



Health and wellbeing for
lesbian, gay, bisexual, trans, intersex [LGBTI]
people and sexuality, genders, and bodily
diverse people and communities
throughout Australia

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02/05/2017

Committee Secretary
Senate Standing Committees on Community Affairs
PO BOX 6100
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Canberra ACT 2600
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Dear Secretariat,

Re: Future of Australia's aged care workforce

Please find following the National LGBTI Health Alliance submission on the Future of Australia's aged care workforce.

The National LGBTI Health Alliance is the national peak health organisation in Australia for organisations and individuals that provide health-related programs, services and research focused on lesbian, gay, bisexual, transgender, and intersex people (LGBTI) and other sexuality, gender, and bodily diverse people and communities.

The capacity & capability of the aged care workforce to deliver LGBTI-inclusive care has been a focused area of work for the Alliance for many years. This incorporates the inclusiveness of the aged care workforce itself. We are very pleased to see the Senate Community Affairs References Committee examining the future of the aged care workforce with a specific reference to the challenges involved in creating a culturally competent and inclusive aged care workforce to cater to the care needs of LGBTI people.

The main barrier to the aged care workforce for LGBTI people is the exemption provided to faith-based providers in the *Sex Discrimination Act 1984* (Cth). Faith-based providers are prohibited from discriminating against LGBTI consumers when delivering Commonwealth-funded aged care. However, faith-based providers enjoy a blanket exemption in relation to their employment practices. This inevitably undermines their efforts to create a LGBTI-inclusive aged care service. The exemption needs to be repealed or reformed.

We look forward to the Australian government repealing or reforming the exemption to ensure that the aged care workforce's ability to deliver LGBTI-inclusive care is not undermined and the employment rights of LGBTI people are not unjustifiably infringed.

If you require any further information, please do not hesitate to contact Samantha Edmonds, Manager Ageing and Aged Care Project on [REDACTED] (02) 8568 1123.

Yours Sincerely

Rebecca Reynolds
Executive Director
National LGBTI Health Alliance



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Recommendation

1. Repeal the exemption; or
2. Narrow the exemption to apply only to positions where religious doctrines are relevant.

We have included our position on the challenges of creating a culturally competent and inclusive aged care workforce to cater to the different care needs of LGBTI people below.

Introduction

There are several challenges to creating a culturally competent and inclusive aged care workforce to cater for the different care needs of LGBTI people. The National LGBTI Ageing & Aged-Care Strategy has improved the delivery of aged care services to LGBTI elders and improved the knowledge and capacity of the aged-care workforce to deliver inclusive care. However, there are still barriers to creating an LGBTI-inclusive workforce.

Amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) prohibit direct and indirect discrimination on the grounds of sexual orientation, gender identity and intersex status.¹ All aged care providers must comply. Faith-based providers are not exempt when delivering Commonwealth-funded aged care services. In other words, they cannot discriminate against consumers on the grounds of sexual orientation, gender identity and intersex status. However, faith-based organisations enjoy a blanket exemption from the SDA in relation to employment.² This exemption enables faith-based providers to adopt discriminatory employment practices against LGBTI people which would otherwise be unlawful.

The exemption to the SDA undermines the ability of faith-based organisations to create an LGBTI-inclusive service and decreases the confidence that LGBTI consumers have in these organisations to deliver inclusive care. Furthermore, the blanket nature of the exemption disadvantages faith-based providers that do not want to be exempted from anti-discrimination laws.

A lack of data makes it difficult to examine the experiences of LGBTI people employed, or seeking employment, in the aged care workforce. The National Aged Care Workforce Census and Survey does not collect information about LGBTI employees.³

¹ *Sex Discrimination Act 1984* (Cth) ss 5A—5C.

² *Sex Discrimination Act 1984* (Cth) s 37.

³ Department of Health (Cth), *2016 National Aged Care Workforce Census and Survey – The Aged Care Workforce, 2016, 2017*.



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Exemptions to the SDA

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) introduced sections to the SDA that prohibit direct and indirect discrimination on the grounds of sexual orientation, gender identity and intersex status.⁴ It is unlawful to discriminate on these grounds in a range of areas including employment, provision of goods & services and accommodation.⁵ All aged care providers must comply when delivering Commonwealth-funded aged care. However, there is an exemption for religious bodies in s 37.

Subsection 37 (1)(d) of the SDA provides a broad exemption for religious bodies. It protects:

any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

However, the effect of this subsection is limited by subsection 37(2) which provides that subsection 37(1)(d):

- ...does not apply to an act or practice of a body established for religious purposes if:
- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
 - (b) the act or practice is not connected with the employment of persons to provide that aged care.

The effect of subsections 37(1)(d)— (2) is that consumers of Commonwealth-funded aged care delivered by faith-based providers cannot be discriminated against on the grounds of sexual orientation, gender identity or intersex status but the individuals employed by, or seeking employment with, the provider can be.

The employment practices of faith-based providers are important as they represent a significant proportion of the sector. In 2015-16 faith-based organisations provided 24.4% of residential care places and 31.9 % of operational home care places in Australia.⁶ These proportions vary between the states and territories. For example, faith-based providers delivered 42.9% of residential care places in Tasmania and 39.7% of operational home care places in Queensland.⁷ On a national level, if every faith-based provider adopted discriminatory employment practices, LGBTI people would be excluded from employment in a quarter of the sector. Whilst faith-based providers are permitted to adopt discriminatory employment practices it cannot be assumed that all faith-based providers do so.

⁴ *Sex Discrimination Act 1984* (Cth) ss 5A—5C.

⁵ *Sex Discrimination Act 1984* (Cth) pt II divs 1—2.

⁶ Productivity Commission, *Report on Government Services 2017*, Table 14A.10.

