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Law Reform Commission of Western Australia  
Level 23 David Malcolm Justice Centre  
28 Barrack Street  
Perth. WA

Dear Commission,

On behalf of GLBTI Rights in Ageing Inc (GRAI), I welcome the opportunity to provide a submission to the review of the Guardianship and Administration Act 1990 (Project 114). Guardianship reform has largely overlooked issues related to sexual orientation and gender identity. Lesbian, gay, bisexual, transgender, and intersex (LGBTI<sup>1</sup>) individuals present a distinct set of needs and concerns due to certain unique demographic characteristics, the evolving nature of LGBTQIA+ civil rights, and the persistent bias and prejudice against these communities.

The Select Committee into Elder Abuse noted that the misuse of Enduring Power of Guardianship has emerged as a prominent theme during its inquiry in 2018. More recently, the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability has observed an increase in the number of guardianship orders, which are not always used as the last resort they are meant to be. It is the opinion of GRAI that seemingly neutral guardianship laws can inadvertently silence LGBTQIA+ identities and place older LGBTI individuals at risk.

GRAI strongly recommends that reforms to the Guardianship and Administration Act incorporate safeguards that explicitly acknowledge the importance of sexual orientation and gender identity. These reforms should expand the definition of 'family' beyond just biological family to include 'chosen family' and ensure guardianship orders are considered only when less restrictive alternatives are unavailable. This may include community and/or family support, incorporating supported decision-making.

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<sup>1</sup> **A note on terminology:** *GRAI uses the initialism LGBTI to refer to older people (50+) of diverse genders, sexualities and sex characteristics, as this reflects their lived experience and recognises that some terms like 'queer' were used as a slur when they were younger.*

*GRAI recognises that the initialism does not capture the full diversity of sexualities, bodies, identities, and experiences that exist within our community, however we also recognise the value of the term LGBTI when exploring collective experiences of stigma, discrimination, and marginalisation, and when advocating for LGBTI rights and inclusivity.*

*GRAI also uses LGBTQIA+/LGBTQ+ when referring to a younger cohort or citing Government documents to align with their terminology*

## Overview

GRAI was established in Perth in 2005 to protect the rights and well-being of older LGBTI people. We are the only community-controlled, peer-led, culturally safe, not-for-profit organisation in Australia working to ensure that older LGBTI people will be safe and welcomed wherever they are.

Older people who identify as LGBTI have faced a lifetime of discrimination, having grown up in an era of criminalisation and systemic discrimination. While the ABS census has never measured how many LGBTQIA+ people live in Australia, the Australian Human Rights Commission<sup>2</sup> estimates that around 11% of the Australian population identifies as LGBTQIA+. Utilising the latest ABS figures for the Western Australian population, this equates to approximately 105,000 LGBTI adults aged 50 or older. This number is expected to grow over the next decade. The 2023 '30-Country Ipsos Global Advisor Survey'<sup>3</sup> supports this estimate, finding that the global average share of the self-identified LGBT+ population is 9%, with Australia specifically at 10%.

## 'Invisibility' of Older LGBTI People

Older LGBTI people face unique challenges as they age. Public perception often views the LGBTQIA+ community as young and affluent, leading public policy efforts to focus on early intervention or treating older LGBTI issues as an 'add-on' to mainstream initiatives, rather than engaging with the specific needs of older LGBTI people.

Discrimination at the intersections of ageism, homophobia, and transphobia has resulted in the invisibility of older LGBTI individuals. They are often excluded from positive media portrayals of LGBTQIA+ communities, which predominantly feature younger individuals. This invisibility extends to service provision, where older LGBTI people are frequently overlooked and excluded, further exacerbating their marginalisation.

## Terminology Used in the Act

Compared to the general population, LGBTQIA+ people are more likely to live alone, be unmarried, not in formal relationships, less likely to have children, and not well connected to their local community. Therefore, there are specific issues and concerns regarding terminology used in the Act for older LGBTI people, especially if the individual 'comes out' or transitions later in life and their biological family opposes the individual's choices.

West Australians now have a more diverse range of views when it comes to defining their family compared to the late 1980s when the Guardianship Act was drafted. The concept of 'family' in Australia now clearly extends beyond biological family members, with more people creating 'chosen families' that include love and unconditional support with non-biological kin and/or those

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<sup>2</sup> Australian Human Rights Commission, 2014.

