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31 July 2020

Equality Portfolio  
Department of Premier and Cabinet  
Victorian Government

By email: [equality@dpc.vic.gov.au](mailto:equality@dpc.vic.gov.au)

To the Department of Premier and Cabinet

## **Equality and inclusion for LGBTIQ Victorians**

Victoria Legal Aid (VLA) welcomes the opportunity to provide input on the Discussion Paper for the Victorian LGBTIQ Strategy (**Discussion Paper**).

VLA is a statutory agency responsible for providing information, advice, and assistance in response to a broad range of legal problems, such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy. Informed by our work with approximately 100,000 Victorians each year,<sup>1</sup> we see the impact of discrimination, inequality and exclusion on lesbian, gay, bisexual, trans, intersex and queer (**LGBTIQ**) people's health and wellbeing.

We support the development of a Victorian LGBTIQ Strategy to remove discrimination and promote equality across all government bodies, services and agencies – including statutory authorities such as VLA.

### **Key recommendations**

- 1. Equality before the law:** Consider amendments to the *Equal Opportunity Act 2010* (Vic) to amend religious exceptions, review and modernise general exceptions, and provide discrimination protections for gender diverse and intersex people.
- 2. Economic security:** Implement recommendations to prevent and address discrimination, sexual harassment, vilification and homelessness affecting LGBTIQ people.
- 3. Health and wellbeing:** Support mental health services to provide tailored and inclusive supports for LGBTIQ people, including safe facilities for trans and gender diverse consumers in inpatient units.
- 4. LGBTIQ inclusive services:** Develop a strategy to improve data collection, address legal need, and embed inclusive service delivery for LGBTIQ people.
- 5. Personal safety and violence:** Ensure data collection, policy development and training measures are tailored for LGBTIQ victim-survivors of family violence, and improve access to LGBTIQ Liaison Officers with specialist family violence training.

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<sup>1</sup> Victoria Legal Aid, *Annual Report 2018–19* <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report>>. Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education.

## Priorities and areas of focus for the Victorian Government

### 1. Equality before the law

As the Discussion Paper recognises, the *Equal Opportunity Act 2010* (Vic) (**EOA**) currently provides exceptions for religious bodies to lawfully discriminate against LGBTQ people, includes an outdated definition of gender identity, and does not include protections from discrimination for intersex people as a protected attribute. The Royal Commission into Family Violence supported a review of the EOA to consider these issues.<sup>2</sup> We welcome the Victorian Government's commitments to remove discrimination against LGBTQ Victorians in religious schools and ensure equality for gender diverse and intersex Victorians.

#### *Discrimination in religious schools*

Currently, religious bodies and schools can lawfully refuse entry to a prospective student, expel a student, refuse to employ someone, or otherwise treat someone differently, based on their sexual orientation or gender identity. VLA has assisted teachers and students in religious schools who have experienced discrimination where the school has sought to rely on these religious exceptions. Other jurisdictions such as the ACT and Tasmania have amended their religious exceptions to prevent religious schools from discriminating against LGBTQ students, teachers and staff.

#### *Outdated definition of 'gender identity'*

The narrow definition of 'gender identity' in the EOA does not provide protections against discrimination for gender diverse people (e.g. non-binary or gender non-conforming Victorians). This is inconsistent with the Victorian Government's recent reforms to the *Births, Deaths and Marriages Act 1996* (Vic), which allow for legal gender recognition for gender diverse people.

#### *Discrimination protections for intersex people*

The EOA does not protect intersex people from discrimination based on their sex characteristics, which is inconsistent with federal protections under the *Sex Discrimination Act 1984* (Cth).

