

# The Risks to LGBT Elders in Nursing Homes and Assisted Living Facilities and Possible Solutions

David Henry Wolfenson\*

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## I. INTRODUCTION

The LGBT community has made many recent advances in obtaining legal protections and equal civil rights.<sup>1</sup> However, one segment of the LGBT community has been left behind: the elderly. Scholars argue that the LGBT movement has overlooked and ignored elderly members of the community and instead focused on the three “signature issues of the contemporary movement for LGBT equality”: employment non-discrimination, Don’t Ask, Don’t Tell, and marriage equality.<sup>2</sup> For many years, few LGBT organizations prioritized issues relating to LGBT seniors.<sup>3</sup> Only recently have organizations like the Human Rights Campaign and the National Gay and Lesbian Task Force included matters of age amongst their action issues.<sup>4</sup>

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\* © 2017 David Henry Wolfenson. Senior Articles Editor, Volume 26, *Tulane Journal of Law and Sexuality*. J.D. 2017, Tulane University Law School; B.A. 2011, Political Science, Clark University. The author would like to thank his family and friends for their unyielding support, and the members of the *Journal* for their dedication, patience, and kindness.

1. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *The Repeal of “Don’t Ask, Don’t Tell,”* HRC.ORG, <http://www.hrc.org/resources/the-repeal-of-dont-ask-dont-tell> (last visited Mar. 30, 2016).

2. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 5 (Winter, 2009).

3. *Id.* at 31.

4. *Id.*

However, this lack of attention has not meant a lack of a problem. LGBT seniors increasingly find themselves in nursing homes and assisted living facilities<sup>5</sup> without adequate protections.<sup>6</sup> Many LGBT seniors, their families, and social workers are concerned about discrimination, isolation, and depression faced by the elderly LGBT community in these facilities.<sup>7</sup> Part II of this Comment discusses threats to the LGBT elderly in nursing homes. Part III focuses on existing statutory protections. Part IV discusses avenues for reform.

## II. THE PROBLEM

LGBT seniors in nursing homes are subject to a variety of threats to their health and well-being. These threats include discrimination, neglect,<sup>8</sup> abuse by staff, and isolation from other residents.<sup>9</sup> A study of treatment of LGBT seniors in long-term care facilities documented the concerns of LGBT seniors, their family members, and service providers.<sup>10</sup> The majority of the LGBT respondents believed staff and other residents would discriminate against an LGBT senior.<sup>11</sup> Moreover, 78% of the LGBT older adult respondents did not believe LGBT older adults could be open with facility staff.<sup>12</sup> Furthermore, 247 of the 289 service providers surveyed felt LGBT seniors were not safe coming out in long-term care facilities.<sup>13</sup>

One of the most frequent issues encountered by LGBT elders in nursing homes is harassment, either physical or verbal, from other residents.<sup>14</sup> Unfortunately, this is not particularly surprising. Many seniors today came of age when homosexuality was considered a mental illness.<sup>15</sup> Tellingly, non-LGBT elders exhibit a higher incidence of

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5. Nursing homes and assisted living facilities, while similar, are different with respect to the treatment and services offered. The legal distinction between the two is discussed in Part III. This Comment generally uses the terms “nursing home” and “homes” to mean both, unless the distinction is relevant.

6. Nat’l Senior Citizens L. Ctr., *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*, JUST. AGING (2010, updated 2015), <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf>.

7. *Id.*

8. Jamie E. Hovey, *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 *ELDER L.J.* 95, 108 (2009).

9. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 9.

10. *Id.*

11. *Id.* at 6.

12. *Id.*

13. *Id.*

14. *Id.* at 10.

15. Knauer, *supra* note 2, at 38.

homophobia as compared to the general population.<sup>16</sup> LGBT seniors are subject to “offhand comments about gays and fags.”<sup>17</sup> Gay couples in nursing homes receive questions from other residents such as, “[w]hich one is the man and which one is the woman?”<sup>18</sup> One lesbian at a Chicago rehabilitation center was faced, on the first day, with a roommate who yelled “[g]et the man out of here!”<sup>19</sup>

