

Response to the OEWGA Intersessional Questionnaire

Identification of possible gaps in the protection of the human rights of older persons and how best to address them.

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About OPAN

Formed in March 2017, the Older Persons Advocacy Network (OPAN) is a national network comprised of nine state and territory organisations that have been successfully delivering advocacy, information and education services to older people across Australia for over 30 years. Our members are also known as Service Delivery Organisations (SDOs). The OPAN SDOs are:

ACT	ACT Disability, Aged and Carer Advocacy Services (ADACAS)	SA	Aged Rights Advocacy Service (ARAS)
NSW	Seniors Rights Service (SRS)	TAS	Advocacy Tasmania
NT	Darwin Community Legal Service	VIC	Elder Rights Advocacy (ERA)
NT	CatholicCare NT (Central Australia)	WA	Advocare
QLD	Aged and Disability Advocacy Australia (ADA Australia)		

OPAN is funded by the Australian Government to deliver the National Aged Care Advocacy Program (NACAP). OPAN aims to provide a national voice for aged care advocacy and promote excellence and national consistency in the delivery of advocacy services under the NACAP.

OPAN's free services support older people and their representatives to understand and address issues related to Commonwealth funded aged care services. We achieve this through the delivery of education, information and individual advocacy support. In 2022/23, OPAN delivered information and advocacy support to over 36,100 people across the nation, an increase of 35% on the previous year.

OPAN is always on the side of the older person we are supporting. It is an independent body with no membership beyond the nine SDOs. This independence is a key strength both for individual advocacy and for our systemic advocacy.

OPAN works to amplify the voices of older people seeking and using aged care services and to build human rights into all aspects of aged care service delivery.

OPAN acknowledges the lived experience, wisdom and guidance provided by members of the National Older Persons Reference Group and others in preparing this submission.

Background

On 7 October 2021 the Human Rights Council (HRC) of the United Nations adopted resolution (A/HRC/RES/48/3). The resolution was adopted by consensus without any voting required. Governments committed to consider and act on the resolution, which calls upon States to prohibit all forms of discrimination against older persons and to take measures against ageism and age-based discrimination. It calls upon all stakeholders to eliminate ageism and age discrimination in all its forms.

It calls upon all stakeholders, including States, the entities of the UN system, civil society, national human rights institutions, and the private sector to adopt a human-rights based approach in all programmes, campaigns and activities relating to ageing and older persons.

In its resolution 48/3, the Human Rights Council requested the Office of the United Nations High Commissioner for Human to convene a multi-stakeholder meeting to discuss a report to be prepared by the High Commissioner on the normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons. The OHCHR report (A/HRC/49/70) was made available in early 2022 and the multi-stakeholder meeting on the human rights of older persons was held on 29–30 August 2022 (summary report at A/HRC/52/49).

There are two quotes from the summary report of the multistakeholder meeting which we argue highlight that the rights pertinent to older people and the gaps in their implementation have already been identified and that, rather than further discussion of whether gaps exist, there is a pressing need to act on delivering a convention on the rights of older people:

“The Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, stated that the global discussion on the protection gaps and solutions had been extensive. Many reports, including the 2021 update by OHCHR to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons and various reports of the Independent Expert, had identified the problems and how to address the challenges that prevented the full implementation and enjoyment of the human rights of older persons. More than 800 documents had been submitted to the Open-ended Working Group on Ageing since its inception and yet a legally binding instrument had still not been drafted. The lack of a comprehensive international instrument had significant negative impacts on the lives of older persons. A binding human rights instrument would provide guidance to States on addressing demographic change.” (para 6)

and

“Human rights in older age must be grounded in the principles of dignity, equality and non-discrimination, autonomy, independence and meaningful participation. The instrument should enable older persons’ independent living, full inclusion and participation in society, including in the digital sphere, and affordable and accessible care and support services. Lifelong learning, education and skills-building without discrimination were crucial for autonomous and independent living. Older persons must also be able to live their lives free from all forms of violence, abuse, ableism, exploitation and neglect. The convention should pay particular attention to older persons’ rights to access to justice, housing, privacy and a clean and healthy environment”. (para 10)¹

Identification of Gaps

1. For each of the topics that have been considered by the Open-ended Working Group since its eighth session, please state possible gaps your Government/organization has identified in the normative framework and practical implementation for the protection of the human rights of older persons.

a) Equality and non-discrimination

The failure to ensure the enjoyment of rights experienced by older people, which often involves an erosion of rights enjoyed earlier in life, can be subtle or explicit, ranging from having one’s right to certain decisions and preferences overridden, to being referred to by diagnosis (e.g. “the dementia ward”, “dementia care”) and even to the point of violations of rights that contravene criminal law (theft, assault etc).