#### *General exceptions*

The EOA contains general exceptions which discourage victims of discrimination from bringing complaints to assert their rights in a broad range of areas (e.g. sport, clubs). In particular, our clients and consumers have also reported concerns around accessing supports from religious service providers based on fears of discrimination and mistreatment. These general exceptions can have an impact on LGBTIQ people affirming their gender at school, feeling safe at work, and accessing essential services. We support a process for ensuring general exceptions are consistently reviewed, effectively balance competing rights, and reflect modern community expectations. The availability of time limited exemptions granted by the Tribunal where reasonable and necessary in the circumstances should be considered as an alternative to permanent, broad exceptions which cover a wide range of conduct and prevent people bringing discrimination complaints.

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<sup>2</sup> Royal Commission into Family Violence, *Report and recommendations: Volume V* (March 2016) <http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>, 158.

## Recommendation 1

We recommend that the Victorian LGBTIQ Strategy should consider amendments to the Equal Opportunity Act 2010 (Vic) to:

- (a) Amend religious exceptions to permit religious bodies and schools to lawfully discriminate only on the basis of religious activity or belief and not on the basis of sexual orientation or gender identity, and only in relation to student admission or where necessary due to the inherent requirements of a job.
- (b) Update the definition of 'gender identity' to provide protections for gender diverse people, consistent with recent reforms to the *Births, Deaths and Marriages Act 1996* (Vic).
- (c) Add the protected attribute of 'sex characteristics', consistent with the *Yogyakarta Principles plus 10* and in consultation with intersex led community organisations.
- (d) Review general exceptions and consider whether exceptions are strictly necessary and result in the minimum intrusion on people's rights (e.g. consideration of time limitations, sunset clauses and the availability of specific exemptions granted by the Tribunal, which may better reflect community standards and appropriately balance rights).

## 2. Economic security

*"I was bullied and harassed in the workplace by a man that thought it was ok to use hate speech against me. He said gays don't deserve to live and that we are disgusting ... What's worse is I put in formal complaints that were not taken seriously and then had to take the company to VCAT to try and get justice. Which was even worse as the VCAT member said "...intolerant or discriminatory behaviour is not sufficient to prove a claim of discrimination under the Act."* (Former VLA client Timothy<sup>3</sup>)

The Discussion Paper recognises that many workplaces are not safe for LGBTIQ people, and LGBTIQ people experience higher rates of financial hardship and homelessness.

### *Workplace discrimination*

VLA provides discrimination advice to LGBTIQ people who have faced workplace discrimination, sexual harassment and vilification – all of which have negative impacts on LGBTIQ people's financial security. In practice, we provide advice to LGBTIQ clients who are reluctant to take legal action when they face discrimination and mistreatment because of barriers to accessing justice.

The EOA places a heavy onus on individual victims to bring a complaint in the absence of effective enforcement powers for regulators. Stronger enforcement powers for the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) would reduce the burden on individuals to bring complaints, introduce effective consequences, and improve rates of compliance with discrimination laws.

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<sup>3</sup> Victoria Legal Aid, *Fair and accessible anti-vilification protections for all Victorians* (January 2020) <https://www.legalaid.vic.gov.au/about-us/news/stronger-protections-against-hate-speech-needed-in-victoria>. 6-7.

### *Sexual harassment*

The Australian Human Rights Commission's national sexual harassment inquiry set out recommendations to improve workplace sexual harassment protections, including for LGBTIQ employees.<sup>4</sup> The Victorian LGBTIQ Strategy is an opportunity to consider ensuring workplace sexual harassment protections are effective for LGBTIQ Victorians. This could include resourcing Worksafe Victoria to distribute its *Work-related gendered violence including sexual harassment* guide,<sup>5</sup> develop a Code of Practice, investigate and prosecute relevant breaches, and making the positive duty on employers to prevent sexual harassment enforceable by VEOHRC.<sup>6</sup>

### *Vilification*

VLA has assisted LGBTQ people who have been subjected to vilification in the workplace, who have been unable to bring legal action because existing protections only apply on the grounds of race and religion. VLA lodged a joint submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections with the Victorian Aboriginal Legal Service (**VALS**) recommending broadening protected attributes under vilification protections to include (among others) sexual orientation, gender identity and sex characteristics, in order to better protect LGBTIQ people from hate conduct.<sup>7</sup>

### *Homelessness*

VLA has provided recommendations to the Victorian Homelessness Inquiry on addressing rates of homelessness,<sup>8</sup> which apply for the disproportionately high number of LGBTIQ people experiencing homelessness in Victoria.

