Act 1997* (Cth) and federal, state, and territory anti-discrimination legislation provide some safeguards such as a complaints process and, in the federal arena, funding consequences for aged care providers who discriminate against LGBTI+ residents, the effectiveness of these measures is unclear.

B Living with Heteronormativity and Homophobia

Many studies and reports refer to ‘heteronormativity’ in places where older people congregate, for example retirement villages, aged care facilities, and seniors social groups.⁵⁷ These situations ignore the diversity of sexual orientation, gender identity and intersex status, with heterosexual, cisgender and defined sex individuals regarded as the norm.⁵⁸ Furthermore, it has been noted that the design and delivery of aged care services are based on an assumption of heterosexual and

54 Lienert, Cartwright and Beck, above n 9, 4–5.

55 Barrett et al, ‘No Need to Straighten Up’, above n 44, 27.

56 Ibid 28.

57 Heteronormativity has been defined ‘as an ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community’: Gregory M Herek, ‘The Social Context of Hate Crimes: Notes on Cultural Heterosexism’ in Gregory M Herek and Kevin T Berrill (eds), *Hate Crimes: Confronting Violence against Lesbians and Gay Men* (SAGE Publications, 1992) 89, 89, quoted in Sean Cahill and Ken South, ‘Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender People in Retirement’ (2002) 26(2) *Generations* 49, 49. Such ‘heteronormativity’ also often includes expectations that individuals will be cisgender and of defined, unitary sex.

58 Carolyn Tolley and Rob Ranzijn, ‘Predictors of Heteronormativity in Residential Aged Care Facilities’ (2006) 25 *Australasian Journal on Ageing* 209, 209; Gregory M Herek, ‘Beyond “Homophobia”: Thinking about Sexual Prejudice and Stigma in the Twenty-First Century’ (2004) 1(2) *Sexuality Research & Social Policy* 6.

gender conforming clients.⁵⁹ This may increase marginalisation and invisibility of LGBTI+ people.⁶⁰

Evidence of heteronormativity can be seen in marketing material such as brochures and posters that convey images of exclusively heterosexual couples.⁶¹ Irwin identifies similar issues with admission forms that assume heterosexual relationships and may cause problems with next of kin and consent.⁶² There have been significant improvements in this area due to the LGBTI Aged Care Strategy and innovation in some states, particularly in South Australia.⁶³ It seems, however, that there is a long way to go.

Concerns about discrimination associated with one's sexuality, gender identity or intersex status arising from such heteronormativity may exacerbate the anxiety and fear of LGBTI+ people entering these facilities or engaging in the broader community. The consequences for LGBTI+ people encountering discrimination may be especially intense, due to the dependence on workers for care or concerns about rejection.⁶⁴ Indeed, LGBTI+ residents may feel more vulnerable to maltreatment and ostracism from both other residents and workers.⁶⁵ Due to this fear, many older LGBTI+ people may choose not to disclose their identity.⁶⁶ A *New York Times* article reported that a common response to entering aged care was to retreat into 'the closet', a defence mechanism learnt from a lifetime of discrimination.⁶⁷ As a gay man who was interviewed for the article stated: 'As strong as I am today ... when I'm at the gate of the nursing home, the closet door is going to slam shut behind me.'⁶⁸ A similar phenomenon, where transgender elderly persons revert to their assigned gender at birth, has also been observed.⁶⁹

59 LGBTI Aged Care Strategy, above n 10, 4.

60 Joy Phillips and Genée Marks, 'Coming Out, Coming In: How Do Dominant Discourses around Aged Care Facilities Take into Account the Identities and Needs of Ageing Lesbians?' (2006) 2 *Gay and Lesbian Issues and Psychology Review* 67, 73; Lyn Irwin, 'Homophobia and Heterosexism: Implications for Nursing and Nursing Practice' (2007) 25(1) *Australian Journal of Advanced Nursing* 70, 73; Michael D Shankle et al, 'An Invisible Population: Older Lesbian, Gay, Bisexual, and Transgender Individuals' (2003) 20 *Clinical Research and Regulatory Affairs* 159.

61 Irwin, above n 60, 73; Tolley and Ranzijn, above n 58, 210.

62 Irwin, above n 60, 73.

63 See, eg, Policy and Community Development Division, Department for Community and Social Inclusion (SA), *South Australian Strategy for the Inclusion of Lesbian, Gay, Transgender, Intersex and Queer People 2014–2016* (2014) <<http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>>.

64 Barrett, Harrison and Kent, above n 7, 25.

65 Stein, Beckerman and Sherman, above n 10, 430.

66 Ibid.

67 Gross, above n 6.

68 Ibid.

69 Ryan Schuessler, 'For Aging Transgender Population, Retirement Can Be Bittersweet Refuge', *Al Jazeera America* (online), 20 February 2014 <<http://america.aljazeera.com/articles/2014/2/20/for-aging-transgenderpopulationretirementcanbebittersweetrefuge.html>>.

C Internalised Homophobia

Like those experiencing various forms of prejudice, LGBTI+ people may internalise prejudices encountered when growing up in a heteronormative environment.⁷⁰ The defensive reactions of stigmatised individuals⁷¹ can lead to internalised homophobia.⁷² Internalised homophobia has been found to be problematic as those affected may neglect their emotional and physical health, engage in risky behaviour, or be reluctant to embrace an LGBTI+ identity.⁷³

D Intersectionality

What is often forgotten in discussions regarding various forms of discrimination is that many LGBTI+ individuals experience two or more characteristics that may result in discrimination: for example ageism, racism or HIV/AIDS prejudice. Indeed, commentators such as Knauer argue that older LGBTI+ people have not been well served by the ‘existing ethnic model’ of LGBTI+ identity that, she argues, normalises ‘homosexuality and gender variance’.⁷⁴ As heteronormative aspects are emphasised, this neglects issues such as internalised homophobia and ageism, and the further combined impact of race, class, disability, or age.⁷⁵

1 LGBTI+ Seniors and Ageism

In a youth-oriented society, those in middle or older age can be made to feel redundant, with issues regarding age discrimination commonplace, particularly at work.⁷⁶ Similarly, as older people negotiate the legal and healthcare systems, they may encounter condescending attitudes from both professionals and staff towards the individual and older friends or family attending with them.⁷⁷

Much has been written about the ‘invisibility’ of ageing.⁷⁸ This can obviously affect older LGBTI+ people, but often manifests within the LGBTI+ community itself. Research in the US suggests that there is a considerable amount of ageism within

70 Iain R Williamson, ‘Internalized Homophobia and Health Issues Affecting Lesbians and Gay Men’ (2000) 15 *Health Education Research* 97, 98.

71 Gordon W Allport, *The Nature of Prejudice* (Addison-Wesley, 1954), ch 9.

72 James Lock, ‘Treatment of Homophobia in a Gay Male Adolescent’ (1998) 52 *American Journal of Psychotherapy* 202, 202.

73 Williamson, above n 70, 98–102.

74 Knauer, ‘LGBT Elder Law’, above n 26, 4–5.

75 Ibid 5; see also Nancy J Knauer, ‘Science, Identity, and the Construction of the Gay Political Narrative’ (2003) 12 *Law & Sexuality* 1, 64.

76 Australian Human Right Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, Issues Paper: Employment Discrimination against Older Australians (2015).

77 This was a common complaint from respondents in the Western Australian Security of Tenure research: Freilich et al, above n 5.

78 See, eg, Emilio Mordini and Paul de Hert (eds), *Ageing and Invisibility* (IOS Press, 2010). Chapter 8, on the ethics of ageing, is particularly informative.

the LGBTI+ community.⁷⁹ Such attitudes can result in a lack of understanding of the issues facing different generations of people, particularly the experiences of older people and the discrimination associated with their formative years. This invisibility can compound rejection by a cohort from whom LGBTI+ seniors may have expected support. Some studies also reveal a lack of interaction between generations of LGBTI+ people, resulting in less intergenerational support within the community.⁸⁰

2 Racism

Older LGBTI+ people from Indigenous or CALD backgrounds may also experience homophobia, transphobia and prejudice towards intersex status to a greater degree. Unfortunately, attitudes towards LGBTI+ people within a person's racial or ethnic group may see a person within that group rejected because of their sexuality, gender identity or intersex status.⁸¹ In the US, black, Latino, Native American, and Asian LGBTI+ people are more likely to be disadvantaged than white LGBTI+ people, with transgender people particularly disadvantaged.⁸² Within their racial or ethnic group, LGBTI+ people are more likely to deliberately conceal their LGBTI+ status, and are more likely to become alienated from their community and broader society.⁸³ Black Rainbow, a support network created to assist LGBTI+ Indigenous people in Australia, does not as yet seem to refer to older people.⁸⁴ Another complication is that, due to lower life expectancy, Indigenous people are regarded as being of older age at an earlier stage than other Australians.⁸⁵

- 79 Glenda M Russell and Janis S Bohan, 'The Gay Generation Gap: Communicating across the LGBT Generational Divide (2005) 8(1) *Policy Journal of the Institute for Gay and Lesbian Strategic Studies* 1, 2.
- 80 Research undertaken at Southern Cross University suggests that this is the case in Australia too: Lienert, Cartwright and Beck, above n 9, 40.
- 81 Steven Lindsay Ross, 'Homosexuality and Aboriginal Culture: A Lore unto Themselves', *Archer* (online), 20 October 2014 <<http://archermagazine.com.au/2014/10/homosexuality-and-aboriginal-culture-a-lore-unto-themselves/>>.
- 82 Marisa Taylor, 'Report: LGBT People of Color at High Risk of Poverty', *Al Jazeera America* (online), 23 April 2015 <<http://america.aljazeera.com/articles/2015/4/23/lgbt-people-of-color-more-likely-to-face-poverty.html>>.
- 83 Allison Aldridge and Robert Espinoza, *Health Equity and LGBT Elders of Color: Recommendations for Policy and Practice* (2013) Services and Advocacy for GLBT Elders <https://www.lgbtagingcenter.org/resources/pdfs/Sage_PolicyBrief_HealthEquity.pdf>.
- 84 Black Rainbow, Home (2017) <<http://www.blackrainbow.org.au/>>; Melissa Davey, 'LGBTI Indigenous People Offered a Rainbow to Follow', *The Guardian* (online), 18 February 2015 <<https://www.theguardian.com/australia-news/2015/feb/18/lgbti-indigenous-people-offered-a-rainbow-to-follow>>.
- 85 Graeme Maguire and Mark Wenitong, 'Indigenous Ageing: Walking Backwards into the Future' *The Conversation* (online), 7 June 2012 <<https://theconversation.com/indigenous-ageing-walking-backwards-into-the-future-7355>>; Australian Institute of Health and Welfare, *Older Australia at a Glance* (21 April 2017) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diversity/aboriginal-and-torres-strait-islander-people>>.