<sup>3</sup> Ipsos | LGBT+ Pride Study 2023 Global Survey.

not recognised as family by law<sup>4</sup>. According to new research by the Australian Institute of Family Studies (AIFS)<sup>5</sup>, a survey of almost 6,000 people revealed that 41% of Australians consider close friends or ‘chosen family’ to be part of their family. LGBTQ+ people were almost twice as likely to rate blood or genetics as not important at all in defining a family compared to others (32% vs 17%). The study also revealed that Aboriginal and/or Torres Strait Islander people were much more likely to nominate chosen family or close friends as important compared to non-Indigenous Australians (62% vs 42%).

LGBTI individuals often rely on ‘chosen family’ for friendship and support. This reflects the fact that many LGBTI individuals, especially older individuals, are estranged from their family of origin due to homophobia and transphobia. Although ‘chosen family’ structures represent a creative way to form relationships and community, they also have major drawbacks. Chosen family members are not generally recognised as next of kin under the law and, therefore, have no legal standing in terms of decision-making authority.

The current terminology in the Act includes statutory preferences for biological family to be legally recognised as next of kin. This can empower hostile family members to isolate and attempt to ‘cure’ LGBTQIA+ individuals. GRAI is of the view that the definition of family should be widened to include individuals the person identifies as family (chosen family), long-term relationships, polyamorous and friends who cohabit. It could be simply stated that ‘family is who the person says is their family.’ This is crucial for older LGBTI individuals where relationships with their family of origin have broken down.

## **Statutory Principles**

Respect for an individual’s sexual orientation and gender identity is essential to the concepts of dignity and self-determination that have served as the guiding principles of guardianship. Part 2 of the Act refers to Principles to be observed by the State Administrative Tribunal, which essentially seek to act in ‘the best interests of any represented person.’ However, how can the ‘best interests’ of a person be determined when there are currently no safeguards explicitly respecting sexual orientation and gender identity within the guardianship statutory framework?

The concept of ‘best interests’ is inherently vague and can be interpreted in ways that may not align with the unique needs and diverse experiences of older LGBTI individuals. Research has shown that the subjective nature of ‘best interests’ provisions can lead to inconsistent and potentially discriminatory outcomes for vulnerable groups, including the LGBTQIA+ community. For example, a study by the National Resource Center on LGBT Aging<sup>6</sup> found that older LGBTI individuals often face bias and misunderstandings from caregivers and legal representatives, which can adversely affect their care and decision-making processes.

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<sup>4</sup> Weeks, J., Heaphy, B., & Donovan, C. (2001). *Same sex intimacies: Families of choice and other life experiments*. London: Routledge

<sup>5</sup> Budinski, M., & Gahan, L. (2023). *What is family?: Australian views on what makes a family*. Melbourne: Australian Institute of Family Studies

<sup>6</sup> National Resource Center on LGBT Aging. (2017). "LGBT Older Adults in Long-Term Care Facilities: Stories from the Field."

In the context of guardianship, the lack of explicit safeguards for sexual orientation and gender identity means that decisions made under the guise of 'best interests' may unintentionally perpetuate harm. This is particularly concerning given the historical and ongoing discrimination faced by LGBTI individuals. The Australian Human Rights Commission has highlighted the importance of recognising and protecting the rights of LGBTI people within legal frameworks to prevent further marginalisation and ensure equitable treatment.<sup>7</sup>

To address these concerns, it is crucial to amend the statutory principles to include explicit references to respecting and considering an individual's sexual orientation and gender identity. This would ensure that the 'best interests' of LGBTI individuals are interpreted in a manner that honours their unique experiences and needs, promoting true self-determination and dignity.

Furthermore, incorporating these explicit safeguards would align with international best practices. The Yogyakarta Principles<sup>8</sup>, a set of international principles on the application of international human rights law in relation to sexual orientation and gender identity, advocate for the protection of LGBTQIA+ rights within all areas of public life, including legal and guardianship frameworks.

Adopting such measures within the Guardianship Act would not only enhance protections for older LGBTI individuals but also signal a commitment to upholding their human rights in line with global standards.