The erosion of rights is an artefact of ageism. Ageism involves the withdrawal of the underlying assumptions of a person’s capacity, of their competency in every-day life, and a failure to uphold their rights, leading ultimately to the loss of the person’s self-determination. It often involves others making assumptions that older persons are losing or have lost the capacity to make their own decisions. As a result, the protection of the rights of older people are often non-existent or undermined by ageist attitudes, practices and beliefs.

¹ A/HRC/52/49: Summary of the multi-stakeholder meeting on the human rights of older persons - Report of the Office of the United Nations High Commissioner for Human Rights, 27 December 2022, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5249-summary-multi-stakeholder-meeting-human-rights-older-persons>

As has been noted repeatedly, there is no specific reference in most of the international non-discrimination guarantees to older age as a ground of prohibited discrimination; nor does the term “ageism” appear in the UN human rights treaties. There is no explicit general treaty obligation requiring States to take steps to eliminate ageism or age discrimination that is comparable to the obligations under conventions relating to discrimination against women, and the rights of persons with disabilities to eliminate sexism and ableism. This gap means that there is no clear external stimulus to take such action at the national level. Australia, for example, has no national plan to eliminate ageism, while it has many national plans in other areas.

A specific Convention on the human rights of older persons would clarify the right of older people to equality and to be free from discrimination, especially the experience of ageism. This will include States’ obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that older persons have a right to equality and non-discrimination and to be free from ageism, that this right applies in public and private spheres, and that States’ have an obligation to take preventive measures.

b) Violence, neglect and abuse

In recent years, the issue of the abuse of older persons has received significant policy attention and community awareness. This attention is the result of decades of work and lobbying undertaken by community, academia and service providers and peak bodies across many sectors.

This policy attention generated numerous formal enquiries at state and territory level, with several jurisdictions developing related rights-based legislation and establishing Elder Abuse Helplines. Some states and territories funded elder abuse prevention and advocacy services for varying lengths of time.²

These changes have been limited and applied differently across the various states and territories. For example, South Australia has established an Adult Safeguarding Unit as part of its response to Elder Abuse; however, in the Northern Territory, the elder abuse phone line can only provide support as there are no services a person can be referred to. In addition, different laws across the states and territories in relation to Guardianship and Enduring Powers of Attorney (often providing for substitute decision making) places older people at greater risk of abuse.

At the Commonwealth level, the government committed funds to establish Elder Abuse Action Australia (EAAA), and the Australian Law Reform Commission conducted an

² Australia has a federal system of government and the formal legislative and practical responsibilities for issues relating to the human rights of older people are shared among the central government (Federal/Commonwealth) and the eight states and territories.

Inquiry and delivered a Report on a national legal response to elder abuse. Importantly, following the 5th National Elder Abuse Conference (2018) the Commonwealth Attorney General, the Hon Christian Porter MP, announced funding for a national plan to address the problem of abuse of older people. The *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* was adopted in 2019: it contained no explicit reference to “human rights” or to any international treaty. The document is currently being reviewed and consultation is occurring for a new National Plan.

In addition, as pointed out in the 2023 report to the Human Rights Council by the UN Independent Expert on the enjoyment of all human rights by older persons, the current international human rights framework lacks specific provisions addressing violence against and abuse and neglect of older persons.

A specific Convention on the rights of older persons would clarify the rights of older people to be free from violence, abuse and neglect in older age and States’ obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to take preventive measures and that older persons have a right to support services, as well as access to remedies and redress. If there had been a convention on the human rights of older persons containing provisions of this sort, it would have helped to drive law and policy reform at all levels in Australia – and we would not have seen a national plan on elder abuse that made no explicit reference to human rights.

c) Long-term care and palliative care

We note that a right to long-term care and support and a right to access palliative care services are two distinct concepts. Neither of these rights is explicitly guaranteed by the United Nations human rights treaties; this represents a significant gap in the international human rights framework that would be filled by a new convention.

i. Use of restrictive practices in long-term care situations

Restrictive practices, which include the use of chemical, physical and environmental restraints, are predominantly used on older people living in residential aged care. Their use involves violations of the rights to freedom from torture or cruel, inhuman or degrading treatment, liberty of movement, the right to health and the right to a remedy for violations of these and other rights.

