



Australian
Human Rights
Commission

Focus area on participation in public life and in decision-making processes

Australian Human Rights Commission

Input to Open-Ended Working Group on Ageing

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1 National and Legal Policy Framework

1.1 National and local legal provisions and policy frameworks that guarantee rights relating to participation in public life and in decision-making processes

Australia does not have a national Human Rights Act, instead, limited protections of human rights may be found in the Constitution and in legislation passed by the Commonwealth Parliament or State or Territory Parliaments.¹

The Australian Constitution explicitly protects the right to vote, right to trial by jury for some offences and some protections of freedom of religion.² The right to vote is also governed by the *Commonwealth Electoral Act 1918* (Cth). Additionally, the High Court of Australia has held that an implied freedom of political communication exists.³ There is no national/Commonwealth law that generally protects the right to freedom of association and peaceful assembly, though there are some Australian laws which place limits on these freedoms.⁴

At the national level, the *Age Discrimination Act 2004* (Cth) (ADA) makes it unlawful to discriminate against older persons on the basis of age in specific areas of public life, including employment, education, access to goods, services and facilities, renting or buying a house or unit, and in the administration of Commonwealth laws and programs.⁵ Similar legislation prohibiting age discrimination exists in each State and Territory.⁶

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), all new Bills and legislative instruments in Australia must be assessed for compatibility with the rights and freedoms recognised in the seven international human rights treaties that Australia has ratified.⁷ These are the ICCPR, ICESCR, CERD, CEDAW, CAT, CRC and CRPD.

1.2 Steps taken to ensure participation in public life and decision-making processes without discrimination

The federal Age Discrimination Commissioner is a statutory appointment under the ADA.⁸ The Commissioner is responsible for raising awareness of age discrimination, educating the community about the impact of age discrimination, and monitoring and advocating for the elimination of age discrimination across all areas of public life.

In Australia, all adults are presumed to have legal capacity to make decisions, unless proven otherwise.⁹ Pre-emptive formal arrangements – such as advance care directives, enduring powers of attorney, enduring guardianships – exist to enable individuals to make decisions in advance about medical treatment or to

appoint another person to make or support them to make certain decisions if they lose legal capacity. Where such arrangements are not in place, a state-appointed public guardian, trustee or advocate may be appointed to make decisions on behalf of the individual.

In 2019, the Attorney-General's Department launched the National Plan to Respond to the Abuse of Older Australians 2019–2023 (the National Plan).¹⁰ One of the key priority areas of the National Plan was planning for future decision-making, which involved drawing attention to the importance of planning ahead and use of future planning tools such as powers of attorney. The Australian Government is in the process of developing the next iteration of the National Plan.

2 Data and research

The Australian Bureau of Statistics and Australian Institute of Health and Welfare collects and publishes data about certain topics related to the participation of older people in public life. This includes participation in cultural and creative activities (19.3% of men aged 65 and over; 35.8% of women aged 65 and over), participation in the workforce (15% of people aged 65 and over) and participation through volunteering (25% of people aged 70 and over).¹¹

The Australian Human Rights Commission (the Commission) collects data relating to complaints of discrimination made to the Commission and publishes a report detailing this data annually. This data is not disaggregated by sex or inequality dimensions. 6% of the complaints received by the Commission between 2022-2023 related to age discrimination. Of these complaints, 59.5% related to the area of employment and 28.5% related to the area of goods, services and facilities. The data is disaggregated by age groups, with complaints made by 65 to 74-year-olds making up 21% of these complaints and over 75-year-olds making up 7.5% of age discrimination complaints.¹²

The State/Territory government anti-discrimination bodies also collect and publish data about the number of age discrimination-related complaints received at the State/Territory level.