In CALD communities in Australia, again there is a dearth of information regarding LGBTI+ older people.⁸⁶ Depending on the country of birth, LGBTI+ people may experience discrimination or in some cases danger due to religious and societal beliefs.⁸⁷

3 HIV/AIDS

The HIV/AIDS epidemic saw renewed discrimination associated with the gay community. Indeed, AIDS remains a significant issue to LGBTI+ persons whether a particular person is HIV-positive or not. For example, older gay men report that aged care workers often assume an older gay man has AIDS.⁸⁸ Furthermore many, if not most, HIV-positive people are older than 50 years of age,⁸⁹ and aged care services may increasingly be unable to adequately deliver care requirements to them. Barrett et al note that many aged-care services fail to understand the needs of older HIV-positive individuals, and thereby discriminate against them through fear of HIV.⁹⁰ Studies establish that in-home carers may refuse to return and assist gay men or that others refuse to touch them or double glove if they do.⁹¹ This could lead to people being reluctant to access aged care or concealing their sexual identity when accessing services.

4 Dementia

Dementia causes anguish and confusion to those experiencing the disease and for those caring for them. The difficulties facing dementia sufferers and their carers can be made worse by negative perceptions of an older person's sexuality, gender identity or intersex status in in-home or residential care.⁹² There are particular

- 86 D Visala Rao, Jeni Warburton and Helen Bartlett, 'Health and Social Needs of Older Australians from Culturally and Linguistically Diverse Backgrounds: Issues and Implications' (2006) 25 *Australasian Journal on Ageing* 174.
- 87 Harriet Radermacher, Susan Feldman and Colette Browning, 'Review of Literature Concerning the Delivery of Community Aged Care Services to Ethnic Groups: Mainstream versus Ethno-Specific Services: It's Not an "Either Or"' (Review, Monash University and Ethnic Communities' Council of Victoria, 2008) <<http://library.bsl.org.au/jspui/bitstream/1/4156/1/Review%20Of%20Literature%20Concerning%20The%20Delivery%20Of%20Community%20Aged%20Care%20Services%20To%20Ethnic%20Groups.pdf>>.
- 88 Catherine Barrett et al, 'Ready or Not: Addressing Stigma and Promoting Wellbeing of People Living with HIV in Aged-Care' (2010) 8(3) *HIV Australia* 35, 35–6.
- 89 Rita Effros et al, 'Workshop on HIV Infection and Ageing: What is Known and Future Research Directions' (2008) 47 *Clinical Infectious Diseases* 542, 542. The article estimated that by 2016, half of HIV-positive individuals in the United States would be 50 years or older. Furthermore, Lyons et al note that, '[t]he strongest predictor of subjective well-being was men's reported history of discrimination from medical service providers around their HIV status, therefore highlighting perceived stigma as a crucial element in overall well-being': see Anthony Lyons et al, 'Ageing with HIV: Health and Psychosocial Well-Being of Older Gay Men' (2010) 22 *AIDS Care* 1236, 1242.
- 90 Barrett et al, 'Ready or Not', above n 88, 35.
- 91 Barrett, Harrison and Kent, above n 7, 45; Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003) 131.
- 92 Des Kelly, 'LGBT Older People with Dementia Should Not be Forced Back into the Closet', *The Guardian* (online), 10 March 2015 <<http://www.theguardian.com/social-care-network/2015/mar/10/lgbt-older-people-dementia-social-care>>.

issues of concern with dementia in older LGBTI+ people.⁹³ It has been noted by Alzheimer's Australia that stigma, whether current or historic, can affect how someone perceives and experiences support.⁹⁴ Some older people lose their inhibitions due to dementia: for example, they may display their attraction to another person and be separated or threatened with telling relatives.⁹⁵ In other cases, older LGBTI+ people who have previously come out feel unable to continue to be open about their sexuality, gender identity or intersex status.⁹⁶

Therefore, it is clear that LGBTI+ seniors face serious, long-term and lasting effects of current and historical discrimination owing to their sexual orientation, gender identity and/or intersex status, in addition to facing ageism, racism and discrimination associated with HIV/AIDS and other minority status. The effects of this discrimination appear to be particularly debilitating as LGBTI+ people age, in contrast to a society that is slowly becoming more accepting of those of diverse sexual orientation, gender identity and intersex status. Notwithstanding the importance of being aware of these sociological factors, the legal position of LGBTI+ seniors in being able to prevent or mitigate such discrimination is crucial.

III OVERCOMING HISTORICAL DISCRIMINATION TO ADDRESS LEGAL ISSUES IN OLDER AGE

Older LGBTI+ people have lived through periods of time when they had very few legal rights or protections. The Australian legal system has, though, evolved significantly in relation to rights and recognition for LGBTI+ people. Same-sex partners now share many of the same rights and benefits enjoyed by heterosexual couples, including the recently-conferred right to marry, and more generally LGBTI+ people enjoy the benefit of state/territory and federal anti-discrimination laws.⁹⁷

93 Alzheimer's Australia, *LGBTI People and Dementia: The Important Issues* (2014) <<https://sa.fightdementia.org.au/sites/default/files/SA/documents/LGBTI%20People%20and%20Dementia%20Booklet%20-%202020150112.pdf>>.

94 Dementia Australia, 'LGBTI Communities, Ageing and Dementia' on Dementia Australia Victorian Library, *Dementia Resources* (12 June 2014) <<http://dementiareources.org.au/2014/06/12/lgbti-communities-ageing-and-dementia/>>.

95 Alzheimer's Australia, *LGBTI People and Dementia*, above n 93, 6: 'Of course, some LGBTI people will not have this choice because of how they present, because of their legal documentation, because of their medical records and treatment regimes, or even because dementia has already affected their capacity to conceal their gender identity, sexual orientation or intersex status.' Alzheimer's Australia, *Caring for LGBTI People with Dementia: A Guide for Health and Aged Care Professionals* (2014), 6 <<https://sa.fightdementia.org.au/sites/default/files/SA/documents/LGBTI%20Caring%20Booklet%20-%202020150112.pdf>>; The National LGB&T Partnership, *The Dementia Challenge for LGBT Communities: A Paper Based on a Roundtable Discussion* (2 December 2014) National Care Forum, 5 <<http://www.nationalcareforum.org.uk/documentLibraryDownload.asp?documentID=1141>>.

96 Alzheimer's Australia, *Caring for LGBTI People with Dementia*, above n 95, 4.

97 *Discrimination Act 1991* (ACT) s 2; *Equal Opportunity Act 2010* (Vic) s 4; *Equal Opportunity Act 1984* (WA) s 4; *Equal Opportunity Act 1984* (SA) s 5; *Anti-Discrimination Act 1991* (Qld) s 4; *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1977* (NSW) s 49ZF; *Anti-Discrimination Act 1992* (NT) s 4; *Sex Discrimination Act 1984* (Cth) s 4.

Unfortunately, however, there has been little discussion in Australia about the specific legal needs of, or the ways that laws may impact on, LGBTI+ seniors.⁹⁸ This is an important omission because generic laws or even laws applying to older people, which on their face may appear neutral, may impact differently upon particular groups of older people.⁹⁹

A The Legal Rights of Older LGBTI+ People

The ageing population has caught the attention of federal and state/territory governments, and the general issue of how to cope with the increasing number of older people, particularly in relation to accommodation (including aged care), healthcare, workforce participation and social cohesiveness has been the topic of considerable discussion. The legal ramifications of the older demographic were considered in the federal House of Representatives' 2007 Inquiry into Older People and the Law. The report examined a range of legal issues particularly relevant to older people including elder financial abuse, substitute decision making, age discrimination and barriers to accessing legal services.¹⁰⁰ The recommendations were, however, applicable to older people generally, and did not delve into the distinct legal needs of particular groups of seniors. In 2012, the federal Department of Health and Ageing noted that:

People of diverse sexual orientation, sex or gender identity are a group requiring particular attention due to their experience of discrimination and the limited recognition of their needs and preferences by service providers as well as in policy frameworks and accreditation processes.¹⁰¹

The unique circumstances of older LGBTI+ people were noted in the federal government's Living Longer Living Better reforms to aged care, where LGBTI+ seniors were recognised as a special needs group due to their history of inequitable treatment and discrimination.¹⁰² In response to the recognition that one of the more contentious areas for older LGBTI+ people was in relation to aged care, in 2012 the LGBTI Aged Care Strategy was launched with a view to ensuring equitable access to high-quality, culturally appropriate aged care for all older LGBTI+ people.¹⁰³ Amendments were made subsequently to the *Aged Care Act*

98 Indeed, previously the law tended to focus on criminality with regard to homosexuality; but homosexuality has been decriminalised for some time now. More recently, people convicted under previous laws for consensual homosexual activity may apply to have the record expunged.