Noting that the CRPD specifies that restrictive practices cannot be used this is only in relation to people living with disability. Though the CRPD also applies to people living with dementia it is not applied in the same way.

Recent changes to legislation on the use of restraints in Australia has improved protections for older people, but not to the full extent of the protections under our National Disability Insurance Scheme, which operates under the CRPD, and the current regulation still falls short of full compliance with human rights standards. On 15 March 2023 the Australian Parliamentary Joint Committee on Human Rights found, in relation to a recent legislative instrument that specifies who can give consent to the use of restrictive practices on aged care residents, that the instrument risked being incompatible with a range of human rights, particularly the rights of persons with disability. The Committee noted that there was no requirement to provide for supported, rather than substitute, decision-making; much depended on unknown safeguards in state and territory legislation; there was some uncertainty for aged care providers as to the applicable law in their jurisdiction; and there was a broad-ranging immunity from liability.³ The committee recommended some amendments to the instrument and noted the need for extensive consultation to consider the broader legislative scheme in which the instrument operated, including whether the consent model to the use of restrictive practices in aged care is the best approach to protect the rights of aged care residents.

This highlights the limited protections applied to the rights of older people, especially to live free from restraint.

A specific Convention on the rights of older persons would clarify the right of older people to be free from restraint in older age, including States' obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to remove the use of restraints and that older persons have a right to be free from restraint as well as to have access to remedies and redress if this right is breached.

ii. Palliative care

OPAN agrees that every person living with a life-limiting illness should always have equitable and non-discriminatory access to quality needs-based palliative care at any point in their illness journey, with timely referral to specialist palliative care if required no matter where they live. This includes access to appropriate and timely telehealth services.

³ Parliamentary Joint Committee on Human Rights, Report 3 of 2023 on the Quality-of-Care Amendment (Restrictive Practices) Principles 2022, 15 March 2023.

Palliative care has a key place in supporting people at end of life. However, even the best palliative care services cannot always alleviate all the suffering experienced by a person. There is no explicit right to equitable access to palliative care services guaranteed by Australian law. Seeking to invoke an international guarantee of such a right requires advocates to argue that the generally framed right to the highest attainable standard of physical and mental health in Article 12 of the ICECSR includes a right to palliative care. While there is some support for this in the non-binding practice of the Committee on Economic, Social and Cultural Rights, this may be contrasted with the specific provisions in the Inter-American Convention on Protecting the Rights of Older Persons which impose clear obligations on States parties to ensure that all have the right to decide on and to enjoy access palliative care services. Filling this gap at the universal level would stimulate legal and policy reform and lead to better access to such services at the national level.

iii. Voluntary Assisted Dying

All Australian state and territory jurisdictions have now introduced voluntary assisted dying (VAD) laws which provide a right of persons suffering a terminal illness, with a relatively short period to live, to access voluntary assisted dying services, provided specified substantive and procedural criteria are satisfied.

This has been seen as ensuring individuals' right to autonomy, independence and choice as to how they live their lives, and the legislation has given rise to substantial debate. One of the issues that has arisen is how this right relates to the right of individual healthcare workers to conscientiously object to participating in the provision of VAD, which is enshrined in every Australian law. However, the obligations of objecting Residential Aged Care providers to their residents are less defined. Earlier laws (Victoria, WA and Tasmania) are silent on the issue, whereas in South Australia, Queensland and NSW a balance is struck between the rights of the institution and those of the individual seeking VAD.

OPAN believes that allowing institutions to refuse to participate in VAD altogether unfairly impinges on the rights of older people who are in their care, to access the same end of life choices as older people living in the community.

In the case of persons living Residential Aged Care Facilities (care homes or LTC), it also ignores the fact that the facility is a person's home. The person should not have to be moved somewhere else due to the end-of-life choice they have made. People living in RACFs should still have the same access to the same information and be able to take the end-of-life medications within a familiar environment.