## **Recommendation 2**

We recommend that the Victorian LGBTIQ Strategy should consider:

- (a) Strengthening enforcement powers for the Victorian Equal Opportunity and Human Rights Commission in the *Equal Opportunity Act 2010* (Vic) in relation to discrimination, sexual harassment and vilification (e.g. the power to initiate own-motion public inquiries, a simplified process for initiating investigation of breaches, information-gathering powers, and the power to issue enforceable undertakings, compliance notices and prosecute).

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<sup>4</sup> See also Victoria Legal Aid, *Change the Culture, Change the System: Urgent Action needed to End Sexual Harassment*, Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces (February 2019) <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-ahrc-national-inquiry-sexual-harassment-at-work.pdf>.

<sup>5</sup> WorkSafe, *Work-related gendered violence including sexual harassment: A guide for employers on preventing and responding to work-related gendered violence* and <https://www.worksafe.vic.gov.au/resources/work-related-gendered-violence-sexual-harassment>

<sup>6</sup> Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

<sup>7</sup> Above n 3.

<sup>8</sup> Victoria Legal Aid, *It Starts with a home: Ten legal issues that cause – or are caused by – homelessness in Victoria*, Submission to the Victorian Homelessness Inquiry (March 2020) <https://www.legalaid.vic.gov.au/about-us/news/urgent-changes-needed-to-break-cycle-of-homelessness-in-victoria>.

- (b) Implementing relevant recommendations from the Australian Human Rights Commission's *Respect@Work* report from the national sexual harassment inquiry.<sup>9</sup>
- (c) Implementing relevant recommendations in the joint VLA and VALS *Fair and accessible anti-vilification protections for all Victorians* submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections.<sup>10</sup>
- (d) Implementing relevant recommendations from VLA's *It Starts with a home: Ten legal issues that cause - or are caused by - homelessness in Victoria* submission to the Victorian Homelessness Inquiry.<sup>11</sup>

### 3. Health and wellbeing

*“Being transgender should no longer be considered a mental illness in the DSM. Currently we are being rejected for hormones unless we pay a psychiatrist to test us extensively and we are being rejected for hormones if we have any other mental illnesses, which statistically we are likely to have.”* (Former VLA client Abe<sup>12</sup>)

The Discussion Paper acknowledges that LGBTIQ people experience higher rates of mental health issues, as a result of discrimination, mistreatment and social exclusion. It also recognises a lack of LGBTIQ inclusive mental health inpatient units, and trans and gender diverse people’s reports of inappropriate care from staff and abuse and sexual assault by other service users.

Alanna’s experience of assault in a mixed gender ward highlights the threats to LGBTIQ people’s safety in mental health services. As Alanna explains:

*I am a transgender woman who was receiving treatment in a psychiatric unit of a public hospital ... During my stay on the mixed ward, I heard another male patient talking in a threatening way about the YES Campaign and the LGBTI community. He was opposed to marriage equality and said things like: “I want to cave in the heads of all the YES supporters” ...*

*Within days of my initial complaint to hospital staff, the male patient attacked me in the common area of the hospital. He grabbed me on my arm and around my throat and verbally threatened me. He threatened to slit my throat.<sup>13</sup>*

These negative experiences are consistent with reports from LGBTIQ clients VLA represents in mental health inpatient units, emergency departments and community mental health services.

<sup>9</sup> Above n 6.

<sup>10</sup> Above n 3.

<sup>11</sup> Above n 8.