99 See, eg, Freilich et al, above n 5, which listed a variety of circumstances where generic laws involving housing and accommodation affect older people, particularly those in minority groups (such as CALD seniors and LGBTI+ seniors) in a particular way. The report also established that even laws focused on older people, such as those regulating retirement villages and aged care, impacted differently on minority groups in comparison to the 'general' older population.

100 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007).

101 'LGBTI Aged Care Strategy', above n 10, 6.

102 Ibid 2.

103 Ibid.

1997 (Cth),¹⁰⁴ and in 2013 the Federal Parliament passed the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).¹⁰⁵ The legislation amended the *Sex Discrimination Act 1984* (Cth) and extends the protection from discrimination to grounds of sexual orientation, gender identity and intersex status.¹⁰⁶ People therefore cannot be discriminated against on the basis of their LGBTI+ status in relation to the areas covered by the Act, including employment, accommodation, land and the administration of Commonwealth laws and programs.¹⁰⁷ Both direct,¹⁰⁸ and indirect,¹⁰⁹ discrimination are unlawful. The definition of ‘marital or relationship status’ also protects same-sex couples from discrimination.¹¹⁰ It is important to note, however — subject to the comments about aged care below — that the amendments do not affect existing exemptions under the legislation regarding voluntary, educational and religious organisations.¹¹¹

The amendments have the potential to protect older LGBTI+ people in several ways, particularly in relation to accommodation, health care and aged care. The focus on aged care is significant because a particularly contentious issue has been discrimination against LGBTI+ people by religious organisations operating aged care facilities. Indeed, it seems that several providers have turned away, refused or removed services from LGBTI+ seniors.¹¹² Service providers in the aged care sector receiving funds from the Commonwealth are obliged to comply with Commonwealth anti-discrimination laws. This provides additional protections for LGBTI+ seniors and removes the exemptions that previously allowed some providers to discriminate on the basis of their religious beliefs.¹¹³

104 Pursuant to *Aged Care (Living Longer Living Better) Act 2013* (Cth) sch 1 cl 6, references to ‘people with special needs’ under the *Aged Care Act 1997* (Cth) s 11-3(h) were amended to include, inter alia, LGBTI people.

105 The amendments were effective from 1 August 2013.

106 *Sex Discrimination Act 1984* (Cth) ss 5A–5C.

107 The legislation has relevance to such areas as employment and superannuation, commission agents, contract workers, partnerships, qualifying bodies, registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth), employment agencies, education, goods, services and facilities, accommodation, land, clubs, and administration of Commonwealth laws and programs: see *Sex Discrimination Act 1984* (Cth) ss 14–28L.

108 Direct discrimination is treating another person less favourably on the basis of their sexual orientation or gender identity or intersex status, than someone without that attribute would be treated in the same or similar circumstances: see, eg, *Sex Discrimination Act 1984* (Cth) s 5A(1).

109 Indirect discrimination is imposing, or proposing to impose, a requirement, condition or practice that has, or is likely to disadvantage people with a particular sexual orientation or gender identity or intersex status, and which is not reasonable in the circumstances: see, eg, *Sex Discrimination Act 1984* (Cth) s 5A(2).

110 *Ibid* s 6. Most states and territories have some form of protection against discrimination on the basis of sexual orientation and gender identity; however, the *Sex Discrimination Act* introduces more inclusive definitions and addresses gaps such as a lack of coverage for acts or practices of the federal government. It also includes the new ground of intersex status: see *Sex Discrimination Act 1984* (Cth) s 5C.

111 *Ibid* ss 37–9. At the time of writing, the federal Religious Freedom Review was yet to report their findings, which may alter religious exemptions found in federal anti-discrimination laws, particularly regarding LGBTI+ discrimination protections: see Department of the Prime Minister and Cabinet, ‘Religious Freedom Review’ <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>>.

112 Freilich et al, above n 5, ch 8.

113 No religious exemptions exist on the basis of intersex status.

However, the religious exemption is still applicable to employment practices in religious organisations.¹¹⁴ Therefore, in order to maintain Commonwealth funding, organisations must provide care to LGBTI+ seniors but a refusal to employ LGBTI+ carers may well still be lawful. Aside from Commonwealth anti-discrimination laws, each of the states and territories have their own laws which protect LGBTI+ people from discrimination.¹¹⁵ Each state and territory legislation is also subject to religious exemptions.¹¹⁶

B Legal Issues Affecting LGBTI+ Seniors

As discussed above, there is a danger in assuming that LGBTI+ people are a homogenous group, leading to a consequential assumption that they share identical legal concerns. While in some cases this is true, certain issues affect different groups of LGBTI+ people and different age groups. For example, research in the US noted that younger generations have focused on marriage equality, workplace discrimination and the American military's former 'Don't ask, don't tell' policy, while older LGBTI+ people identified families of choice, estate planning, health care and end of life issues as legal concerns.¹¹⁷ It can be assumed that similar issues are of concern to older LGBTI+ people in Australia.¹¹⁸ Therefore this article considers, in particular, housing and accommodation issues, laws affecting families of choice, and health care and end of life planning.

C Housing Issues Affecting LGBTI+ Seniors

The laws relating to housing and accommodation are many and impact differently on individuals depending on a person's particular circumstances. However, the effectiveness of, and any shortcomings in, the laws pertaining to housing and accommodation arrangements are likely to present a greater level of stress and anxiety to LGBTI+ seniors than other age groups. Seniors are at a stage in their lives when tenure is especially important. Seniors place a high value on their home environment as they are less likely to be in full-time employment and

114 *Sex Discrimination Act 1984* (Cth) s 37(1).

115 See, eg, *Equal Opportunity Act 1984* (WA) s 3 is said to promote equality of opportunity in Western Australia and to provide remedies in respect of:

[D]iscrimination against persons on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age, publication of relevant details on the Fines Enforcement Registrar's website or, in certain cases, gender history ... [and] sexual harassment and racial harassment.

Part IIB of the Act addresses discrimination based on sexual orientation.

116 *Sex Discrimination Act 1984* (Cth) s 37(1); *Equal Opportunity Act 1984* (WA) s 72; *Equal Opportunity Act 1984* (SA) s 50; *Equal Opportunity Act 2010* (Vic) s 82(1); *Anti-Discrimination Act 1977* (NSW) s 56; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1992* (NT) s 51; *Anti-Discrimination Act 1998* (Tas) s 52; *Anti-Discrimination Act 1991* (Qld) s 109.

117 Knauer, 'LGBT Elder Law', above n 26, 5–6.

118 The Aged-Care Rights Service, 'Q&A for LGBTI: Top Ten Legal Issues to Consider for Older Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People' <http://www.lgbtihealth.org.au/sites/default/files/14772_79675_10%20Most%20Important%20Legal%20Questions%20for%20LGBTI.PDF>.

consequently are more likely to spend greater time in their homes and in their immediate neighbourhoods than at any other period in their lives. Perry, Andersen and Kaplan note that '[t]he experience of aging may necessitate transitions in living environments, either through adaptations to current residences or through relocations to more supportive environments.'¹¹⁹ Although such issues may also be experienced by other age groups and demographics, LGBTI+ seniors are particularly vulnerable to their occurrence and may face distinct barriers in accessing assistance.

It is instructive to discuss the findings of various studies on LGBTI+ seniors' experiences regarding housing and neighbourhoods. Andrew Gorman-Murray's research on gay and lesbian home environments emphasises that normative views of home, including the idealisation of the heterosexual nuclear family home in house design, public policy and social convention,¹²⁰ leads to a model 'heterosexualised' home. Indeed, this is the very environment that many LGBTI+ seniors may have left in their younger years and which may be associated with feelings of previous discrimination.¹²¹ Despite this, Gorman-Murray's research suggests that 'it is possible to see gay/lesbian experiences of home as both congruent with and contesting normative meanings of home: homes can be understood as sites of privacy, identity and heart, but not necessarily in (hetero)normative ways'.¹²²

Feeling free in one's home can be compromised if other people, whether relatives, neighbours or carers, come into the home and are not understanding or respectful of one's sexuality, gender identity and/or intersex status. Such apprehensions can impact on the domestic living environment with concern about 'heteronormative surveillance and harassment from the surrounding community'.¹²³ In some cases this may extend to LGBTI+ people feeling the need to conceal their LGBTI+ status within the domestic environment when receiving visitors or tradespeople.¹²⁴

119 Tam E Perry, Troy C Andersen and Daniel B Kaplan, 'Relocation Remembered: Perspectives on Senior Transitions in the Living Environment' (2013) 54 *The Gerontologist* 75, 75.

120 Andrew Gorman-Murray, 'Gay and Lesbian Couples at Home: Identity Work in Domestic Space' (2006) 3 *Home Cultures* 147.