While some providers may object to VAD, they should not have the right to deny a person access to those who will support them with their choices.

A specific convention on the rights of older persons would clarify the right of older people to have equitable and non-discriminatory access, if desired, to voluntary assisted dying, regardless of where they are living. It would outline States' obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to remove barriers to accessing VAD, especially those which discriminate by reference to where the person is living.

d) Autonomy and independence

Most adults in Australia exercise self-determination, have their personhood acknowledged, their competency assumed in every-day life, and their capacity under the law assumed. However, these assumptions are not extended to all adults, particularly to some people with disability, and often, to people of advanced age.

Ageism is one of the "causes of systemic failures", leading to substandard care, mistreatment, and even abuse. Ageism involves the withdrawal of the underlying assumptions of capacity and competency, the failure to uphold the rights of 'older' adults and eventually, the loss of their self-determination.

Article 12 of the CRPD, which covers equal recognition before the law, stipulates that "*States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*". The CRPD's definition of legal capacity is two-pronged, defined as the capacity to be both: a holder of rights which entitles persons to full protection of their rights by the legal system; and recognition that a person is an agent with the power to engage in transactions and create, modify or end legal relationships. Substitute decision making is contrary to this important safeguard against abuse.

The right to Supported Decision Making, to enable autonomy and independence is a key right that must be applied to older people. As with all adults, older people have the right to make decisions about the care and services they receive, their day-to-day life and community connection, their relationships and the risks they are willing to take. The presumption must always be that older people have the ability to make decisions. Decision-making ability is complex, fluctuating and difficult to assess. Decision-making ability depends on many complex and inter-related factors, including but not limited to the quality of information provided, the supports available to make a decision, the person's confidence and the person's communication methods and preferred language.

The presumption of decision-making ability should only be diverged from when the complex nature of decision-making ability has been fully considered and all possible options to support a person to make their own decisions have been exhausted or are impossible (e.g. if the person is in a coma). However, too easily agencies and services

default to substitute decision makers, who act in the “best interests” of the older person rather than adhering to their “wishes and preferences”.

A specific Convention on the rights of older persons would clarify the right of older people to have autonomy and independence and the right to supported decision making. It would outline States’ obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to remove barriers to accessing supported decision making and access to remedies and redress if this right is breached.

h) Access to justice

OPAN wants to ensure that access to justice is afforded to older people. OPAN notes the significant numbers of older people in Australia who are subject to Guardianship and Administration orders every year. OPAN understands that there is limited transparency about these orders and is also concerned about ensuring older people receive appropriate support to participate in hearings and legal representation when the State is making decisions that impact on the rights of older people to live their lives autonomously like any other adult.

A Convention specific to older people should include or adopt or adapt, the “*International Principles and Guidelines on Access to Justice for Persons with Disabilities*” (Geneva, 2020) to ensure access to justice.

A specific Convention on the rights of older persons would clarify the right of older people to have access to justice. It would outline States’ obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to remove barriers to accessing justice for older people, especially in regards to the nomination, duties, oversight and, where needed, the revocation, of substitute decision makers.

k) Right to Health and Access to Health Services

COVID-19 impacted on all of us but especially on older people. The perceived increased susceptibility to the virus of older persons led to targeted responses designed to protect those cohorts. Unfortunately, these responses led to a greater level of stigma and discrimination within the broader community. This was exacerbated by media, with their simplified messages of “older people more likely to die” and coverage of the situations in other countries, where overwhelmed health resources were being rationed, with reports that older people were more likely to be the ones who were denied interventions.

Every day we heard the public debate about “competition for ventilators” and “older people taking up beds” as though their lives were negotiable and expendable. OPAN heard, through our member advocates, that some older people were deciding not to seek treatment for general illnesses or for existing chronic conditions. They did not want to be a “burden” or “use up” resources that younger people could need, or they considered themselves as not worthy of care. This is not to say that an older person cannot choose not to receive care as this is within their rights to autonomy, choice and control. OPAN was concerned that there were now external factors pressuring older people to make these decisions.