### **Guardians and Administrators in Estranged Biological Families**

Older LGBTI individuals are twice as likely to be single more likely to be single and estranged from their family of origin than their non-LGBT peers. They are four times less likely to have children<sup>9</sup>. Government institutions must understand the unique risk factors this demographic faces, including increased risk of social isolation, diverse relationship structures, potential family conflict between biological families and LGBTQIA+ 'chosen family', and institutional avoidance due to systemic discrimination.

However, chosen family networks are at a significant disadvantage when it comes to caregiving in later life because they tend to be comprised of individuals who are in the same age cohort, whereas guardians and administrators typically assume a multi-generational support system.

GRAI has observed alarming trends where older LGBTI adults are coerced into financial decisions against their will. In several cases, individuals have been threatened by biological family members or caregivers with abandonment or withdrawal of support unless they relinquish control over their finances. This form of abuse is not just a betrayal of trust but a clear manipulation leveraging the fear of isolation and loneliness that many older LGBTI adults face.

Abuse is also rooted in the fact that LGBTI relationships in the past had to make informal arrangements due to a lack of recognition by government, banks and other institutions. Financial,

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<sup>7</sup>Australian Human Rights Commission. (2015). "Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights."

<sup>8</sup> International Commission of Jurists. (2007). "Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity."

<sup>9</sup> SAGE & National Resource Center on LGBT Aging (2021), Facts on LGBT Aging

social, and emotional abuse are present in cases of forced separation of intimate partners when one person in the couple loses capacity and becomes subject to guardianship and administrator decisions by their biological relatives (e.g., siblings or adult children). Long-term partners or other significant people like families of choice may then be refused permission to see their loved one. They may not be able to access their partner's retirement or pension benefits, contributing to economic insecurity for LGBTI individuals.

This kind of situation may result in the forced sale of a previously cohabited property to support entry into residential aged care. While this scenario is also commonly reported with reference to straight couples in blended families or later marriages, participants report that lifelong discrimination and family shame can exacerbate these experiences for older people in same-sex relationships.

### **Lack of Research into Guardianship Abuse of Older LGBTI People**

The invisibility of older LGBTI people in research is glaringly evident in the scarcity of Australian studies addressing the abuse they experience and the limited knowledge of appropriate service provision. As these communities age, they encounter compounded disadvantages due to belonging to multiple marginalised groups. Subgroups within the older LGBTI population, such as bisexual, transgender, intersex individuals, and those at the intersection of other identities (e.g., older First Nations Brotherboy and Sistergirl individuals, and rainbow migrants), are critically understudied. The limited existing research fails to conclusively address the impacts of intersectional discrimination. There is a pressing need for age-specific analysis to develop targeted interventions that effectively address the unique challenges faced by these subgroups. Without this research, we will continue to fall short in safeguarding the well-being and dignity of older LGBTI people.

Research specific to Western Australia is particularly scarce. Historically, WA has often been an 'add-on' to broader studies conducted primarily in the eastern states. This peripheral inclusion results in a lack of detailed, region-specific data that is crucial for addressing the unique challenges faced by older LGBTI individuals in WA. Given the distinct socio-cultural and legal landscape of WA, securing funding for dedicated, local research is essential to fully understand and address the localised issues within guardianship systems.

To develop effective guardianship laws and policies that truly reflect the challenges faced by older LGBTI individuals and protect them, it is crucial to provide funding for dedicated, local research. This funding should support studies that explore the prevalence and nature of guardianship abuse, identify the unique needs of older LGBTI individuals, and develop evidence-based recommendations for reform. Without such targeted research, the guardianship system in WA will continue to fail in adequately safeguarding one of its most vulnerable populations.

### **Supported Decision-Making**

The Attorney General of Western Australia has noted that alternatives to the appointment of substituted decision-makers should be used when possible. Additionally, the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability has stated: 'Supported decision-making should be embedded in guardianship and administration law and practice, and other systems over time, to ensure substitute decision-making only happens as a last resort and in

the least restrictive manner.’ The Committee into Elder Abuse has noted that incorporating supported decision-making into the guardianship model would be a way for the State Administrative Tribunal to meet the needs of an adult who cannot make decisions for themselves, in the least restrictive way possible.