121 For example, the scholarship of Dr Andrew Gorman-Murray and Dr Jo Hamilton. To date, with some notable exceptions, there has not been a significant amount of Australian research in this area. It is to be hoped that more Australian-specific research is undertaken; as the LGBTI+ population ages, such studies will be invaluable in guiding planning and policy directions to ensure appropriate housing supply and assistance is available.

122 Andrew Gorman-Murray, 'Reconfiguring Domestic Values: Meanings of Home for Gay Men and Lesbians' (2007) 24 *Housing, Theory and Society* 229, 232 (emphasis altered).

123 Gorman-Murray, 'Gay and Lesbian Couples at Home', above n 120, 147; Julia Smailes, 'The Struggle Has Never Been Simply about Bricks and Mortar: Lesbians' Experience of Housing' in Rose Gilroy and Roberta Woods (eds), *Housing Women* (Routledge, 1994) 152.

124 Gorman-Murray, 'Gay and Lesbian Couples at Home', above n 120, 147, citing Stewart Kirby and Iain Hay, '(Hetero)sexing Space: Gay Men and "Straight" Space in Adelaide, South Australia' (1997) 49 *Professional Geographer* 295; Sarah A Elwood, 'Lesbian Living Spaces: Multiple Meanings of Home' in Gill Valentine (ed), *From Nowhere to Everywhere: Lesbian Geographies* (Haworth Press, 2000) 11; Lynda Johnston and Gill Valentine, 'Wherever I Lay My Girlfriend, That's My Home: The Performance and Surveillance of Lesbian Identities in Domestic Environments' in David Bell and Gill Valentine (eds), *Mapping Desire: Geographies of Sexualities* (Routledge, 1995) 99.

Other studies have indicated that the privacy and autonomy of the home is of added importance to LGBTI+ people since the home environment permits people to 'be themselves', with societal prejudices often deterring public displays of affection such as holding hands.¹²⁵ The amenity of the domestic environment can therefore be significantly impacted upon by surrounding circumstances and some LGBTI+ seniors may then be reluctant to engage with the local community because of concerns they will not be accepted.¹²⁶

1 Home Ownership within the LGBTI+ Community

Statistics on home ownership by LGBTI+ people are difficult to obtain and are centred on narrow geographic areas with limited responses. The report, 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians', states that just over 50 per cent of respondents rented the property in which they lived and around 25 per cent were purchasing a home.¹²⁷ Seventeen per cent owned the property in which they lived. The report's authors noted, however, that 'this is a much lower rate of home ownership than in the community generally'.¹²⁸ In all states same-sex couples have available to them the status and protections of recognised de-facto partnerships,¹²⁹ and federally same-sex couples can now get married in Australia. However, it is important to emphasise that as same-sex marriage has only recently been legally recognised in Australia, most same-sex couples remain unmarried and must establish that they meet the criteria to be regarded as de facto partners. Of course, this standing does not apply to those who maintain single status.

Laws relevant to all home owners are pertinent to LGBTI+ homeowners; however, several issues impact upon LGBTI+ seniors in a different way. This is particularly the case where partners purchase property together or where one partner is not noted on the title either through choice or because the couple are living in a property owned by the other partner. The matter may become particularly complicated if there is a present or former spouse and/or children. In

125 Gorman-Murray, 'Gay and Lesbian Couples at Home', above n 120, 153, citing Iris Marion Young, 'A Room of One's Own: Old Age, Extended Care, and Privacy' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press, 2005) 155. See also Christopher Carrington, *No Place Like Home: Relationships and Family Life among Lesbians and Gay Men* (University of Chicago Press, 1999).

126 Kath Hulse and Lise Saugeris, 'Housing Insecurity and Precarious Living: An Australian Exploration' (Final Report No 124, Australian Housing and Urban Research Institute, Swinburne-Monash Research Centre, November 2008) <https://www.ahuri.edu.au/__data/assets/pdf_file/0005/2003/AHURI_Final_Report_No124-Housing-insecurity-and-precarious-living.pdf>. See also Smailes, above n 123, 155.

127 Marian Pitts et al, 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians' (Monograph Series No 57, Australian Research Centre in Sex Health and Society, La Trobe University, March 2006) 26 <http://www.glhv.org.au/sites/www.glhv.org.au/files/private_lives_report_0.pdf>.

128 Ibid.

129 Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law — Part One: Couples' (2006) 34 *Federal Law Review* 1, 41–2.

the event of the death of a partner, the surviving partner's security of tenure could be undermined.¹³⁰

2 LGBTI+ Experiences in the Private Rental Market

Private rental throughout Australia is regulated by state and territory residential tenancies legislation. The legislation does not make provision to counter discrimination in relation to rental practices; therefore, reference must be made to state and territory anti-discrimination legislation.¹³¹

The Victorian Human Rights and Equal Opportunity Commission has investigated discrimination against LGBTI+ renters and concluded that some LGBTI+ tenants were having their applications for private rental properties continually rejected owing to discrimination.¹³² In the report, *Locked Out: Discrimination in Victoria's Rental Market*, several respondents were of the view that their sexual orientation led to them being refused a rental property.¹³³ The report indicated several key problems LGBTI+ tenants faced in such circumstances.¹³⁴ First, it is very difficult to prove discrimination. This is especially the case when the demand in the market exceeds supply, as the refusal can be disguised as some other reason. Second, the complaint process is time-consuming and may be to no avail. Third, making complaints may do more harm than good because tenants are concerned they may then be 'black-listed' by agents and unable to find any accommodation.

3 LGBTI+ Experiences in the Public Rental Market

There is little Australian research on the experiences of LGBTI+ people who want to live, or do live, in public and community housing. Again, it is important that appropriate demographic and statistical data be obtained because 'a lack of data about [older LGBTI+ people's] real housing needs ... could be interpreted as evidence of an absence of real needs'.¹³⁵ In the UK, Stonewall Housing has undertaken research to identify public housing issues faced by the LGBTI+ community, including older people. The research revealed one third of respondents felt they would be uncomfortable being 'out' to a housing provider.¹³⁶

130 These issues are discussed in more detail below with reference to Families of Choice.

131 Western Australia will be used as an example: *Equal Opportunity Act 1984* (WA) s 35Z addresses discrimination in relation to accommodation, although an exception in relation to religious providers remains in place. Part IIAA addresses discrimination of gender history grounds with accommodation considered in s 35AM.

132 Victorian Equal Opportunity and Human Rights Commission, *Locked Out: Discrimination in Victoria's Private Rental Market* (2012) 16.

133 *Ibid* 13.

134 *Ibid* 14.

135 John Thornhill and Tina Wathern, 'Inside and Out: The Housing Experiences of Older LGBT People', *The Guardian* (online), 3 May 2012 <<https://www.theguardian.com/housing-network/2012/may/03/housing-experience-older-lgbt-people>>.

136 *Ibid*.

It is useful to refer to the position in Western Australia, where public housing tenancies are subject to a ‘three strikes’ policy regarding antisocial behaviour.¹³⁷ The provisions have been the subject of considerable controversy and, indeed, allegations of misuse.¹³⁸ On the face of it, disapproval of a person’s sexual orientation, gender identity or intersex status by other residents could lead to complaints of anti-social behaviour. Another issue arising out of 2014 Western Australian research was that community housing providers — who are subject to the *Residential Tenancies Act 1987* (WA) but not the three strikes provisions — were utilising the provisions against older residents as a disciplinary measure.¹³⁹ Although the research did not find evidence of this conduct being directed towards LGBTI+ residents, a manager who did not approve of a resident’s LGBTI+ status could, theoretically, misuse the three strikes policy in the same way.

4 Retirement Villages¹⁴⁰

Each Australian jurisdiction has legislation regulating the retirement village industry.¹⁴¹ There is no reference to discrimination in the legislation itself so reference must be made to anti-discrimination legislation. Under such legislation, religious exemptions may apply such that retirement villages overseen by religious providers could legitimately refuse entry to a gay couple.¹⁴² The 2014 Western Australian research heard some anecdotal reports of discrimination but the complaints were mainly in relation to other residents rather than the organisations themselves.¹⁴³ Barrett et al report the concerns of older lesbians in moving into a retirement village, as they ‘would have to put up with other residents who would be looking down their noses because they would be of an age when it was taboo’.¹⁴⁴ The heteronormative environment in some retirement villages may see older LGBTI+ people excluded from the village ‘community’,¹⁴⁵ and there are also concerns about the attitudes of management and staff.¹⁴⁶ There are issues with respecting people’s privacy and the ability of same-sex couples to make decisions for each other, ensuring that friends and people in the community are welcome to visit. Such discrimination could be countered by making a complaint,

137 Freilich et al, above n 5, 61.

138 Ibid 61–2.

139 Ibid 66.

140 The retirement village issue overlaps to some degree with aged care facilities. For the purposes of this article, retirement villages refer to independent living arrangements for relatively healthy older people who do not require residential aged care. Some facilities offer a transition of aged care within retirement villages but this is subject to receipt of Commonwealth funding.

141 See, eg, Freilich et al, above n 5, ch 6.

142 On the intricacies of whether the religious exemption provisions may apply in such cases, see Liam Elphick, ‘Sexual Orientation Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions’ (2017) 38 *Adelaide Law Review* 149.