OPAN’s position is that access to health care is a basic human right and that all older people have the right to access and receive quality healthcare, when and if they need it, without the discrimination, often intersectional, that is in evidence. Health care must be age-friendly, responsive to older people’s needs and take “into account the diversity of older people, as they are not a homogeneous group but face varying health risks and circumstances”.⁴ The delivery of health care, especially for marginalised and vulnerable older people, must be non-discriminatory and health resource allocation decisions must be based within an ethical framework and not be based solely on a person’s age.⁵

A specific Convention on the rights of older persons would clarify the right of older people to have the right to health and health care services without discrimination on the basis of age, including States’ obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to take ensure equitable access and outcomes and that older persons have a right to health services, as well as access to remedies and redress if their right to health care is not upheld.

1) Social Inclusion

Addressing social isolation and supporting older people to age in place and access their communities requires a multifaceted approach that involves all levels of government. An inter-government commitment to affordable, safe and accessible transport options for people of all ages and abilities is critical to achieving ageing in place. Aged care policy and programs must look beyond transport as a private service and expense, to a key support enabling older people to age independently in the community. A future commitment to older people must consider transport as essential

⁴ Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada. Forty-second session, November 7, 2008, CEDAW/C/CAN/CO/7. Accessed 6 April 2020, from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/CAN/CO/7&Lang=En

⁵ This includes, but is not limited to, lesbian, gay, bisexual, trans and intersex people (LGBTI), Aboriginal and Torres Strait Islander people, Forgotten Australians, people with disability, people who are homeless or at risk of homelessness, people from culturally and linguistically diverse backgrounds and people from low socio-economic backgrounds.

to the provision of adequate home care and services as well as for older people living in residential aged care (LTC).

Appropriate investment in a diverse range of affordable, safe and accessible transport options and supports will support the preferences of older people to age in place. A future aged care program should be grounded in a human rights model that respects the mobility and transport needs of older people and supports their full participation in community life, whether living at home or in residential aged care. Access to transport services should be flexible, not limited by artificial supply constraints and have government stewardship to address thin markets.

At present the international human rights framework provides no explicit right to social inclusion or to social participation that takes particular account of the diverse needs of older persons, although some aspects of such rights are covered in a fragmented fashion in some treaty provisions. The adoption of specific provision on these rights in a new convention would provide a coherent framework for the realisation of these rights at the national level.

m) Accessibility, infrastructure and habitat (transport, housing and access)

Long-term care institutions (care homes) are often recognised for their size, separateness from the community and for enforcing routine and regulation in all spheres of life. The routines, systems and regimes of an institution can result in “institutional abuse” with poor or inadequate standards of care and poor practices affecting the whole setting and restricting the dignity, privacy, choice, independence or fulfilment of individuals residing in care.

Deinstitutionalisation is the shift in the service delivery system away from institutional settings and towards less restrictive care in the home and the community. It is founded on a philosophy of care which emphasises better outcomes for individuals, the maximisation of independence, inclusion and participation in the community, and flexible and coordinated services to support people to live the lives they want. Deinstitutionalisation is a means to achieve positive change and ensure that the fundamental human rights of older people are upheld.

Article 19 of the Convention on the Rights of Persons with Disabilities supports deinstitutionalisation by outlining that people with a disability, including older people with a disability, have a right to live independently and be included in the community. However, this has not been applied consistently to older people in general or those living with dementia, or those who develop a disability after age 65.

OPAN notes that large institutions housing children and people with disability and mental illness have been progressively closed or replaced with smaller group homes or community-based services from the late 1960s to 1980s and onwards in Australia. Whilst the aged care system has introduced community-based care, residential care institutions continue to grow in both size and number.

Institutional settings also limit the right of people to access transportation. In Australia under current funding arrangements for residential aged care (RAC) assumes that access to the community outside of RAC is not relevant to the assessment of funding to support mobility. Under the Aged Care Act, 1997, approved RAC providers must assist residents to arrange transport, and escort, if required, to and from medical and allied health care appointments without additional charge. However, the cost of the transport and escort are the responsibility of the resident.

OPAN believes that transport must be regarded as an essential support that older people receiving aged care services at home and in residential care are entitled to receive if they have an assessed need.