⁷ *Ibid.*



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Not all faith-based organisations adopt discriminatory workplace practices or wish to be exempted from anti-discrimination laws. For example, Uniting, which is the services and advocacy arm of the Uniting Church NSW & ACT,⁸ has sought external endorsements to demonstrate its commitment to being an LGBTI inclusive employer. It is a member of the Pride in Diversity program and in 2016 was ranked in the top 10 employers for LGBTI Workplace Inclusion.⁹ Whilst Uniting's efforts to highlight their commitment to inclusive employment practices is appreciated, they are countering a public perception that all faith-based providers are discriminatory. This perception is reinforced by the blanket exemption provided to faith-based organisations.

The blanket exemption provided to all faith-based bodies has five adverse effects.

1. It undermines faith-based providers' efforts to create an inclusive service for LGBTI elders and damages consumer confidence in the providers' ability to deliver LGBTI-inclusive care.
2. It enables discrimination in employment on grounds that are irrelevant to the position and would otherwise be unlawful.
3. It maintains a public perception that all faith-based providers are engaged in discriminatory practices. This creates a situation where inclusive faith-based employers who do not want to be exempt from anti-discrimination laws must dedicate resources to promoting themselves as inclusive organisations to reassure their consumers and supporters that they reject discriminatory employment practices.¹⁰
4. Even where a faith-based provider is ostensibly inclusive, the exemption creates uncertainty for the employees. A change in management and a different interpretation of religious doctrines can lead to the loss of employment for LGBTI people.¹¹
5. The blanket exemption creates a lack of transparency on how the exemption is used and by whom. Faith-based organisations who utilize discriminatory practices can be opaque about their position until they assert their right to discriminate, at which point there is no mechanism to ensure the position is proportionate to the religious freedom they are claiming to protect.

⁸ Uniting, *About Uniting* <<https://uniting.org/about-uniting>>

⁹ Uniting, *Join Our Team – Diversity at Uniting* <<https://uniting.org/join-our-team/diversity-at-uniting>>.

¹⁰ Victorian Gay & Lesbian Rights Lobby & NSW Gay & Lesbian Rights Lobby, Submission No 120 to Australian Law Reform Commission, *Traditional Rights & Freedoms – Encroachments by Commonwealth Laws*, 21 September 2015, 7-8.

¹¹ Ibid.



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The exemptions to anti-discrimination laws have been examined in several inquiries, such as:

- Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013)
- Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (2013)
- Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2015)

The blanket nature of the exemption was criticized by numerous organisations such as the Combined Pensioners and Superannuants Association of NSW,¹² Inner City Legal Centre,¹³ Kingsford Legal Centre,¹⁴ Liberty Victoria,¹⁵ National Association of Community Legal Centres,¹⁶ UnitingJustice Australia,¹⁷ the NSW Council of Civil Liberties¹⁸ and others.

Different methods have been proposed to facilitate a better balance between the right to religious freedom and the right to non-discrimination.

Options for reform

To create a more reasonable balance between freedom of religion and freedom from discrimination for LGBTI people the exemptions to anti-discrimination laws need to be reformed. Changes need to address the permanence of the current exemption, its general application and its lack of transparency. There are two broad options for reforming the exemption – complete removal of the exemption or narrowing its application and scope.

¹² Combined Pensioners and Superannuants Association of NSW, Submission No 52 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, April 2013, 4.

¹³ Inner City Legal Centre, Submission No 335 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 20 December 2012, 5-6.

¹⁴ Kingsford Legal Centre, Submission No 19 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, April 2013, 6-7.

¹⁵ Liberty Victoria, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, September 2011, 7-8.

¹⁶ National Association of Community Legal Centres and Kingsford Legal Centre, Submission No 334 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 21 December 2012, 38.

¹⁷ UnitingJustice Australia, Submission No 466 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, December 2012, 7-8.

¹⁸ NSW Council for Civil Liberties, Submission No 328 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 21 December 2012, 4-5.



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Repeal

One option for reforming the exemption is to repeal it entirely. This would establish a clear expectation that faith-based providers are operating in the public sphere and are required to adhere to the same principles of non-discrimination as other providers in the provision of services and in their employment practices.¹⁹ In relation to aged care it would provide greater confidence to LGBTI consumers that the services provided by faith-based providers are genuinely inclusive of LGBTI people. Given that a significant proportion of public services are delivered by faith-based organisations it is reasonable to expect that they meet the same standards of non-discrimination as other providers in both the delivery of services and in their employment practices.

Narrow the exemption

The second option narrows the application of the exemption. Rather than providing a blanket exemption to faith-based organisations it would be limited to the inherent requirements of a position. This would allow faith-based organisations to discriminate on prohibited grounds but only where religious doctrine is relevant.²⁰ Under this option, a faith-based provider would be able to lawfully discriminate when hiring a chaplain but it would not allow discrimination against other staff (e.g. cleaners).

Conclusion

Both options address the problems with the current blanket exemption in different ways. The strongest option is the first. Faith-based providers are delivering a significant proportion of publicly funded services. They are legally obligated to provide an inclusive service to LGBTI elders. They are organisations that are operating within the public sphere. They should be required to adhere to the same non-discriminatory standards as other providers. However, in the absence of repealing the exemption there are ways to improve it.

The Alliance has indicated that it does not support legislation or policies that enable discrimination against LGBTI people, unless it directly relates to the inherent requirement of a position.²¹ The second option would narrow the application of the exemption and limit its application to positions where religious doctrines are relevant.

¹⁹ Inner City Legal Centre, Submission No 335 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 20 December 2012, 5-6.

²⁰ UnitingJustice, Submission No 446 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, December 2012, 7-8.

²¹ National LGBTI Health Alliance, Submission to the Attorney-General's Department, Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 9-10.