143 Freilich et al, above n 5, ch 6.

144 Barrett et al, ‘No Need to Straighten Up’, above n 44, 27 (emphasis altered). Similarly, Robinson’s research regarding gay men aged 60 and over identified ‘fears of being ostracised because of their sexuality were strongest when the men spoke about aged-accommodation settings’: see Robinson, above n 5, 6.

145 Barrett et al, ‘No Need to Straighten Up’, above n 44, 27.

146 Ibid 27–8.

but the concern already noted above would be whether such an action could in fact make the situation worse.

Before entering a retirement village, the nature of the financial commitment and the difficulty in leaving a village must be considered. As already discussed, many older LGBTI+ people are not wealthy and are less likely than the general population to be home owners. Therefore, buying into a retirement village is a significant and continuing financial commitment. If a person is unhappy and wants to leave the village, the effect of exit fees and the structure of the financial arrangements means that often an older person gets little money back — usually not enough to purchase property elsewhere. Furthermore, the growth in ‘gay retirement homes’ internationally suggests that ‘standard’ retirement villages are failing to provide an equitable environment for LGBTI+ elders.¹⁴⁷ Australia’s first such village, Linton Estate, is currently in development.¹⁴⁸

5 Aged Care

Aged care refers to a range of services including in-home care,¹⁴⁹ and temporary or permanent residential care. Aged care is frequently provided in combination with basic medical services.¹⁵⁰ For some time, there has been concern regarding the experiences of older LGBTI+ people in aged care environments.¹⁵¹ In relation to in-home care, the main issues are feelings of lack of privacy and judgement by carers, while in aged care facilities concerns have been in relation to people wanting to go into aged care as a couple, transgender people wanting to live as their identified gender and feelings of discrimination as a result of treatment by staff and other residents. Research indicates that although there may not be ill intent involved, there is a lack of understanding and ignorance about the needs and concerns of LGBTI+ people in these facilities.¹⁵² In particular, aged care providers have been less likely to recognise and address the needs of LGBTI+ clients in health issues and sexual and cultural expression.¹⁵³

147 Freilich et al, above n 10, 179; Tom Nightingale, ‘Advocates Hail Australia’s First Gay Retirement Village’, *ABC Radio Australia* (online), 25 May 2012 <<http://www.radioaustralia.net.au/international/2012-05-25/advocates-hail-australias-first-gay-retirement-village/950564>>.

148 Jennifer Duke, *The 30 Year Journey to Australia’s first LGBTI Village* (April 24 2015) Domain <<https://www.domain.com.au/news/the-30year-journey-to-australias-first-lgbti-village-20150424-lms9lf/>>; see also Kathleen M Sullivan, ‘Acceptance in the Domestic Environment: The Experience of Senior Housing for Lesbian, Gay, Bisexual and Transgender Seniors’ (2014) 57 *Journal of Gerontological Social Work* 235.

149 In-home care is a particularly attractive option given that most older people prefer to ‘age in place’ and this allows older people to stay in the home for as long as possible, thus taking pressure off the public purse.

150 Productivity Commission (Cth), ‘Caring for Older Australians: Overview’ (Productivity Commission Inquiry Report No 53, (28 June 2011) XI <<http://www.pc.gov.au/inquiries/completed/aged-care/report/aged-care-overview-booklet.pdf>>. Medical assistance refers to ‘help with wound dressing, pain management, medication, health monitoring ... prevention, reablement or palliative care services’.

151 Anne K Hughes, Rena D Harold and Janet M Boyer, ‘Awareness of LGBT Aging Issues among Aging Services Network Providers’ (2011) 54 *Journal of Gerontological Social Work* 659.

152 Productivity Commission, above n 150; LGBTI Aged Care Strategy, above n 10, 6.

153 *Ibid*; Robinson, above n 5.

A common sentiment is the need to hide one's identity in aged care. This can have serious consequences on mental health and undermine other health issues, as older LGBTI+ people may not feel comfortable disclosing relevant personal information relating to care.¹⁵⁴ The LGBTI Aged Care Strategy supports this notion, stating that discrimination and poor health are directly correlated.¹⁵⁵ Furthermore, 'the lack of opportunity for physical intimacy in aged care facilities is also a concern for LGBTI people'.¹⁵⁶

The composition of the aged care workforce may present further difficulties for LGBTI+ elders. Staff in the industry are culturally diverse and often from regions where homophobia is commonplace.¹⁵⁷ Furthermore, the positions tend to be poorly paid and require few qualifications. There is a considerable amount of turnover in the industry and keeping staff updated on culturally appropriate responses to clients can be difficult.¹⁵⁸ Research is consistent in finding that many older LGBTI+ people feel they need to hide their sexuality and/or gender identity because of the attitudes of care staff.¹⁵⁹

Theoretically, older LGBTI+ people experiencing discrimination in an aged care environment may proceed through the Aged Care Complaints procedure,¹⁶⁰ or lodge a complaint under federal anti-discrimination laws. As above, however, older LGBTI+ people may prefer to hide their identity and 'disappear', or simply put up with discrimination or harassment if they are too unwell or feel the situation may get worse. Once a complaint is made, there may also be fear of reprisals.

Due to these potential barriers, the law may be of little use in this area, except in the most extreme cases. Therefore, it is important for the goals under the LGBTI Aged Care Strategy to be embraced and rolled out across the sector. The key to overcoming historical discrimination for older LGBTI+ people in aged care may not be hard law itself, but rather through education of management and staff and an empowerment of LGBTI+ seniors and their advocates. Cultural awareness and intergenerational understanding are likely to be the keys to diluting historical discrimination within the aged care sector.

154 GRAI (GLBTI Retirement Association Inc) and Curtin Health Innovation Research Institute, *'We Don't Have Any of Those People Here': Retirement Accommodation and Aged Care Issues for Non-Heterosexual Populations* (2010) 62.

155 LGBTI Aged Care Strategy, above n 10, 7; Freilich et al, above n 5, 180.

156 Ministerial Advisory Committee on Gay and Lesbian Health, Rural and Regional Health and Aged Care Services Division (Vic), 'What's the Difference? Health Issues of Major Concern to Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Victorians' (Research Paper, July 2002) 43 <<http://www.glhv.org.au/sites/www.glhv.org.au/files/difference.pdf>>; Freilich et al, above n 5, 181.

157 GRAI and Curtin Health Innovation Research Institute, above n 154, 63.

158 Freilich et al, above n 5, ch 12; Linda Belardi *Unhappy Workers: Tackling the Reasons Why Aged Care Staff Leave* (27 January 2016) Australian Ageing Agenda <<https://www.australianageingagenda.com.au/2016/01/27/tackling-why-staff-leave/>>.

159 Barrett, Harrison and Kent, above n 7.

160 'The Aged Care Complaints Commissioner provides a free service for anyone to raise their concerns about the quality of care or services being delivered to people receiving aged care services subsidised by the Australian Government': see Aged Care Complaints Commissioner, *Home: Welcome to the Aged Care Complaints Commissioner Site* <<https://www.agedcarecomplaints.gov.au/>>.

6 Marginal Accommodation

The nature of marginal accommodation is often precarious and older people, particularly older LGBTI+ people, may be at risk of harassment and violence. Recent research on homelessness amongst older women suggested that ‘in the case of older lesbians, housing security may ... be undermined by circumstances affecting many older women: a lifetime of gender inequality, lower wages and lack of superannuation in retirement’.¹⁶¹ Due to past social attitudes, older women often struggled during divorce proceedings and when settling property disputes, such that children regularly stayed with either their extended families or their fathers.¹⁶² Generally, there is still a concern that social attitudes can lead to vulnerability and can further contribute to social isolation.¹⁶³ For example, although homelessness and LGBTI+ people are identified as priority areas in the Living Longer, Living Better program, there remains a fear of discrimination from service providers and concern about being ‘out’ in an aged care setting, especially where the facility is administered by a religious organisation.¹⁶⁴ As a result, ‘some older lesbians prefer to remain in marginal circumstances, or homelessness, rather than face “judgements” in aged care settings.’¹⁶⁵

D Legal Protection for Older LGBTI+ People and Their Families of Choice¹⁶⁶

As LGBTI+ people age, research suggests that they are less likely to have traditional sources of caregiver support.¹⁶⁷ LGBTI+ seniors may have a greater reliance on formal and informal care providers due to the comparative lack of familial support.¹⁶⁸ This may see an increased reliance on friends,¹⁶⁹ or ‘families of choice’: a term that denotes the range of relationships, including partners, that extend the boundaries of biological families.¹⁷⁰ It is likely that demand for such

161 Ben Travia and Eileen Webb, ‘Can Real Property Law Play a Role in Addressing Housing Vulnerability? The Case of Older Women Experiencing Housing Stress and Homelessness’ (2015) 33(2) *Ageing and the Law* 52, 63.

162 Ibid.

163 Ibid.

164 Interview with June Lowe, GLBTI Rights in Ageing Inc Chair (Perth, 10 September 2014).

165 Travia and Webb, above n 161, 64.

166 Millbank, above n 129; Noell L Rowan and Nancy Giunta, ‘Building Capacity in Gerontological Social Work for Lesbian, Gay, Bisexual and Transgender Older Adults and Their Loved Ones’ (2014) 57 *Journal of Gerontological Social Work* 75, 77.

167 Sue Westwood, ‘“My Friends are My Family”: An Argument about the Limitations of Contemporary Law’s Recognition of Relationships in Later Life’ (2013) 35 *Journal of Social Welfare and Family Law* 347, 349.