<sup>12</sup> See also, Victoria Legal Aid, *Abe’s story* (June 2020) <https://www.legalaid.vic.gov.au/about-us/building-better-justice-system/access-to-justice-for-people-with-mental-illness-and-disability/roads-to-recovery-building-better-system-for-people-experiencing-mental-health-issues-in-victoria/abes-story>.

<sup>13</sup> See Victoria Legal Aid, *Roads to Recovery: Building a Better System for People Experiencing Mental Health Issues in Victoria* (July 2019) <https://www.legalaid.vic.gov.au/about-us/news/roads-to-recovery-building-better-system-for-people-experiencing-mental-health-issues-in-victoria>, 65.

VLA's Mental Health and Disability Law Program and Independent Mental Health Advocacy (IMHA) report the following examples:

- People in same sex relationships being treated differently by hospital staff or fearing that their partner won't be able to visit them or be included in conversations because of their sexual orientation
- Gender diverse people who use gender neutral pronouns repeatedly referred to using the incorrect title and pronoun by staff and other consumers (i.e. misgendering)
- Clinicians insisting on using a trans or gender diverse person's previous gendered name and history (i.e. deadnaming)
- Written clinical reports using incorrect pronouns, or referring to a person's correct pronouns in quotation marks (e.g. "them"), and
- LGBTQ consumers being transferred to more restrictive High Dependency Units after being subjected to homophobic or transphobic abuse by other consumers, and told this was 'for their own safety' as the only way to 'protect them' from further abuse.

### Recommendation 3

We recommend that the Victorian LGBTIQ Strategy should consider:

- (a) Education and prevention measures to address stigma, discrimination and mistreatment which cause and exacerbate LGBTIQ people's mental health issues.
- (b) Funding for trauma informed mental health supports LGBTIQ people, including specialised services tailored to address LGBTIQ community needs.
- (c) Capacity building, policy development and training to ensure mental health services and bodies (e.g. inpatient units, community mental health services, Emergency Departments, and the Mental Health Tribunal) provide tailored and inclusive services for LGBTIQ consumers, as set out in VLA's *Paving the roads to recovery: Building a better system for people experiencing mental health issues in Victoria* recommendations for the Royal Commission into Victoria's Mental Health System.<sup>14</sup>
- (d) Separate beds and safe facilities are available for trans and gender diverse consumers in acute mental health inpatient units.

<sup>14</sup> Victoria Legal Aid, *Paving the roads to recovery: Building a better system for people experiencing mental health issues in Victoria*, Our recommendations for the Royal Commission into Victoria's Mental Health System (May 2020) <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability/roads-to-recovery-building-better-system-for-people-experiencing-mental-health-issues-in-victoria> Recommendation 9.

#### 4. LGBTIQ inclusive services

*“Services, especially shelters for survivors of abuse, need better training and understanding about transgender people. I was rejected from seeking refuge largely because of my male voice. Transgender people are statistically more likely to be victims of abuse. The current system is divided into women’s services and men’s services and the LGBTIQ services are lumped together and sparse. I wouldn’t have felt safe even if there was a centre for male survivors to get relocated. I was treated like I was toxic when I was trying to find somewhere safe to go and transgender women will experience the same issue and be questioned about their genitals and made to feel like they aren’t welcome or are a danger.”*  
(Former VLA client Abe)

The Discussion Paper recognises that LGBTIQ people experience barriers to accessing safe and inclusive services (e.g. disability, aged care, mental health and housing supports) and that Rainbow Tick accreditation can be costly and resource intensive for many service providers.

##### *LGBTIQ people and legal need*

VLA is committed to providing safe and inclusive legal services for LGBTIQ Victorians. Currently, we do not collect data on the number of LGBTIQ clients who access VLA services. Victorian Law Foundation research has confirmed there are significant variations across legal assistance services in how data on gender is collected and recorded,<sup>15</sup> which has implications for understanding whether LGBTIQ people’s legal needs are being met and building an evidence based for policy change or responsive service delivery. In October 2019, VLA updated client intake forms and databases to allow clients to have the option to record a gender neutral title (e.g. Mx), and new gender options of 'trans or gender diverse', 'self-described' and 'prefer not to say'. We recognise that there is further work needed to ensure we provide safe and inclusive services for LGBTIQ staff, clients and consumers.