3 Equality and non-discrimination

Research by the Commission in 2021 found that ageism is prevalent across the adult lifespan in Australia and inaccurate stereotypes are held about different age groups. The study found that most Australians consider older people to have declining skills, agency and vitality and lacking competence in many areas, including with technology or professionally.¹³

Such age-based assumptions and beliefs can lead to discriminatory behaviour in different areas of public life, including in employment where older people can experience barriers at the point of recruitment and in relation to opportunities for training, development, and promotion.¹⁴

These attitudes can, in extreme cases, lead to elder abuse, which can have serious impacts on older people's health, wellbeing and public participation. In Australia, 1 in 6 older people over 65 have experienced some form of abuse in a given year and almost 2 in 3 older people do not seek help when they are abused.¹⁵

Australia does not have a uniform standard for legal capacity.¹⁶ Inconsistencies in state and territory laws governing formal arrangements related to decision-making, such as powers of attorney, guardianship and advance care directives, also create challenges for older people and their families. The Australian Government is considering options for achieving greater national consistency in financial enduring powers of attorney laws.¹⁷

A number of national inquiries and reports have recommended the embedding of a national supported-decision making framework in Commonwealth and State and Territory legislation.¹⁸ This would enable people who require decision-making support to express, and make decisions that align with their will and preferences and fully exercise their right to legal capacity on an equal basis with others.¹⁹ While this is currently being considered in the contexts of aged care, disability and adult safeguarding reforms in Australia, a national approach to supported decision-making is yet to be implemented.

Further, Australia's Aboriginal and Torres Strait Islander peoples continue to experience disproportionate levels of disadvantage and worse outcomes compared to non-Indigenous groups across a wide range of indicators, including realisation of their rights to education, housing, health, self-determination and participation in public life and decision-making processes. While Australia has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it is not included in the list of instruments new Bills must be assessed against under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Australian Government has not taken steps to implement UNDRIP into domestic law, policy and practice.²⁰

A key focus of the Commission's proposal and recommendations for a new Human Rights Act and Framework in Australia is to ensure that engagement and participation is central to all stages of the decision-making process. The proposed new Act and framework, if adopted by the Australian Government, would embed participation principles across a range of accountability mechanisms and would require the views of vulnerable groups – including people with disability, Aboriginal and Torres Strait Islander peoples and culturally

and racially marginalised communities – to be sought and considered in relation to laws, policies and programs that disproportionately or directly impact them.²¹

4 Accountability

If an older person feels they have been treated less favourably because of their age in an area of public life covered by the ADA, it is open for them to lodge a complaint with the Commission's Investigation and Conciliation Service.²² This process is free, voluntary and confidential. If the matter is terminated by the Commission, they may have the option of pursuing the matter further with the Federal Court or Federal Circuit and Family Court, which may result in an enforceable remedy. Similar complaints processes are also available at the State and Territory level with the relevant anti-discrimination bodies.

An older person wishing to complain about aged care service providers can do so to the Aged Care Quality and Safety Commission.²³

Where an older person has been treated unfairly in their employment because of their age, it is open for them to make a complaint with the Fair Work Commission.²⁴

Three States and Territories in Australia have enacted adult safeguarding laws and established dedicated agencies to protect at-risk adults mainly from abuse in family and community settings, including by receiving, assessing and investigating cases of suspected abuse and coercion.²⁵ There have been strong calls for all States and Territories to introduce safeguarding laws, agencies and develop a National Adult Safeguarding Framework.²⁶

Older persons advocacy groups and specialist services may provide advice, advocacy, referral or support for older people to access relevant mechanisms for complaint and redress.

Due to the lack of national Human Rights Act in Australia, in many cases an older person who claims that their human rights have been breached cannot obtain an enforceable remedy. It is open for an older person to lodge a complaint with the Commission if they feel that their human rights have been breached by the Australian Government. However, if the Commission cannot conciliate a human rights complaint, and the Commission finds that a breach of human rights has occurred, the Commission can only make recommendations and there is no available recourse to enforceable remedies through the courts – only if the matter falls within the 'unlawful discrimination' grounds in the ADA.²⁷