LGBT seniors are also tremendously concerned about discrimination by the staff of nursing homes.<sup>20</sup> A majority of respondents to the survey believed that discrimination by staff was the most common issue likely to be faced by an LGBT resident.<sup>21</sup> One survey of nursing home social workers revealed that these employees considered more than half of their coworkers “either intolerant of homosexuality . . . or openly negative and condemnatory.”<sup>22</sup> Staffs at various nursing homes have discriminated against LGBT residents in a variety of fashions. Sometimes, staff may refuse to provide LGBT residents with care equal to other residents.<sup>23</sup> Refusal to touch LGBT residents has led to multiple such occasions, where staff members fail to provide basic care, including “bathing, toileting, and feeding[.]”<sup>24</sup> Other LGBT elders have been blackmailed into not reporting negligent care because of threats by staff to “out” them to other residents.<sup>25</sup> Discrimination by staff may take on different forms for transgender residents, including the refusal to refer to transgender residents by their preferred name and/or pronoun.<sup>26</sup> Several elderly LGBT respondents reported that staff “prayed over” them or told them hell would await them because of their sexual orientation or gender identity.<sup>27</sup>

LGBT seniors also have difficulties expressing their sexuality while residing in nursing homes. Studies have reported homes banning the admission of same-sex partners.<sup>28</sup> LGBT residents also may have

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16. *Id.*

17. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 10.

18. *Id.*

19. Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES (Oct. 9, 2007), [www.nytimes.com/2007/10/09/us/09aged.html](http://www.nytimes.com/2007/10/09/us/09aged.html).

20. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 8.

21. *Id.*

22. Hovey, *supra* note 8, at 109.

23. *Id.* at 110.

24. Nancy J. Knauer, *Gen Silent: Advocating for LGBT Elders*, 19 ELDER L.J. 289, 320 (2012).

25. Hovey, *supra* note 8, at 110.

26. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 13-14.

27. *Id.* at 11.

28. Hovey, *supra* note 8, at 110.

difficulty convincing their home to provide space for conjugal visits.<sup>29</sup> Moreover, LGBT seniors who do engage in sexual activity have been subjected to separation and transfer.<sup>30</sup>

As a result of discrimination (or the threat of discrimination) received in nursing homes, many LGBT elders experience isolation, depression, and re-closeting. One elderly lesbian, legally named Hazel, preferred to be called “Rusty” and had been her entire adult life.<sup>31</sup> However, the staff refused to call her “Rusty,” and she experienced isolation because the staff and other residents rarely interacted or conversed with her.<sup>32</sup> An anonymous survey respondent noted that a transgender resident was prevented from eating, speaking, or participating in recreational activities with other residents.<sup>33</sup>

One woman at an assisted-living facility in Santa Fe, New Mexico, reported feeling like a “pariah” once she told others that she was gay.<sup>34</sup> She was “no longer included in conversation or welcome at meals,” so she eventually moved to a facility catering to the LGBT community.<sup>35</sup> The woman described her decision to move as a “choice between life and death.”<sup>36</sup> Unfortunately, not everyone has the ability to move. In fact, without financial resources or a strong support system, LGBT elders may be “trapped in situations where they face bullying and harassment on a daily basis.”<sup>37</sup>

Further isolation may occur for LGBT residents because they are subject to discriminatory transfers. Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, notes that in order to placate other residents, moving gay residents is common.<sup>38</sup> More upsetting, many LGBT elders are moved to places they have no reason to be, like psychiatric wards.<sup>39</sup> One couple, Harold and Clay, were enjoying retired life together when Harold fell and his injuries necessitated calling 911.<sup>40</sup> Suspecting domestic violence, the County separated the couple

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29. *Id.*

30. *Id.* (recalling a story of how when two elderly men were found having oral sex, the men were separated and one was transferred to a psychiatric ward).

31. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 14.

32. *Id.*

33. *Id.*

34. Gross, *supra* note 19.

35. *Id.*

36. *Id.*

37. Knauer, *supra* note 24, at 321.

38. Gross, *supra* note 19.

39. *Id.*

40. Knauer, *supra* note 24, at 311.

and placed Clay “in a secure facility for individuals suffering from dementia without the necessary medical screening.”<sup>41</sup>

Another story is a particularly tragic example of the dire consequences of isolation and depression. An openly gay 79-year-old man, without any family or friends, was moved off his floor “to quiet the protests of other residents and their families.”<sup>42</sup> The home moved him to a room among patients with physical and mental health issues, including dementia.<sup>43</sup> The man hung himself before a better solution was found.<sup>44</sup> While suicide is not the outcome of every instance of isolation or depression, the threat of suicide and the lack of support for LGBT residents in nursing homes cannot be ignored.