The Australian Government Attorney General’s Department has noted that ‘a number of Australian and international jurisdictions and organisations have started to move away from substitute decision-making toward supported decision-making’. Despite this, the substituted decision-making system remains in place in Western Australia, where abuses continue to occur.

The current system of substituted decision-making via guardianship orders can limit the autonomy of older LGBTI people and may not reflect their personal desires, preferences, or relationships. The following example was provided by a member of GRAI with regards to abuse within the current substituted decision-making framework.

*As a social worker and a cis gay man, I’ve often worked with the public advocate and the public trustee to support the vulnerable members of our community.*

*The current system for appointing enduring guardians and enduring power of attorney is fraught and dangerous. The lack of checks and balances in this process exposes all members of the WA community to the risk of adult abuse. These challenges are compounded for the intersectional challenges faced by elder LGBTI people who are more lonely, have less social connections and become reliant on non- family member.*

*The system in WA set up where pharmacists and people without an understanding of a vulnerable person’s capacity are at times coerced into witnessing enduring powers of guardianship or enduring powers of attorney. The system creates the abuse. The lack of an accountable process means that further work needs to be done at the State Administrative Tribunals. Please consider adopting processes like in NSW where there needs to be an appointment to agree to the process.*

## **Transgender-specific concerns**

The Act currently does not specifically address the needs of transgender people. This can place older transgender individuals at risk, particularly in situations where their gender identity is not recognised or respected by their family or guardians.

Older transgender adults face severe and systemic challenges, including pervasive discrimination in accessing healthcare, social services, and legal recognition of their gender identity. Guardianship orders that fail to explicitly affirm and protect transgender individuals’ gender identities can compel them to live in a gender that does not align with their true selves. This forced misgendering exacerbates mental health crises and deepens social isolation.

Moreover, the vulnerability of transgender individuals to discrimination and abuse by health professionals is alarmingly high. This risk is particularly acute for older transgender adults, who often require more frequent and intimate healthcare due to age-related conditions and disabilities<sup>10</sup>. Without explicit protections, these individuals remain at significant risk of mistreatment and neglect.

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<sup>10</sup> Cook-Daniels, L. (2006). *Trans Aging. Lesbian, Gay, Bisexual and Transgender Aging: Research and Clinical Perspectives*. New York: Columbia University Press.

Anecdotal reports indicate that transgender individuals in aged care facilities are routinely called by the wrong name, and forced by biological family members to wear gender inappropriate clothes

GRAI advocates for guardianship reforms to include specific provisions that protect the rights of transgender individuals, including the recognition of their gender identity in all legal and medical decisions.

### **Effectiveness of Existing Legislation**

Current legislation does not sufficiently protect older LGBTI individuals from abuse in guardianship scenarios. The existing legal and regulatory frameworks often fail to consider the intersectionality of ageism, homophobia, and transphobia, resulting in inadequate protection and support for older LGBTI people.

The current legislative framework does not adequately consider the compounded effects of ageism, homophobia, and transphobia. Older LGBTI individuals often face multiple forms of discrimination simultaneously, which can exacerbate their vulnerability under guardianship.

Despite the absence of broad-based research findings, growing anecdotal evidence highlights numerous structural gaps and blind spots in the guardianship systems that place older LGBTI individuals at significant risk. The following example is provided from a member of GRAI which highlights problems within the existing legislation

*I am a gay man who is currently becoming a guardian for my older lesbian friend. She has children, however they are estranged. She remains cognisant that her memory is fading. She has shared her biggest fear is her children taking her money and not giving her the care that she wants. There is a long history of her children being abusive. The bravery and effort to have a quality life separated from her children has given her some peace.*

*As my friend's cognition deteriorates, she is becoming more reliant on others, at the same time her abusive children are beginning to reach out. There will be a time where my friend's life will hang in the balance or in hospital while her children use the lengthy process in SAT to attempt to take control of my friends life. The efforts we are currently making to document years of estrangement (including recounting years of abuse and hostility) are traumatic. We are aiming to put in place guardianship, but we know hospitals don't ask or read that information. We know the banks won't be helpful and ask for more information.*

*It's exhausting.*

### **Funding and Operation of Advisory Bodies**

The lack of understanding by mainstream bodies about of the nuanced needs of older LGBTI individuals is evident. Funding must be available to peer-led and peer-controlled organisations to influence policy and practice, ensuring that the needs of older LGBTI people are considered in all aspects of financial regulation and consumer protection.