168 See generally *ibid*; Marcus Green, ‘Do the Companionship and Community Networks of Older LGBT Adults Compensate for Weaker Kinship Networks?’ (2016) 17 *Quality in Ageing and Older Adults* 36, 46.

169 LGBT Movement Advancement Project and Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders, ‘Improving the Lives of LGBT Older Adults’ (Report, March 2010) 7 <<http://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf>>.

170 Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge, 2004).

support will grow as a greater number of LGBTI+ people live independently in the community.¹⁷¹

Many older LGBTI+ people are also concerned that, in the event of illness or death, their wishes may not be respected. A person's LGBTI+ status may be known to a partner or close friends but, to ensure these wishes are respected, the appropriate legal procedures must be followed. A reluctance to engage with the law can lead to problems in relation to distribution of assets (including the vagaries of intestacy), and management of the person's affairs and their wishes in the event of incapacity or serious illness.

The difficulty is that, unless a person can establish that they are married or a de facto partner of the individual concerned, members of 'families of choice' are not recognised by law. Legal avenues must be followed to ensure that a family member or members can manage the individual's affairs and/or be protected financially in the event of death. The following sections make several suggestions which LGBTI+ seniors could implement to protect their interests in such circumstances.

1 *Legal Rights of Same-Sex Partners*

Under Australian law, same-sex partners can now be recognised as married partners – or as de facto partners if they are not married.¹⁷² Until relatively recently, there was a disconnect between the rights of same-sex partners and opposite-sex partners when it came to entitlements under Commonwealth legislation. As a result, reform of 85 pieces of Commonwealth legislation was undertaken in 2008 to remove existing legislative discrimination against same-sex couples and their children.¹⁷³ Amendments to legislation were made in several diverse areas including superannuation, Centrelink entitlements, aged care, veterans' affairs, health insurance and taxation.¹⁷⁴ It is important to note, however, that there are still inequalities in relation to workers compensation death benefits, pensions for partners of defence force veterans and access to carer's leave for same-sex de

171 Ibid; see also Catherine F Croghan, Rajean P Moone and Andrea M Olson, 'Friends, Family and Caregiving Among Midlife and Older Lesbian, Gay, Bisexual and Transgender Adults' (2014) 61 *Journal of Homosexuality* 79; Jill Wilkens, 'The Significance of Affinity Groups and Safe Spaces for Older Lesbians and Bisexual Women: Creating Support Networks and Resisting Heteronormativity in Older Age' (2016) 17 *Quality in Ageing and Older Adults* 26.

172 *Marriage Act 1961* (WA) s 5; Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements — National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007).

173 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth).

174 Ibid.

facto couples.¹⁷⁵ Pursuant to the 2008 amendments, same-sex de facto couples may access the Federal Family Court for property and maintenance matters.¹⁷⁶

2 Property Ownership

Real property can be held by co-owners as joint tenants or tenants in common under the Torrens System in Australia. Upon the death of a co-owner, the rules of survivorship state that where property is held as joint tenants, the surviving co-owner receives the share of the deceased co-owner.¹⁷⁷ Where the property is held as tenants in common, each party may bequeath their share of the property as they please pursuant to a will.

To ensure that a co-owner receives rights to the jointly owned property upon the death of another co-owner (if this is the intention of the parties), it is prudent to register the ownership as joint tenants upon purchase. This is often simply assumed when a heterosexual couple are purchasing property, whereas the opposite view is often taken in the case of same-sex purchasers by real estate salespeople and settlement agents when preparing contracts and title documents.¹⁷⁸

3 Wills

For the above reasons and to ensure legal protection, it is of greater importance for LGBTI+ partners, than heterosexual partners, to make a will. This is also applicable to those who are not in a relationship but have a friendship group or a 'family of choice' as, if there is no will, the laws of intestacy may see property or assets devolve in a way not intended by the deceased person. If the deceased person was the sole registered owner of a property, it is essential that if a partner dies, the surviving partner's right to reside in the property is protected. The importance of making a will is never to be underestimated and is especially so in circumstances where one, or both, partners have a previous spouse and/or children. Wills protect the surviving partner too by likely avoiding the need to proceed to court if the deceased partner died intestate and the surviving partner has to compete with other family members for a property settlement. Such an experience can be expensive and traumatic, especially when LGBTI+ relationships are regarded by some judges as less valid than traditional marriages. For example, in *Mair v Hastings*,¹⁷⁹ a same-sex partner's claim was upheld and, although it was dealt with

175 For other examples of legal inequalities between opposite-sex and same-sex de facto couples, see Liam Elphick, 'Do Same-Sex Couples Really Have the Same Rights as Married Couples?', SBS Australia (online), 21 September 2017 <<https://www.sbs.com.au/topics/sexuality/agenda/article/2017/09/14/do-same-sex-couples-really-have-same-rights-married-couples>>. Though same-sex couples can now be legally recognised as married in Australia, many remain in de facto relationships.

176 The exception being Western Australia, owing to its separate family law jurisdiction. See *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) s 50.

177 Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbook, MacCallum and Moore's Australian Real Property Law* (Thomson Reuters, 6th ed, 2016) 561–2 [12.05], 565 [12.40], 567–8 [12.70].

178 Interviews undertaken for Western Australian security of tenure research: see Freilich et al, above n 5, ch 12.

179 [2002] NSWSC 522 (31 May 2002).

in the same way as a heterosexual partner's claim would have been determined, it was noted that:

The relationship was a long one. It was for 31 years. It had its own commitments between the two parties to the relationship but it must be noted that, in fact, it was only a de facto relationship and in this sense one cannot quite compare it to the situation of a married heterosexual couple who have made the public commitment of marriage ...¹⁸⁰

If a deceased person has not made a will, or omitted to include certain property, their assets are distributed pursuant to the various state and territory intestacy provisions.¹⁸¹ Such legislation sets out an order of priority in which the estate is distributed and the provisions vary from jurisdiction to jurisdiction. These laws can, however, be overridden by successful family provision claims. Navigating these provisions would be difficult for members of 'families of choice' in the absence of being able to establish a de facto relationship or being married.

Another issue is the distribution of superannuation. Although unmarried same-sex partners are usually treated as de facto partners for the purposes of superannuation distribution, it is more complex in the case of a close friend. Superannuation funds require a binding and non-binding nomination for the trustee to distribute the funds as directed in the nomination. Binding nominations need to be updated every three years.¹⁸² They are only applicable to a financial dependent or the executor of the estate.

4 Assistance with Financial and Personal Affairs¹⁸³

The ageing process may see a decline in a person's physical and/or mental ability to take care of business, financial, health and personal affairs. An older LGBTI+ person should consider entering into an Enduring Power of Attorney (for financial and/or property decisions) and an Enduring Power of Guardianship (for important personal, lifestyle and treatment decisions) if circumstances arise where the

180 Ibid [50]. See Jenni Millbank, 'The Changing Meaning of "De Facto" Relationships' (2006) 12 *Current Family Law* 82; see also Millbank, 'Recognition of Lesbian and Gay Families in Australian Law' above n 129, 43–4 where Millbank notes that:

There are examples in other NSW cases of judges appearing insensitive to the realities of gay and lesbian life, for instance by holding it against the credit of a gay man that he was not prepared to answer, in open court, questions about whether his former partner had died of AIDS, and that in filling out a government application for an interdependency visa for his present partner, he had not disclosed that they met through an escort agency: *Dridi v Fillmore* [2001] NSWSC 319 at [77]. It did not seem to occur to the judge that a gay person in that situation would be exposing themselves to the considerable risk of discrimination by responding truthfully, and that a lack of candour in such circumstances might be reasonable.

181 See, eg, *Family Provision Act 1972* (WA).

182 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report No 124 (2014) 299 [11.53].

183 For a discussion on the US position in relation to estate planning see Nancy J Knauer, 'Gay and Lesbian Elders: Estate Planning and End-of-Life Decision Making' (2010) 12 *Florida Coastal Law Review* 163.

older person is incapable of making decisions for themselves.¹⁸⁴ Having these documents in place can avoid interference by other people, for example other family members, during periods of incapacity. However, an issue may be finding a trusted, and trustworthy, person to act in these roles. Research finds that social isolation is problematic amongst some older LGBTI+ people,¹⁸⁵ and thus they may find it difficult to find an appropriate attorney or guardian.

E Health Care and End of Life Planning

People often avoid planning for future health needs and end of life decision making. Indeed, there is limited understanding and use of available procedures, especially among older people generally.¹⁸⁶ Despite the existence of legal options to protect the rights of LGBTI+ people, particularly in end of life decision making and care decisions, there is evidence of a limited understanding of these options within the LGBTI+ community.¹⁸⁷

Older LGBTI+ people who are close to a partner or a family of choice may be concerned that, in the event of a health crisis, lack of capacity or the onset of dementia, other people such as their biological family may interfere.¹⁸⁸ No matter what the circumstances or relationships between the older person and those close to them, it is important to be aware of, and put in place, legally enforceable planning options — including end of life planning. Recent research in New South Wales identified a worrying failure in health care professionals to understand the appropriate person to make decisions in such circumstances, often deferring to the biological family in preference to same-sex partners.¹⁸⁹ Legislation to allow people to direct their affairs prior to or in the event of incapacity and serious illness is state and territory-based, through the appointing of an Enduring Guardian, as discussed above. Part II of the *Guardianship Act 1987* (NSW), for example, provides for the appointment of one or more enduring guardians to make decisions about an adult's health and lifestyle if that person is unable to

184 Although in some states and territories Enduring Power of Attorneys extend to medical and other lifestyle decisions, this is not the case in Western Australia: Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press Law Books, 2011).