Isolation and depression frequently also lead to LGBT residents “re-closeting” themselves. Many LGBT elders came of age in a time when homosexuality was even more stigmatized than today, and many describe the closet as a means of survival.<sup>45</sup> Even if they have lived openly, when faced with possibility of bias and discrimination, many LGBT elders retreat to the closet.<sup>46</sup> Unfortunately, returning to the closet is “a faster pathway to depression, failure to thrive and even premature death.”<sup>47</sup> When retreating to the closet, LGBT elders often hide parts of their past that may provide clues to their true identities.<sup>48</sup> This may involve creating an alternate set of memories to share with others or hiding important details of their lives.<sup>49</sup> In nursing homes, “the pressure to edit is particularly acute.”<sup>50</sup> The isolation of the closet “can literally leave LGBT elders alone with their memories.”<sup>51</sup> Without support of facilities and their employees, LGBT seniors may continue to suffer.

### III. LEGAL CONSIDERATIONS AND SOLUTIONS

A variety of state and federal laws affect elder-care facilities and their residents. The law clearly distinguishes between nursing homes and other facilities, including assisted living facilities. Nursing home residents are protected by federal statute.<sup>52</sup> Assisted living standards are

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41. *Id.*

42. Gross, *supra* note 19.

43. *Id.*

44. *Id.*

45. Knauer, *supra* note 24, at 312.

46. *Id.* at 315.

47. Gross, *supra* note 19 (internal citations omitted).

48. Knauer, *supra* note 2, at 28.

49. *Id.*

50. *Id.*

51. Knauer, *supra* note 24, at 315.

52. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 21.

set state-by-state.<sup>53</sup> Part III describes each in turn, along with a California statute that should become a model for the other states.

#### A. Federal Law

The federal Nursing Home Reform Act (NHRA)<sup>54</sup> creates a “minimum set of standards of care and rights” for nursing home residents in federally certified homes.<sup>55</sup> The NHRA requires nursing homes to “provide services and activities to attain or maintain the highest practicable physical, mental, and psychological well-being of each resident.”<sup>56</sup> The NHRA also affirms the rights of residents “to be free from physical or mental abuse” or “involuntary seclusion.”<sup>57</sup> Furthermore, federal regulation requires residents in long-term care facilities be treated with “dignity” and “respect in full recognition of his or her individuality.”<sup>58</sup> Residents also have the right to make lifestyle and healthcare decisions “consistent with his or her interests.”<sup>59</sup>

The federal Fair Housing Act (FHA) also prohibits discrimination based on sex.<sup>60</sup> The Department of Housing and Urban Development, which administers the FHA, has found “discrimination against a resident or applicant because he or she is transgender or fails to conform to gender stereotypes may violate the FHA.”<sup>61</sup>

#### B. State Law

The states govern standards for assisted living facilities; therefore, these laws vary in terms of their protections. State statutes “generally include a resident’s right to self-determination and dignity.”<sup>62</sup> Additionally, these statutes often obligate facilities to provide care in accordance with a legally obligated assessment of a resident’s condition.<sup>63</sup> However, unlike federal protections, state laws vary with respect to the

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53. *Id.* at 24.

54. 42 U.S.C. § 1369r (2011).

55. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 21.

56. 42 U.S.C. § 1369r (b)(2) (2011).

57. 42 U.S.C. § 1369r (c)(1)(A)(ii).

58. 42 C.F.R. § 483.15(a).

59. 42 C.F.R. § 483.15(b)(1).

60. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 21.

61. *Id.* (citing Press Release, HUD Issues Guidance on LGBT Housing Discrimination Complaints, HUD.GOV (July 1, 2010), [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-139](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-139)).

62. Nat’l Senior Citizens L. Ctr., *supra* note 6, at 24.

63. *Id.*

“allowed justifications for eviction” of residents, and may contain more ambiguous language about residents’ rights to appeal.<sup>64</sup>

### C. *Handling Complaints*

Under both federal and state law, the process to file complaints is fairly similar. For example, under federal law, when a person encounters discrimination under the FHA, “the resident may obtain relief by making a complaint with HUD.”<sup>65</sup> If a resident suffers a violation of state anti-discrimination law, they can seek relief by “making a complaint . . . with the relevant state anti-discrimination agency.”<sup>66</sup> The state agency may have the authority to “fine or otherwise punish an offending assisted living facility.”<sup>67</sup> At the least, the agency will “require the facility to correct the situation.”<sup>68</sup> It is unclear, however, what correction the law requires. It is also unclear how the damage already done will continue to impact the well-being of the affected resident.