A specific Convention on the rights of older persons would clarify the right of older people to be free from institutional living and a right of access to appropriate transport services and community engagement, including States' obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to take ensure these rights are applied to enable older people to stay in their own homes, or access other living arrangements that suit them, and access the services they need to remain connected to the community.

n) Participation in the public life and in decision-making processes

The right to self-determination, choice and control is regularly overlooked in residential aged care. In 2015, the home care sector made a shift towards consumer directed care and whilst this system is still far from perfect, the reform did encourage aged care providers to shift their thinking and deliver more person-centred care. No similar attempts have been made in residential care and it is evident that older people residing in residential aged care have limited voice, choice and control over even the most basic decisions regarding their care, supports and activities.

OPAN considers it essential that people living in residential care have genuine choice and control over how their aged care needs are met across all new categories of care. For example, they should not have their social supports limited to activities available within the facility where they reside. They should be supported to exercise choice and access social support available external to the residential care facility. This approach

will allow people to maintain connection with the social and community networks they established prior to entering residential aged care. It will also support people living in residential care to access social supports that genuinely interest them and meets their needs across all aspects of life (cultural, emotional, spiritual, political etc.). Quality of, and enjoyment with, life must be a core foundation of residential care.

OPAN also notes that access to participation in political life is often limited in residential aged care. This includes reliance on family or friends to provide postal voting forms, or on staff if the person has no support network. While the Australian Electoral Commission has provided mobile election booths within residential aged care this can be limited due to remoteness or outbreaks of infectious diseases that prevent access. Participation in other political activities also becomes limited where the person has no access to transport to attend meetings or items such as tablets/laptops or even Wi-Fi to participate online.

A specific Convention on the rights of older persons would clarify the right of older people to participate in public life and in decision-making processes, including the right to engage in political activities, such as voting in elections. This would include States' obligations arising from that human right and how it is to be implemented in practice. It would, for example, clarify that the right applies in public and private spheres, and that States have an obligation to take ensure these rights are applied to enable older people to engage regardless of where they live.

II. Options on how best to address the gaps

1. Please state how your Government/organization has engaged with international and regional human rights mechanisms (for example: universal periodic review (UPR) treaty bodies, special procedures, regional mechanisms), specifically with regard to older persons

OPAN was accredited to the Open Ended Working Group on Ageing in 2022. OPAN supported, in partnership with the Global Alliance on the Rights of Older People, a member of our National Older Persons Reference Group to attend OEWGA in 2022 to enable members to hear the voice of lived experience.

In 2022 OPAN, along with EveryAge Counts, Relationships Australia, the Australian Human Rights Institute at the University of New South Wales, Community Legal Centres

Australia and the National Older Women's Network established the Rights of Older Persons Australia network which is advocating for a Convention on the Rights of Older Persons and lobbying the Australian Government to support such a Convention.

OPAN's engagement with international and regional human rights mechanisms has primarily been through engagement with different non-governmental organisations and networks, in particular:

- Participating in meetings with the Global Alliance for the Rights of Older People
- Being on the Board of Directors of the International Federation of Ageing and contributing to discussions
- Participating in the Second Stakeholder Consultation for the Asia-Pacific Intergovernmental Meeting on the Fourth Review and Appraisal of the Madrid International Plan of Action on Ageing

OPAN has also sought to make use of binding human rights standards in seeking to influence the improvement and reform of the Australian aged care system. However, efforts to contribute to the development of a "rights-based aged care act" by drawing on international human rights norms has been challenging due to the lack of specific attention to many issues that are of particular concern to older people. This contrasts with recent inquiries and reforms in relating to persons with disability, which have been framed by the CRPD and have drawn on its specific standards to inform analysis and reform options.

2. Have those engagement resulted in positive impact in strengthening the protection of the human rights of older persons? Please elaborate.

OPAN's engagement with these mechanisms may have had some positive impact though it is difficult to measure this. However, we believe that without a Convention, this work is not enough in terms of delivering real change in the protection of older persons' human rights. The absence of a dedicated convention on the human rights of older persons hinders advocacy and policy development, when compared with the use of other core international instruments such as the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) generally or in relation to older persons. For example, in Australia the National Disability Insurance Scheme Act was written to give effect to the Convention on the Rights of Persons with Disabilities. However, people aged over 65 with a disability are excluded from these protections (unless they enrolled in the Scheme before they turned 65) and instead are covered by the Aged Care Act which has been recognised to provide a much inferior

level of support for individual's conduct of their daily lives and continued participation in their communities.