185 Lienert, Cartwright and Beck, above n 9, 51; Mark Hughes and Sue Kentlyn, 'Older LGBT People's Care Networks and Communities of Practice: A Brief Note' (2011) 54 *International Social Work* 436, 438–9.

186 Cartwright C, Phillips J and Rodwell J, 'A Multi-Disciplinary Approach to Advance Care Planning' (Pilot Study Report, Aged Services Learning and Research Collaboration, June 2006) <https://www.researchgate.net/profile/Colleen_Cartwright/publication/37358943_A_Multi-Disciplinary_Approach_to_Advance_Care_Planning_Pilot_Study_Report/links/09e41511d70a8b85ff000000.pdf>.

187 Deb Rawlings, 'End-of-Life Care Considerations for Gay, Lesbian, Bisexual and Transgender Individuals' (2012) 18 *International Journal of Palliative Nursing* 29; Richard Harding, Eleni Epiphaniou and Jayne Chidgey-Clark, 'Needs, Experiences, and Preferences of Sexual Minorities for End-of-Life Care and Palliative Care: A Systematic Review' (2012) 15 *Journal of Palliative Medicine* 602.

188 Cartwright, Hughes and Lienert, above n 8, 543–4.

189 Ibid; see also Justine McGovern, 'The Forgotten: Dementia and the Aging LGBT Community' (2014) 57 *Journal of Gerontological Social Work* 845.

do so.¹⁹⁰ The appointment must be in the prescribed form.¹⁹¹ The functions of an enduring guardian include deciding the place where the appointer will live, the health care received, personal services, consent for certain medical and dental treatment, and any other functions stipulated in the document.¹⁹² Therefore, an older LGBTI+ person could appoint a partner, friend or family member as an enduring guardian to make health and accommodation decisions in the event of the person's incapacity.

Where there is no enduring guardian, the position becomes murkier. Under Part V of the *Guardianship Act 1987* (NSW), there is provision for authorisation by a 'person responsible' of medical and dental treatment in a person lacking capacity. A person responsible is defined in terms of a hierarchy: the person's guardian, if any;¹⁹³ the spouse of the person;¹⁹⁴ a person who has the care of the person;¹⁹⁵ and a close friend or relative of the person.¹⁹⁶

In the absence of a spouse, a member of a family of choice could argue that they fit within the criteria of having the care of the person.¹⁹⁷ This process is risky, however, and could be subject to competing legal claims. Furthermore, evidence in a study by Southern Cross University revealed a lack of awareness amongst some health practitioners as to the criteria set down in the legislation for identifying a 'person responsible' and that the wishes of families of choice have been overridden in some instances by biological families.¹⁹⁸ It is prudent, therefore, for older LGBTI+ people who wish to ensure that partners, friends or

190 See *Guardianship Act 1987* (NSW) s 6, and in relation to the appointment of two or more enduring guardians see s 6D.

191 Ibid ss 6, 6C.

192 Ibid ss 6E(1)(a)–(e).

193 Ibid s 33A(4)(a).

194 Ibid s 33A(4)(b): the relationship between the person and the spouse must be close and continuing. The definition of spouse extends to a same-sex partner.

195 Ibid s 33A(4)(c). Having the care of another person is defined in s 3D:

- (1) For the purposes of this Act, the circumstances in which a person is to be regarded as 'having the care of another person' include (but are not limited to) the case where the person, otherwise than for remuneration (whether from the other person or any other source), on a regular basis:
 - (a) provides domestic services and support to the other person, or
 - (b) arranges for the other person to be provided with such services and support.
- (2) A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.

196 Ibid s 33A(4)(d). Close friend or relative is defined in s 3E:

- (1) A person is a 'close friend or relative' of another person for the purposes of this Act if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare. However, a person is not to be regarded as a close friend or relative if the person is receiving remuneration (whether from the other person or some other source) for, or has a financial interest in, any services that he or she performs for the other person in relation to the person's care.

197 Ibid ss 33A, 33A(4).

198 Lienert, Cartwright and Beck, above n 9.

specific family members can administer their instructions in the event of illness or incapacity to enter into a formal guardianship arrangement.

Finally, older LGBTI+ people can enter into an Advance Care Directive. This document sets out issues to be considered before medical treatment decisions are made on behalf of a person who is too ill or incapacitated to make such decisions. There is no prescribed form, but an Advance Care Directive will be legally binding where it is made when the person has capacity, the instructions are clear, specific and current, and the document is signed.¹⁹⁹ In the Southern Cross University study, most participants had heard of Enduring Powers of Attorney, Enduring Guardianship and Persons Responsible but few had heard of Advance Care Directives.²⁰⁰ Few LGBTI+ seniors had done anything about organising such documentation, and respondents said that the issue of end of life planning was rarely raised by health practitioners.²⁰¹ The Report noted a dearth of data on end of life planning by transgender seniors.²⁰²

Legal options exist to protect and promote rights of LGBTI+ people towards end of life but there seems to be a gulf between these rights and the understanding and willingness of LGBTI+ people to pursue these options. Unfortunately, it cannot be taken for granted that an older LGBTI+ person's wishes will be adhered to in the absence of such documentation. Assuming that a friend or specific family member will take up the mantle of a 'person responsible' in the absence of a partner is a risky course. Furthermore, uncertainty during a health crisis makes matters more difficult for a close friend or relative, especially if there are competing views on treatment options.²⁰³

IV DISCRIMINATION REVISITED — WHERE TO NOW FOR LGBTI+ SENIORS?

This article has examined the historical discrimination that still affects many older LGBTI+ people today. As a result of such discrimination, many LGBTI+ seniors continue to fear rejection and discrimination, adding to the usual vulnerabilities that are prevalent during the ageing process. These experiences may hinder willingness to engage with the legal system. At issue is whether the law can make a meaningful contribution to ensuring LGBTI+ seniors can live

199 Department of Health (NSW), *Using Advance Care Directives — New South Wales* (2004) 7.

200 Mark Hughes and Colleen Cartwright, 'LGBT People's Knowledge of and Preparedness to Discuss End-of-Life Care Planning Options' (2014) 22 *Health and Social Care in the Community* 545, 545.

201 Ibid; Cartwright, Hughes and Lienert, above n 8; Andrew J Bezzina, 'Prevalence of Advance Care Directives in Aged Care Facilities of the Northern Illawarra' (2009) 21 *Emergency Medicine Australasia* 379, 379.

202 Hughes and Cartwright, above n 200, 547.

203 Similarly little work has been done on bereavement for LGBTI+ older people: Kathryn Almack, Jane Seymour and Gary Bellamy, 'Exploring the Impact of Sexual Orientation on Experiences and Concerns about End of Life Care and on Bereavement for Lesbian, Gay and Bisexual Older People' (2010) 44 *Sociology* 908; see generally, Lee-Ann Fenge, 'Developing Understanding of Same-Sex Partner Bereavement for Older Lesbian and Gay People: Implications for Social Work Practice' (2014) 57 *Journal of Gerontological Social Work* 288.

openly and confidently in old age. This final Part makes several suggestions as to what could be done across the legal and social spectrum to ensure this occurs.

A Raising the Profile of LGBTI+ Seniors' Issues

LGBTI+ seniors have been mobilising for some time throughout Australia to ensure that issues of older LGBTI+ people are put on the agenda, including legal issues. Indeed, a major focus has been the treatment of older people in aged care facilities, and these groups were consulted widely in the recent government reforms. One aspect of the LGBTI Aged Care Strategy involves producing information and providing education for management and staff of aged care facilities.²⁰⁴ There has been considerable interest in these programs and most aged care providers have embraced the opportunity to receive LGBTI+ cultural awareness training and be informed of their legal obligations regarding LGBTI+ seniors.²⁰⁵ It is hoped that this heightened awareness will ensure that 'LGBTI people ... experience equitable access to appropriate ageing and aged care services',²⁰⁶ including preparation of inclusive promotional literature and intake and assessment forms.

However, while first indications are promising, LGBTI+ organisations and advocates must remain vigilant and be mindful that recurrent discrimination is rarely overt. While, no doubt, heightened training programs and awareness will improve the circumstances in aged care considerably, the realities of the industry, its workforce and the unpredictable attitudes of other residents mean that stakeholders must be mindful of the re-emergence of old prejudices. The fact that the Community Visitors Scheme is to be expanded to include LGBTI+ people is welcome.²⁰⁷ It is suggested that LGBTI+ advocates need to have a meaningful presence in aged care facilities and, if necessary, advocate on behalf of older LGBTI+ people if issues involving discrimination arise. As discussed above, the nature of older age is such that some older people may not want to 'rock the boat'. LGBTI+ advocates could assist older people in raising their concerns in a non-confrontational way and working through issues with management before there is a detrimental effect on an older LGBTI+ person. This suggestion fits with the review of the National Aged Care Advocacy Programs guidelines to ensure LGBTI+ inclusion.²⁰⁸ Few older people may want to pursue an Aged Care Complaints process or take legal action for discrimination. The presence and involvement of LGBTI+ advocates to liaise and work towards solutions would be a sensible compromise.

