

RUSSELL KENNEDY PRESENTS AT INTERNATIONAL AGEING CONFERENCE

Michael Gorton AM presented at the International Federation on Ageing Conference in May 2010 at the Melbourne Convention Centre. Michael's presentation reflected on legal obligations for cultural diversity for aged care services. (Michael is also a Board Member of the Victorian Equal Opportunity and Human Rights Commission, and a Director of National Ageing Research Institute). He was interviewed by SBS Broadcasting on this topic.

The following is an edited version of the presentation:

CULTURAL DIVERSITY IN AGED CARE: HUMAN RIGHTS & LEGAL OBLIGATIONS



Providers of aged care services should be aware of issues regarding cultural diversity and risk management.

Firstly, service providers must be aware of their legal obligations under anti-discrimination legislation.

Secondly, service providers will wish to provide "best practice" standards of care. This will include issues concerning communication (particularly to those of a non-English speaking background) and the provision of culturally appropriate services, dealing with issues of culture, religion, beliefs, etc.

LEGAL OBLIGATIONS

Liability for discrimination primarily rests with the person who discriminates. However, service providers will also be liable for the actions of their employees or agents (who could be contractors) who discriminate.

It is unlawful to treat people unfairly or unfavourably on the basis of the following characteristics:

- age
- impairment or disability
- sexuality
- gender, pregnancy, marital status
- political belief or activity, industrial belief or activity
- race, nationality, religious belief or activity
- physical features
- and other attributes covered by the EO Act.

Anti-discrimination legislation also contains a number of exceptions to these requirements. For example, a person can discriminate in determining who should be offered employment in relation to the provision of domestic or personal services in the employer's home. An employer can set and enforce reasonable standard of dress, behaviour and appearance in the work place. An organisation can discriminate

on the basis of disability or impairment if the costs or circumstances for providing any special requirements or special measures to deal with the disability or impairment are unreasonable or impose an unreasonable burden.

It is also unlawful to sexually harass a person.

Unfair treatment is prohibited in the following areas applicable to the providers of aged care services:

- employment related areas
- provision of goods and services
- accommodation
- "non-private" clubs and associations

Service providers must understand their obligations under equal opportunity and anti-discrimination laws, and the possibility of both direct and indirect (unintended) discrimination. Michael Gorton AM, a partner at Russell Kennedy Solicitors, warns that many operators and facilities could unintentionally breach these obligations. He says that it is a common misconception that aged care providers can choose to refuse services to potential clients who require culturally appropriate services. It may be unlawful to refuse to provide services to people who speak a language other than English, or require particular services to be delivered in accordance with religious or cultural requirements.

Mr Gorton warns that "just one complaint at the Equal Opportunity Commission can cost an organisation \$25,000 in direct and indirect costs ... before it gets to Court". Rather than wait for a breach or for legal action to occur, he suggests that service providers have a pro-active compliance culture to educate staff and implement culturally appropriate policies and procedures.

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Aged care legislation also includes quite specific provisions to prevent discriminatory practices in relation to regulated aged care services and aged care facilities.

RISK MANAGEMENT

Facilities face many risks, not just legal. Organisations and service providers face risks of a legal, financial and business environment nature. By addressing cultural diversity at all levels of service design and delivery, facilities ensure the health and well being of their clients, and reduce these risks.

Service providers should move towards a governance culture, in order to ensure that risks are minimised. This involves:

- an organisational culture which is open to discussion and criticism
- staff with knowledge of the beliefs and values of the organisation and aware of its policies
- system design that recognises and addresses risks and implements the beliefs and values of the organisation
- resources are allocated to support these governance measures
- management professes and demonstrates these values.

A risk management approach requires organisations to consider:

- 1 Reviewing levels of delegation and responsibility, to ensure that appropriate people in the organisation have a clear understanding of their roles, objectives and duties.
- 2 The organisation has a system of accountability and reporting – to ensure that urgent issues are raised through appropriate channels so that regular reporting occurs through appropriate lines of management.
- 3 Appropriate policies and procedures are in place – demonstrating both a commitment and implementation of good practice in relation to discrimination and equal opportunity.
- 4 Appropriate education and training of all relevant staff – it is not sufficient to merely have appropriate policies, staff must be properly trained and educated in these issues.
- 5 A system of notice requirements, compliance check list and sign-off – a system by which management at various levels of the organisation “sign-off” in relation to compliance within their area of EO and discrimination issues, and notification of any complaint, breach or incident.
- 6 Complaint handling – a system to deal with instances which occur and complaints which are received.

SPECIFIC ISSUES FOR CULTURAL DIVERSITY

Service Delivery

- Be aware of the cultural and religious requirements of your client base.
- Ensure that there is no overt discrimination on the basis of nationality, religion or race.
- Be aware of the requirements of those of a non-English speaking background.
- Be aware of “indirect discrimination” – where the method or mode of delivery of certain services does not

actually discriminate on the basis of nationality or race, but which those of a particular race or religion may have greater difficulty complying with, or cannot receive the benefit of, the services because of their racial or religious background (eg. be aware of specific religious holidays and observances, be aware of particular religious food requirements).

- Consider appropriate modes and methods of communication.
- Consider all levels of service provision, including language, food, cultural activities.
- Have appropriate policies and procedures in place which address equal opportunity and discrimination issues and train and educate staff accordingly.
- Where necessary, have translation or interpreting services available.
- Where contracts are to be signed (resident agreements, etc.) ensure that, prior to signing, clients have access to appropriate professional advice and interpreters.
- Avoid privacy breaches and breaches of confidentiality when using family, friends or bilingual staff to interpret for a client.

Employment

- Check that your workforce reflects the diversity of the workforce in our community generally. This may be a sign that your organisation does not adequately reflect cultural diversity.
- Check that your workforce reflects the diversity of your residents particularly. Recognise that having a culturally diverse workforce means that you will have access to staff who are more aware of the requirements of cultural diversity and the particular requirements of your clients.
- Ensure that all staff have cultural awareness training, and are fully trained and educated in your EO and discrimination policies and procedures.

A COMPLIANCE CULTURE

Risk management is not just about being able to deal with problems when they arise. It is about being preventative and proactive. Organisations should consider undertaking a cultural diversity audit, and ensure that they have appropriate systems in place to measure compliance of their organisation against EO and discrimination requirements. As noted, a compliance check list, with sign-off requirements from key managers may assist the organisation to better understand their obligations, and ensure they recognise these risks as they occur. Be aware that an appropriate complaints handling system may provide an early warning system of possible breaches of standards and legal obligations.

Michael Gorton warns “Cultural diversity is hard to do and hard to get right. Compliance measures for cultural diversity are seriously under funded, especially the costs of interpreting and translation as required.”

MICHAEL GORTON AM, Principal

Tel: 03 9609 1625

Email: mgorton@rk.com.au

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