

LGBTI fact sheet 2b - Human & legal rights

Human rights of LGBTI peoples with dementia

Until recently the human rights of older LGBTI peoples were largely ignored, in part because of their invisibility (1) and in part because of the active discrimination against them, often manifesting as an attitude of indifference.

Historical influences

- Historically, LGBTI peoples could be imprisoned, forced to endure 'medical cures' or excluded from services, education, family and friends if their sexual orientation, gender diversity or intersex status was disclosed.
 - Many older LGBTI peoples have experienced discrimination and social stigma throughout their lives forcing them to remain 'invisible' (see *fact sheet 4a*) to protect themselves (2-4).
 - These cumulative experiences of discrimination, violence and marginalisation have contributed to social isolation, economic and health disadvantage (5-9). These experiences are internationally recognised as an abrogation of human rights, although only recently prompting a call for recourse to human rights-based advocacy (7).
 - Human rights violations of intersex people including harmful medical practices continue to occur throughout the world, including Australia (10).
- The medical profession in Australia currently advocates for the human rights of transgender children but not intersex children (11).

United Nations

- In 2012 and 2015, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released the first two official UN reports on violence and discrimination based on sexual orientation and gender identity (12). These reports generated a number of recommendations, the most significant being that member States:
 - i. repeal laws used to punish people based on their sexual orientation and gender identity and expression;
 - ii. consult LGBT and intersex people and civil society when making laws and policies that impact their rights and
 - iii. enact effective anti-discrimination laws that protect LGBT and intersex people from discrimination, and work to end negative stereotypes, including through public education campaigns.
- More specifically in regards to ageing and disability, including dementia and BPSD, the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD; 13, 14) is the first binding international human rights instrument developed explicitly to address disability.
- The CRPD is a treaty intended to protect the rights and dignity of persons with disabilities (15, 16) which was ratified by Australia in July 2008.

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- Of the 50 articles included in the CRPD, a number have direct relevance to the human rights of LGBTI peoples with dementia and BPSD.
- As outlined in the table on page four, most notably the rights to dignity, freedom from abuse and exploitation, equal recognition before the law, and respect for privacy, the family and relationships.

Service provision

- These human rights are essential to the dignity, personal freedom and bodily autonomy of all individuals (7, 17, 18).
- Many LGBTI people have experienced discrimination in health care settings or at best, they have been unrecognised or underserved (19).
- Service providers and health care professionals who do not recognise, validate and support the special needs of LGBTI peoples with dementia increase their distress and violate their basic human rights.
- By being better informed and spreading the word about the lived experiences and special needs of older LGBTI peoples as well as the human rights violations they face, we are working towards making aged care a safer and more welcoming space.

***Note:** Support from welcoming service providers is a protective factor against isolation and a buffer against the negative impacts of living alone for older LGBTI peoples (9).

Legal rights of LGBTI peoples with dementia

Raising awareness of legislation and the legal obligations of service providers and health care professionals supports LGBTI advocacy.

- While international treaty provisions, such as the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) provisions outlined in the table on page four, are not legally binding under Australian law until they are incorporated into domestic law via statute, international treaty provisions have relevance when Australian courts are interpreting domestic legislation (20).
- Further, when Australia ratifies an international treaty this can create a legitimate expectation (where there is no statutory or executive indication to the contrary) that an executive decision-maker will act consistently with its provisions (20).
- A number of statutory measures have been in place, or were recently put in place, to support the enactment of these human rights.

Government initiatives

- In 2012, the Australian Government launched the Living Longer Living Better Aged Care Reform package (21) and the National LGBTI Ageing and Aged Care Strategy (22). Following this, the Aged Care Living Longer Living Better Bill 2013 (23) allowed for expansion of the meaning of 'people with special needs' under

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Section 11.3(h) of the Aged Care Act 1997 to include 'lesbian, gay, bisexual, transgender and intersex people' under the subsequent Allocation Principles 2014 (Section 26(a) and 29).

- The effect of this was that allocation of subsidised places in residential care could be specified for LGBTI peoples to increase their diversity of choice in relation to aged care.

***Note:** From 1 August 2013 it has been unlawful to discriminate against a person on the basis of sexual orientation, gender identity or intersex status under federal law.

- Same-sex couples were also protected from discrimination under the definition of 'marital or relationship status'. The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (24) inserted these new grounds into the Sex Discrimination Act 1984 (25).
- Under this legislation, discrimination occurs when a 'discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation or gender identity, or is not of intersex status'.
- The Aged Care Diversity Framework (26) which identifies the common barriers preventing access to aged care services was released in 2017 as a step towards more inclusive aged care. Together with the LGBTI Aged Care Action Plan, these documents now replace the LGBTI Ageing and Aged Care Strategy.

- Aged care providers need to ensure that LGBTI peoples with dementia, with or without BPSD, are not treated 'less favourably' than those from the general population.

Guardianship legislation

- Since the late 80s and early 90s, LGBTI partners or (in their absence, or the absence of an appointed guardian/health attorney) unpaid carers or friends/relatives with close continuing relationships with the person can lawfully act as proxy decision makers on behalf of a person unable to give consent. This right is embedded within Guardianship and Administration legislation across Australia.
- Specifically, the 'same sex partner' (assuming they are recognised as such) has the same rights as any spouse to act as the Person Responsible or Statutory Health Attorney to give proxy treatment consent on behalf of a partner who is unable to give consent themselves (27).
- While these legislative changes are a significant advance in their own right, their strength relies on awareness raising and dissemination amongst service providers and health care professionals (28) as well as amongst the LGBTI community.

***Note:** Lack of knowledge frequently leads to non-compliance with the law, with adverse consequences for the ageing LGBTI community.

- Education and knowledge translation of these issues are key to LGBTI-inclusivity by supporting the human and legal rights of older LGBTI peoples living with dementia.

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Convention on the Rights of Persons with Disabilities (CRPD) article and description	Clinical example or practical import
<p>Article 12: Equal recognition before the Law</p> <p>States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law, enjoy legal capacity on an equal basis with others in all aspects of life, and respect the rights, will and preferences of the person.</p>	<p>The right of a person who is L, G, B, T or I to choose whom they wish to make decisions on their behalf (including about medical treatment) should they be unable to do so.</p> <p>The right of a person who is L, G, B, T or I to have their will and preferences in regard to carer and family of choice respected by health care providers and health care professionals, particularly at the end of life.</p>
<p>Article 16: Freedom from exploitation, violence and abuse</p>	<p>Staff must be made aware of, and supported in, their responsibility to protect the safety and rights of LGBTI peoples from homophobic or transphobic abuse and bullying, from other residents, clients or patients, some of whom may have dementia.</p>
<p>Article 19: Living independently and being included in the community</p>	<p>The right of a person who is L, G, B, T or I and their carers to have equal access to home supports to maintain independent living, and to have equal access to residential care that meets their needs.</p>
<p>Article 22: Respect for privacy</p>	<p>The right of a person who is L, G, B, T or I to disclose their sexual orientation or gender identity, or intersex status when and how they wish; to have their rights to confidentiality respected when they do disclose; and to have privacy when they choose to engage in sexual activity in residential care.</p>
<p>Article 23: Respect for home and the family</p> <p>States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.</p>	<p>The right of a person who is L, G, B, T or I to have their relationships, sexual and intimacy needs respected, supported and maintained in residential care.</p>
<p>Article 25: Equal Access to Health</p> <p>States parties must provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons.</p>	<p>The right of a person who is L, G, B, T or I to have equal access to person-centred aged care.</p>

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See *Fact sheet 1 – Overview* for details.