Research conducted by the Law Council of Australia and the LGBTIQ Legal Service confirms that LGBTIQ people have specific legal needs, but there are critical gaps in service delivery for LGBTIQ people.<sup>16</sup> The Victorian Access to Justice Review also found that LGBTIQ people’s legal needs are currently not met, with particular barriers for LGBTIQ people in rural and regional areas, where there is often less expertise in LGBTIQ people’s legal needs and concerns around privacy and confidentiality.<sup>17</sup> The Review recommended that the Victorian Government include legal triage and services in the Pride Centre to provide tailored and specialist legal information, education, referrals and advice to LGBTIQ people and to deliver LGBTIQ cultural competency training to legal service providers.<sup>18</sup>

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<sup>15</sup> Victoria Law Foundation, *Apples, Oranges and Lemons: The use and utility of administrative data in the Victorian legal assistance sector* (2020) <http://content.victorialawfoundation.org.au/wp-content/uploads/2020/07/Apples-Oranges-and-Lemons-The-use-and-utility-of-administrative-data-in-the-Victorian-legal-assistance-sector.pdf>, 58.

<sup>16</sup> Law Council of Australia, *The Justice Project: LGBTI+ People* (2018) <https://www.lawcouncil.asn.au/justice-project/final-report>; St Kilda Legal Service’s LGBTIQ Legal Service & Thorne Harbour Health, *LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program* (2020) <https://lgbtiqlegal.org.au/wp-content/uploads/2020/07/LGBTIQ-Legal-Needs-Analysis.pdf>.

<sup>17</sup> Victorian Government Department of Justice and Regulation, *Access to Justice Review* (August 2016) <https://engage.vic.gov.au/accesstojustice> 81.

<sup>18</sup> *Ibid* 191.

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### *Intersectionality*

VLA acknowledges that services need to be provided in an intersectional way which understand that LGBTIQ people have diverse identities and experiences.

Laws and services need to be provided for LGBTIQ Aboriginal and Torres Strait Islander people with intersectional needs, and legal assistance providers should provide inclusive services for First Nations people who are members of LGBTIQ communities. However, funding is limited for legal services to undertake training and accreditation, or develop intersectional approaches that meet local community needs.

Our lawyers report that police officers, court staff and judicial officers do not have the requisite training or knowledge to take an intersectional approach towards LGBTIQ young people engaged in youth justice and child protection systems. For example, Independent Mental Health Advocacy has supported LGBTIQ consumers from CALD communities where their sexual orientation has been disclosed without their consent to their families. This has resulted in serious consequences for their lives, mental health and wellbeing. We welcome the Department of Justice and Community Safety's commitment and strategy to support LGBTIQ children and young people in the *Youth Justice Strategic Plan 2020-2020* to address some of these concerns.<sup>19</sup>

### *LGBTIQ people's experiences in courts and tribunals*

VLA sees how the legal sector could improve existing policies, trainings and systems to be more inclusive of LGBTIQ clients and consumers. Our lawyers report judges and judicial officers engaging in behaviour that reveals a lack of understanding of LGBTIQ communities. For example:

- Referring to a trans or gender diverse person by their previous name in an open court hearing, despite requests from the client and submissions by their lawyer to use the name that reflects their gender identity
- Insisting on using gendered titles, and showing a lack of familiarity with gender neutral titles and pronouns which make the client feel uncomfortable and unheard, and which distract from the subject matter of the hearing (e.g. making comments about Mx and using they / them pronouns as being cumbersome or difficult)
- Magistrates making inappropriate comments about a person's gender expression in the courtroom including their personal views connecting a person's gender conforming presentation as positive (and gender non-conforming behaviours as a negative indication of a person's mental health issues)
- Attributing an intersex person's legal problems to their intersex status where this is not relevant, and failing to understand and respect that intersex people may feel uncomfortable and unsafe about having their sex characteristics discussed in a public court hearing, particularly in an offensive and stigmatising way, and
- Repeatedly referring to trans and gender diverse clients and consumers using the incorrect pronouns, and refusing to change their behaviour when informed by counsel.

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<sup>19</sup> Victorian Government Department of Justice and Community Safety, *Youth Justice Strategic Plan 2020-2030* (May 2020) <https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-strategic-plan-2020-2030-supporting-lgbtqi-children-and>.

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#### Recommendation 4

We recommend that the Victorian LGBTIQ Strategy should consider:

- (a) Guidance for government bodies to remove barriers to legal help, update and standardise data collection based on best practice, and support improved access to inclusive legal services for LGBTIQ people.
- (b) Resourcing for government agencies, courts and tribunals, and service providers to undertake training, update policies and implement service improvements to provide safe and inclusive environments for LGBTIQ people.
- (c) Specific funding for Aboriginal community controlled services to provide culturally safe and inclusive services for LGBTIQ Aboriginal and Torres Strait Islander people.

### 5. Personal safety and violence

LGBTIQ people are more likely to have experienced vilification, harassment or violence in institutional settings, and low levels of trust have resulted in some LGBTIQ people feeling reluctant to engage with police.<sup>20</sup> VLA's Client Safety Framework training identifies barriers to seeking help (such as fears of being outed to friends and family) as a family violence risk indicator. The Royal Commission into Family Violence identified a range of barriers to address under-reporting and understanding of family violence towards LGBTIQ victim-survivors, discrimination when seeking access to services, and fear and mistrust of police, courts, and health and community organisations.<sup>21</sup>

We commend the Victorian Government on implementing a range of reforms and measures to address family violence against LGBTIQ people, including support for specialist LGBTI family violence and mental health services. However, VLA duty lawyers representing clients in Family Violence Intervention Order (**FVIO**) and criminal cases report examples of inappropriate behaviour by police and court staff, such as listing matters between former same sex de facto partners as Personal Safety Intervention Order (**PSIO**) matters, rather than FVIO matters. VLA provides limited assistance in PSIO matters, which leaves the onus on police and the courts to recognise where the PSIO should be converted to a FVIO.

We are also concerned that LGBTIQ people are at risk of being misidentified as the primary aggressor in a family violence incident. At times, we see cases where police attend an incident and have difficulty determining who is the victim and may therefore respond by placing orders against both parties. Misidentification of the primary aggressor has the impact of victims not being offered appropriate supports and can deter future help seeking behaviour. It also fails to uphold the purposes of family violence legislation by not holding perpetrators to account.

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<sup>20</sup> Above n 6. See also, La Trobe University, *Policing for same sex attracted and sex and gender diverse young Victorians* (2018) <https://www.rainbowhealthvic.org.au/research-resources>.

<sup>21</sup> Above n 2.

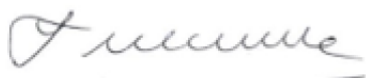
### Recommendation 5

We recommend that the Victorian LGBTIQ Strategic should consider:

- (a) Capacity building frameworks (e.g. data collection, policy development, training, inclusive service delivery) which provide guidance on how government agencies, statutory authorities, courts, tribunals and service providers can improve responses to LGBTIQ people experiencing family violence.
- (b) Access to additional LGBTIQ Liaison Officers with specialist family violence training who are aware of the dynamics and types of family violence LGBTIQ people experience and trained to respond sensitively and respectfully.

Please feel free to contact me at [Louise.Glanville@vla.vic.gov.au](mailto:Louise.Glanville@vla.vic.gov.au) or on 0417 012 475 if you would like to discuss VLA's work and recommendations in more detail.

Yours faithfully



**LOUISE GLANVILLE**  
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