Existing LGBTQIA+ organisations are stretched thin and cannot tackle these issues alongside the urgent need for LGBTI service delivery.

## Key Issues and Recommendations

These recommendations aim to create a more inclusive and protective guardianship system that respects and upholds the rights and dignity of older LGBTI individuals.

### 1. Terminology Used in the Act

- **Recommendation:** GRAI strongly advocates for expanding the definition of 'family' to include 'chosen family' members—those whom the individual identifies as family. This change would ensure that all significant relationships, particularly for LGBTI individuals, are legally recognised.

### 2. Statutory Principles

- **Recommendation:** Amend the statutory principles to explicitly include respect for an individual's sexual orientation and gender identity, ensuring decisions are made with full consideration of these factors to uphold the dignity and self-determination of LGBTI individuals. This should include a focus on the intersectionality of ageism, homophobia, and transphobia.

### 3. Accountability Mechanisms

- **Recommendation:** Establish robust accountability mechanisms to ensure that guardianship decisions are made transparently and with appropriate oversight. This includes regular audits, the possibility of independent reviews, and mechanisms for reporting and addressing abuses of power.
- **Recommendation:** Enhance the role of the Public Advocate to include specific responsibilities for protecting the rights of LGBTQIA+ individuals.

### 4. Research Funding

- **Recommendation:** Allocate funds specifically for research on guardianship abuse affecting older LGBTI individuals in Western Australia. This research should focus on the prevalence, nature, and impacts of such abuse, especially for subgroups like bisexual, transgender, intersex individuals, and those with intersecting identities.

### 5. Supported Decision-Making

- **Recommendation:** Embed supported decision-making practices in guardianship and administration law to ensure substitute decision-making occurs only as a last resort and in the least restrictive manner. Follow best practices from other Australian and international jurisdictions that have moved towards supported decision-making.

### 6. Transgender Protections

- **Recommendation:** Reform guardianship laws to explicitly protect transgender individuals' rights, including the recognition of their gender identity in all legal and medical decisions. This includes prohibiting forced misgendering and ensuring that all interactions respect the individual's affirmed gender identity.



## 7. Culturally Appropriate Training and Awareness

- **Recommendation:** Implement mandatory LGBTI training for all professionals involved in guardianship processes, including healthcare providers, legal professionals, and tribunal members. This training should cover the specific needs and rights of older LGBTI individuals, with a focus on preventing discrimination and abuse. This should include Rainbow Tick accreditation for the SAT to prevent abuse and ensure fair representation of LGBTQIA+ individuals.

## 8. Public Awareness Campaigns

- **Recommendation:** The government should engage peer support programs led by LGBTI-controlled organisations to develop specific public awareness campaigns to highlight guardianship options to older LGBTI individuals, aiming to reduce stigma and encourage engagement.
- **Recommendation:** The government should also educate the broader community about the unique challenges faced by older LGBTI people in guardianship scenarios. This includes promoting the importance of respecting and affirming gender identity and sexual orientation in all care and legal decisions.

## 9. Advisory Bodies and Peer-Led Organisations

- Provide funding and support to peer-led and peer-controlled LGBTI organisations to allow them to support older LGBTI people who are engaging in the guardianship process. This includes ensuring that these organisations can participate in advisory capacities to mainstream bodies, enhancing their understanding and response to the needs of older LGBTI individuals.

## Conclusion

It is crucial to understand that older LGBTI individuals should not be seen as victims, as their lives have demonstrated incredible resilience in the face of adversity. They have been at the forefront of activism and change within the LGBTQIA+ community.

GRAI is committed to working with the Law Reform Commission of Western Australia to ensure the Guardianship and Administration Act 1990 is reformed in a way that recognises and protects the rights of older LGBTI people.

By implementing the recommendations outlined above, we can ensure that older LGBTI individuals are protected and supported, allowing them to live their later years with dignity, security and authenticity. Without these safeguards, older LGBTI individuals remain at risk of discrimination, abuse, and neglect within the guardianship system.

Yours sincerely,



David Gibson  
Chair, GRAI