### D. *California’s SB-1279*

Currently only California requires cultural competency training with respect to issues of sex and gender, ever since SB 1729 became law in 2009.<sup>69</sup> The legislature recognized that the education requirements for nurses and physicians do not include training in sexual orientation or gender identity.<sup>70</sup> Further, the legislature acknowledged that the marginalization of LGBT seniors places them “at high risk for isolation, poverty, homelessness, and premature institutionalization.”<sup>71</sup> Appreciating the lifelong social, financial, and health-related struggles faced by a great many LGBT seniors, the legislature recognized the obligation of the state to “ensure the needs of LGBT seniors . . . can be adequately addressed by the staff at senior care facilities.”<sup>72</sup>

California law now requires all “registered nurses, certified nurse assistants, licensed vocational nurses, and physicians working in skilled nursing facilities . . . or congregate living health facilities . . . [to] participate in a training program.”<sup>73</sup> The focus of the training is

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64. *Id.*

65. *Id.* at 25.

66. *Id.*

67. *Id.*

68. *Id.*

69. Cal. SB 1729 (2008).

70. Cal. SB 1729 (1)(a) (2008).

71. Cal. SB 1729 (1)(c) (2008).

72. Cal. SB 1729 (1)(h) (2008).

73. CAL. HEALTH & SAFETY CODE § 1257.5(a) (2009).

“preventing and eliminating discrimination based on sexual orientation and gender identity.”<sup>74</sup>

#### IV. AVENUES FOR REFORM

Reforms for the benefit of LGBT seniors could take many forms. However, legislative solutions may not be the best answer because protections must be quickly implemented. Rather, nursing homes should adopt mandatory cultural competency training with respect to LGBT issues, and should also institute policies prohibiting discrimination amongst their residents. With these protections in place, states should mandate that all elder-care facilities require staff be trained in sexual orientation and gender identity competency.

Multiple organizations have advocated for elder-care facilities to require cultural competency training.<sup>75</sup> Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) has encouraged facilities to develop non-discrimination statements and insists upon cultural awareness and sensitivity training.<sup>76</sup> Many LGBT elders fear possible discrimination from medical professionals.<sup>77</sup> If they knew that those responsible for their care had been adequately trained, perhaps they would have less reason to worry. Moreover, policies addressing LGBT discrimination may “provide a strong signal of inclusion and acceptance.”<sup>78</sup> Facilities should also communicate with their residents and encourage them to “rethink traditional conceptions of family to include LGBT couples” which may help prevent discriminatory acts before they occur.<sup>79</sup>

Instituting these policies may prove difficult, however, due to resistance from nursing homes. Many homes do not have sexual orientation and gender identity non-discrimination policies, and when asked during a survey about such policies, many were hostile.<sup>80</sup> However, the need for facility staffs to be trained is of the utmost importance, especially when one-half of nursing home social workers report that over half of their coworkers are either “intolerant of

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74. CAL. HEALTH & SAFETY CODE § 1257.5(a) (2009).

75. Hovey, *supra* note 8, at 112.

76. *Id.*

77. Knauer, *supra* note 2, at 38 (citing a 2006 study of LGBT Baby Boomers in which 19% of respondents said they had “little or no confidence that medical personnel [would] treat them with dignity and respect”).

78. *Id.* at 39.

79. Hovey, *supra* note 8, at 112-13.

80. *Id.* at 108-09.

homosexuality among the residents” or “openly negative and condemnatory.”<sup>81</sup>

A legislative solution should look like California’s SB 1729. Any facility that provides care to seniors should be required by law to mandate sexual orientation and gender identity competency training for their staff. Legislation may prove difficult also. Bills introduced to protect LGBT people—regardless of age—often face opposition.<sup>82</sup> Further, states vary widely with respect to the protections they currently offer the LGBT community.<sup>83</sup> For example, while some states offer broad protections for LGBT persons, Mississippi offers no employment, public accommodation, or hate crime protections.<sup>84</sup> Adopting protections for LGBT elders will prove challenging in Mississippi and many states like it, where the entire LGBT community is vulnerable. Thus, federal action may be required. If Congress gets involved, it should adopt language similar to the California statute.

#### V. CONCLUSION

LGBT seniors have been overlooked in many respects, and remain woefully unprotected. Upon entering a nursing home or assisted living facility, they are at risk of blatant discrimination, isolation, and depression. They are confronted with outdated attitudes by both staff and other residents. And those without the ability to leave for more welcoming accommodations are at the mercy of people who do not have their best interests in mind.

While there are both state and federal anti-discrimination laws in place, none are strong enough to make seniors confident in the level of care and protection they will receive. Legislatures must remedy this situation. Nursing homes have an obligation to institute training practices for the safety and well-being of some of their most vulnerable residents. If nursing homes are unwilling to adopt these policies themselves, the states must mandate competency training and, if they are unwilling to do so, the federal government must take the lead.

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81. *Id.* at 109.

82. *Id.* at 102.

83. *State Maps of Laws & Policies*, HRC.ORG, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Mar. 30, 2016).

84. *Id.*