- ¹ Australian Human Rights Commission, 'How are human rights protected in Australian law?' (Webpage), accessed 9 April 2024 <<https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>>.
- ² Australian Constitution ss 41, 80, 116 and 117.
- ³ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
- ⁴ Attorney-General's Department, 'Public sector guidance sheets: Right to freedom of assembly and association' (Webpage), accessed 4 April 2024 <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-assembly-and-association>>.
- ⁵ *Age Discrimination Act 2004* (Cth).
- ⁶ State and territory acts include: *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).
- ⁷ Attorney-General's Department, 'Human rights scrutiny' (Webpage), accessed 8 April 2024 <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny>>.
- ⁸ *Age Discrimination Act 2004* (Cth) s 53A.
- ⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper 44, November 2011).
- ¹⁰ Attorney-General's Department, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (8 July 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>>.
- ¹¹ Australian Bureau of Statistics, 'Cultural and creative activities' (Webpage 21 March 2023), accessed 8 April 2024 <<https://www.abs.gov.au/statistics/people/people-and-communities/cultural-and-creative-activities/2021-22#adults-participation>>; Australian Institute of Health and Welfare, 'Older Australians: Employment and work' (Webpage 28 June 2023), accessed 8 April 2024 <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/employment-and-work>>; Australian Institute of Health and Welfare, 'Older Australians: Social support' (Webpage 28 June 2023), accessed 8 April 2024 <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/social-support>>.
- ¹² Australian Human Rights Commission, *Annual Report 2022-2023* (6 November 2023) 28 <<https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2022-23-0>>.
- ¹³ Australian Human Rights Commission, *What's age got to do with it? A snapshot of ageism across the Australian lifespan* (2021) <<https://humanrights.gov.au/our-work/age-discrimination/publications/whats-age-got-to-it-2021>>.
- ¹⁴ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016).
- ¹⁵ Australian Institute of Health and Welfare, 'Family, domestic and sexual violence: Older people' (Webpage 15 February 2024), accessed 8 April 2024 <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/older-people#:~:text=The%20AIFS%20National%20Elder%20Abuse,abuse%20in%20the%20past%20year>>.
- ¹⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper 44, November 2011).

- ¹⁷ Australian Government, Attorney-General's Department, *Achieving Greater Consistency in Laws for Financial Enduring Power of Attorney* (Consultation Paper, September 2019).
- ¹⁸ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report 214, August 2014); Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report 131, May 2017) and *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Enabling Access and Autonomy* (Final Report, Volume 6, September 2023) 122.
- ¹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report 124, August 2014); *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Enabling Access and Autonomy* (Final Report September 2023) rec 6.6.
- ²⁰ Australian Human Rights Commission, *Free & Equal: Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023* (2023) 106; Australian Human Rights Commission, 'Implementing UNDRIP' (2021), accessed 11 April 2024 <https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf>; Australian Human Rights Commission, Submission to the Senate Legislative and Constitutional Affairs Committee, *Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (22 June 2022) 17 [69] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/UNDRIP/Submissions>.
- ²¹ Australian Human Rights Commission, *Free & Equal: Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report 2023* (2023).
- ²² *Australian Human Rights Commission Act 1986* (Cth) s 46P.
- ²³ Aged Care Quality and Safety Commission, 'What to do if you have a complaint' (Webpage), accessed 8 April 2024 <<https://www.agedcarequality.gov.au/contact-us/complaints-concerns/what-do-if-you-have-complaint>>.
- ²⁴ Fair Work Commission (Webpage), accessed 8 April 2024 <<https://www.fwc.gov.au/>>.
- ²⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report 214, August 2014) rec 14-1. See also *Ageing and Adult Safeguarding Act 1995* (SA), *Ageing and Disability Commissioner Act 2019* (NSW), *Crimes Act 1900* (ACT) ss 36A-C.
- ²⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Independent Oversight and Complaint Mechanisms'* (Final Report, Volume 11, September 2023) rec 11.1; Office of the Public Advocate (Vic), 'Line of sight: Refocussing Victoria's adult safeguarding laws and practices' (August 2022) 87; Public Advocate (Queensland), 'Adult Safeguarding in Queensland, Volume 2: Reform recommendations, Volume 2' (November 2022) rec 1 and 2; Public Advocate and Children and Young People Commissioner, 'Submission in response to Violence and abuse of people with disability at home issues paper' (26 February 2021, ISS.001.00575) rec 1, cited in *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Independent Oversight and Complaint Mechanisms'* (Final Report, Volume 11, September 2023) 6.
- ²⁷ *Australian Human Rights Commission Act 1986* (Cth) ss 20A and 29.