204 LGBTI Aged Care Strategy, above n 10, 11.

205 Such programs have operated successfully elsewhere: Anissa Rogers et al, 'Older LGBT Adult Training Panels: An Opportunity to Educate about Issues Faced by the Older LGBT Community' (2013) 56 *Journal of Gerontological Social Work* 580; Kristen E Porter and Lisa Krinsky 'Do LGBT Aging Trainings Effectuate Positive Change in Mainstream Elder Service Providers?' (2014) 61 *Journal of Homosexuality* 197.

206 *LGBTI Aged Care Strategy*, above n 10, 12.

207 *Ibid* 13.

208 *Ibid*.

B Utilising Anti-Discrimination Legislation and Complaints Procedures

Despite the recent amendment of anti-discrimination laws to promote a degree of equality and protection from discrimination, the reality is that statutes are only as good as the willingness and ability to take action on behalf of complainants. Of concern is whether, due to the discrimination of times past and the realities of the ageing process, older LGBTI+ people may take the path of least resistance and not be aware of, or choose not to avail themselves of, legal protection. Indeed, the likelihood of an older person, especially one requiring a significant level of residential care, navigating the Aged Care Complaints Scheme,²⁰⁹ or commencing legal action against those providing that care, is likely to be small. This is especially the case where other pressing issues associated with ageing, such as assistance with day-to-day tasks and increasing frailty or illness, take precedence over legal proceedings. Certainly, advocates may also be able to assist with this process but the realities of doing so — and the associated stresses on the older person — may tell against such action in all but the most extreme circumstances.²¹⁰

For example, interviews with older people regarding accommodation issues have revealed a desire to ‘remain invisible’ in relation to anything that may cause them to experience harassment or discrimination.²¹¹ The ageing process, with all its challenges, may not be a stage in life where people want to ‘make a stand’. There can also be concern that reporting an issue may only make things worse for them. The present housing affordability issues and lengthy waiting lists for suitable retirement and aged care facilities makes many older people fearful of having to move and having ‘nowhere to go’. As many LGBTI+ people have at some stage of their lives experienced unlawful discrimination, it is important to ensure that this discrimination does not continue into old age,²¹² and suggestions below are made to this effect.

Having said this, an increased usage of anti-discrimination laws, however minimal, would help to deter against such discriminatory conduct in future. The younger members of the older LGBTI+ cohort may be prepared to shine a light on such practices. A few ‘test cases’ brought by such persons, or by LGBTI+ advocates acting on their behalf, could focus the industry’s attention on their legal obligations and encourage compliance in the future. LGBTI+ advocates from groups such as GRAI could provide support in any such litigation. Most importantly, aged care facilities could also implement and publicise explicit policies that ensure no adverse consequences will arise from a complaint of discrimination. This may encourage the use of anti-discrimination legislation by LGBTI+ seniors in cases

209 Aged Care Complaints Commissioner, *Aged Care Complaints — About* <<https://www.agedcarecomplaints.gov.au/about/>>.

210 Lienert, Cartwright and Beck, above n 9.

211 See generally the discussions in Freilich et al, above n 5; Robinson, above n 5.

212 Australian Human Rights Commission, *A Human Rights Approach for Ageing and Health — The Aged Care Reforms and Human Rights* (2012) 22. <https://www.humanrights.gov.au/sites/default/files/content/age/ageing/human_rights_framework_for_ageing_and_health.pdf>.

of discrimination. Whether such policies would minimise fears of more subtle repercussions from aged care facility staff is unclear though.

C Ensuring Housing Security

The provision of stable and safe accommodation is essential for the individual expression and ontological security of LGBTI+ people, and particularly seniors. As discussed, there is evidence of discrimination towards LGBTI+ tenants in both the private and public systems but the realities of pursuing an action under state or territory legislation are likely to tell against taking this course. Furthermore, the financial structure of retirement villages means that if an older LGBTI+ person or couple wanted to leave, it may be financially impossible to do so. Although there are concerns about older LGBTI+ people in purpose built retirement villages, it would be useful to provide more Australian research on experiences within these facilities. More research should also be done on lower income LGBTI+ people in marginal accommodation or experiencing homelessness. It is likely that there are many highly vulnerable people in this predicament with few support services. Research may help to shed a light on their experiences and potential solutions.

It is further suggested that there is a pressing need for education in relation to anti-discrimination laws and LGBTI+ rights on behalf of those who interact with LGBTI+ seniors in housing situations. Education of these issues should be mandatory for those working in accommodation services, particularly real estate agents, property managers and retirement village management. Indeed, components of the LGBTI Aged Care Strategy could be a template for such programs and initiatives.

D Protecting Friends and Families of Choice

To ensure the security of a friend or a family of choice, if that is the wish of an older LGBTI+ person, there needs to be engagement with the legal system. In an era where same-sex couples can be legally recognised as married and receive ensuing rights, it must be noted that such protections do not extend to people who may not be a partner but are very close to an older LGBTI+ person. Whatever the situation, the importance of making a will has been emphasised above, together with the need to provide for instructions regarding superannuation. The importance of entering into an Enduring Power of Attorney cannot be underestimated. Furthermore, it cannot be assumed that an older LGBTI+ person's wishes in relation to end of life care will be honoured, even if he or she has discussed the matter with close friends. It is important for older LGBTI+ people to engage with the legal system to the extent of investigating the appointment of an Enduring Guardian or even entering into an Advance Care Directive. Reliance on the 'Person Responsible' provision and similar legislation in other jurisdictions is risky and may lead to uncertainty and confrontation in a time of crisis.

In all cases, it is suggested that education is again the key. A troubling issue is that many older people assume their oral instructions will be honoured, while

healthcare workers seem unaware of the appropriate person to make decisions in times of crisis and tend to err on the side of the biological family. Healthcare workers are often the ‘front-line’ for older people so it is essential that the issue of advanced care planning is raised and correct advice is given. Information needs to be provided to LGBTI+ seniors themselves and the best way to do this is through properly informed health practitioners and, in some cases, community legal centres and programs organised by LGBTI+ organisations. It is suggested that such an interaction be made customary for all persons upon their first appointment with their doctor after reaching the age of 65. Education could be provided by LGBTI+ organisations to health practitioners, who could then pass on such information to LGBTI+ seniors in a more regular setting. More formalised and direct education of LGBTI+ seniors could also be organised through retirement villages and other means of access.

E Recognising Minorities and Other Forms of Discrimination

Some LGBTI+ seniors also experience discrimination associated with age, race, religion, cultural background or illness. This can make one’s experience increasingly difficult and result in not only experiencing discrimination due to LGBTI+ status, but in some cases result in being excluded from a cohort to whom one relates and would expect support. Cultural training of staff members working in aged care facilities and retirement villages could help educate relevant persons as to how some LGBTI+ seniors may face multiple and intersectional levels of discrimination. More targeted research into the experience of LGBTI+ seniors who also experience discrimination associated with race, religion or cultural background should also be undertaken.

F Consideration in Connection with the 2016–2017 ALRC Inquiry into Elder Abuse

This research is especially important considering a recent inquiry into elder abuse. In February 2016, the Australian Commonwealth Attorney-General announced an inquiry into laws and frameworks to safeguard older Australians from abuse.²¹³ This Australian Law Reform Commission Inquiry was to ‘assist the federal government to identify the best way to protect older Australians, while at the same time promoting respect for their rights.’²¹⁴ Experiences of abuse of LGBTI+ seniors — many of which have been discussed in this paper — were under consideration; as such the solutions suggested in this paper should be

213 George Brandis, Attorney-General for Australia, ‘Safeguarding Older Australians’ (Media Release, 24 February 2016) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/24-February-2016-Safeguarding-Older-Australians.aspx>>.

214 Eileen Webb, ‘Explainer: What is Elder Abuse and Why Do We Need a National Inquiry into It?’, *The Conversation* (online) <<https://theconversation.com/explainer-what-is-elder-abuse-and-why-do-we-need-a-national-inquiry-into-it-55374>>.

considered in connection with the ALRC Report. In particular, the Report noted that:

Older LGBTI people may experience abuse related to their sexual orientation or gender identity. For example, an LGBTI older person may be abused or exploited by use of threats to 'out' a person. Abuse may be motivated by hostility towards a person's sexual orientation or gender identity. ... Older LGBTI people may also be reluctant to disclose their sexual orientation or gender identity to services for fear of discrimination.²¹⁵

V CONCLUDING REMARKS

With an evolving society and legal system, it may be that the present cohort of LGBTI+ seniors in Australia will be the last to experience widespread stigma and underlying discrimination. With younger LGBTI+ people growing up in more progressive times and with more LGBTI+ people living openly, having families and playing significant roles in their communities, the problems experienced by the present older cohort in their formative years may become a thing of the past. However, this will not occur without significant improvements in the current socio-legal order. For many older LGBTI+ people there is a real concern that times may not have changed enough and that, as they age and are likely to navigate the health and aged care systems, experiences of such discrimination may recur. The tendency to avoid engaging with legal procedures means that LGBTI+ seniors may leave themselves, or their loved ones, exposed in times of illness or bereavement. Given that this group did much to press the cause for LGBTI+ equality and to achieve many significant steps forward in LGBTI+ rights, it is essential that they receive support and effective protection as they age. Targeted research and increased education and training of both LGBTI+ seniors and those who interact with them most regularly would be the most important, though not last, steps towards removing discrimination and improving the rights and wellbeing of LGBTI+ seniors in Australia.

215 Australian Law Reform Commission, *Elder Abuse – A National Legal Response (Final Report)*, ALRC Report 131 (May 2017) <<https://www.alrc.gov.au/publications/elder-abuse-report>> 46.