3. What other options can be considered to strengthen the protection of older persons? Please elaborate.

OPAN considers that a new convention on the human rights of older persons is an essential part of any effective response to the gaps, limitations and deficiencies of the current international human rights framework. Only by the adoption of a comprehensive and coherent treaty framework, supported by a monitoring body comprising members with expertise in ageing and human rights issues, will it be possible to overcome the fundamental conceptual limitations of the existing framework, as well as its operational limitations, that have been analysed in OHCHR studies and reports the work of the Independent Experts and in submissions to the Open-ended Working Group and other United Nations fora..

OPAN recognises that other options to improve the enjoyment by older persons of their human rights. have been proposed. OPAN acknowledges that some improvements could be made by encouraging States, the human rights treaty bodies, other UN human rights mechanisms and non-governmental organisations to devote more attention to the human rights of older persons in their work. However, OPAN considers that these improvements are likely to insufficient, given the fundamental conceptual limitations of the present framework.

Furthermore, there are clearly limits to the capacity of the present system and to the preparedness of participants in it to give substance to these suggestions. Despite many States (including Australia) stating that existing norms are sufficient and advocating for the better use of existing mechanisms since the establishment of the Open-ended Working Group on Ageing more than a decade ago, there has been no significant general improvement in the raising and consideration of the human rights of older persons within the international human rights framework. More is needed.

OPAN therefore strongly supports the elaboration of a Convention on the Human Rights of Older Persons. A comprehensive and coherent treaty framework would make a unique and significant contribution to improving the protection of the human rights of older persons at the international and national levels. Any other option would not be universal/international, not legally-binding, not comprehensive in its coverage of rights and would lack adequate monitoring mechanisms with expertise in relation to ageing and human rights. Above all, a Convention would provide protections that are currently lacking, or not adequately addressed in existing human rights conventions.

4. *If applicable*, what is your assessment on the protection of the human rights of older persons according to regional and international instruments?

The rights of older people are the same universal rights afforded to all adults. However, the specific ways in which some rights apply to older persons may vary, hence the need for explicit, tailored protections. As we age, we experience an erosion in the enjoyment of our human rights in many areas. The 'Open-ended Working Group on Ageing has recognised the need to consider older persons as specific rights holders in order to allow for their participation in social, economic, cultural, civil and political life. Similarly, the Australian Charter of Aged Care Rights restates rights that are already enshrined in law e.g. to live without abuse, the right to privacy etc. Yet the absence of a comprehensive human rights treaty on the human rights of older persons means that legislative change and policymaking lack an essential framework providing substantive for the taking of concrete steps. For example, a new 'rights-based' Aged Care Act is under development in Australia, but those engaged in have encountered significant challenges as there is no specific convention on the rights of older people from which the rights can be drawn.

The erosion or impeding of rights experienced by older people can be subtle or explicit. For example, most OPAN Service Delivery Organisations report instances where older people who have received a diagnosis of a dementia-related condition are defined and referred to by their diagnosis. Often the support person is spoken to at the exclusion of the older person, with decision made on behalf of the older person without consultation or without using supported decision-making approaches.

COVID-19 has provided significant evidence of gaps in protection of older persons' right to non-discrimination as a right in itself and in the realisation of other rights including the rights to health, care and support, freedom from violence, abuse and neglect, and participation as full members of society. As one older person noted "During covid, older people in residential care didn't have an opportunity to vote, excluding them from participation in political life and silenced their right to a voice in democracy".

One hundred and forty-six Member States have recognised these violations and committed to fully promoting and respecting the rights of older persons in their support for the UN Secretary General's policy brief on the impact of COVID-19 on older persons. This highlights that the rights of older people are not currently protected within existing frameworks.

Member States have ratified the Conventions on the Rights of Persons with Disabilities and on the Rights of the Child, indicating that the Governments recognise that there are particular rights that people have that are not captured by existing human rights documents. In addition, in considering the existing human rights conventions we can see that there are many gaps and shortfalls in explicit and effective protection; they

include, but are by no means limited to, the lack of explicit rights to care and support for independent living in older age and to autonomy and independence in older age.

OPAN member organisations by state or territory:

