

27 March 2024

The Chair  
General Assembly Open-ended Working Group on Ageing  
By email: [ageing@un.org](mailto:ageing@un.org)

**Invitation to provide input: participation in public life and decision-making processes; social inclusion and the right to health and access to health services**

Thank you for the opportunity which you have extended to accredited organizations to provide substantive inputs for the 14<sup>th</sup> session of the United Nations Open-Ended Working Group on Ageing. We are pleased to provide inputs in respect of selected guiding questions about participation in public life and decision-making processes, as well as content for the development of possible international standards on the protection of the rights of older persons to social inclusion and the right to health and access to health services.

**Participation in public life and decision-making processes**

**Question 1 a) National and local legal and policy framework**

Existing domestic normative statements (a framework and action plan) have not upheld human rights of older persons or promoted participation by older persons in public life. They maintain the ‘visibility gap’ in recognition of the human rights concerns that engage us as we age.<sup>1</sup> Australia’s ambivalence towards the rights of older persons is evident in proposed aged care legislation which, while identifying rights of older persons, expressly excludes older persons from directly enforcing their rights in a court or tribunal. This is a grave denial of a right which is fundamental to the rule of law. In Australia, the evidence of ageism directed at older people and its impact on their status as rights holders is extensive and growing.<sup>2</sup> Ageism is deeply implicated in the marginalisation of older people, and human rights guarantees are often denied to older people, as older people.<sup>3</sup> Ageism is at the root of the glacial progress, on the political agenda, of issues of critical concern to all of us as we age. The absence of explicit international and domestic human rights norms undermines basic rights of older Australians.<sup>4</sup>

**Question 5 Accountability**

Proposed aged care legislation excludes mechanisms to directly enforce, vindicate and remediate the breach of, older persons’ rights. This exacerbates the risk that under-resourced policy-makers, decision-makers and regulators will become quiescent and inactive, and that ‘ritualistic’ tick a box regulation will reassert itself as the default. Further, older persons currently experience significant barriers in accessing legal advice and representation, making vindication of their rights, and remediation for breaches, a remote prospect.<sup>5</sup>

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<sup>1</sup> See, eg, Herro A & Byrnes, A (2021) ‘Transcending framing contests over the human rights of older persons’ (2020) 38 Australian Yearbook of International Law 253-284.

<sup>2</sup> Australian Human Rights Commission (2021a) What’s age got to do with it? A snapshot of ageism across the Australian lifespan.

<sup>3</sup> Van Bueren QC, G ‘The case for a convention on the rights of older persons’ (Web Page)

<sup>4</sup> See Royal Commission into Aged Care Quality and Safety (2021) Final Report <https://agedcare.royalcommission.gov.au/publications/final-report> ; North M S & and Fiske S T ‘Act Your (Old) Age: Prescriptive, Ageist Biases Over Succession, Consumption, and Identity’ (2013) 1(1) International Perspectives Psychology Research Practice Consultation 72.

<sup>5</sup> Law Council of Australia (2018) Justice Project, <https://lawcouncil.au/justice-project> [accessed 28 June 2023]

## Social inclusion

### Question 3 State obligations

Delivering the Hugh Stretton Oration of 2023, the Australian Minister for Health and Ageing declared that ‘...age equality must become another of the great human rights issues of our time’ in relation to which ‘societies everywhere must act’. He further declared that ‘governments must provide the leadership.’<sup>6</sup> The Human Rights Framework of 2010 provided a useful basis for considering Australia’s suite of (fragmented) human rights and anti-discrimination legislation. However, the Framework and the 2012 Action Plan offered limited recognition of, and response to, ageism and age discrimination. Our rights as we age are customarily viewed through reductionist medicalised, economic, or technocratic lenses. This impoverished understanding has facilitated ongoing ageism and age discrimination, as well as amply-documented violence, abuse, neglect and exploitation.<sup>7</sup> The Framework and the Plan have maintained the ‘visibility gap’ in public and political recognition of the human rights concerns that engage us as we age.<sup>8</sup>

A national human rights act, identifying older persons’ rights as a national priority, would provide a normative basis for upholding our rights as we age. The Act must explicitly recognise that older persons remain rights-bearers. It should counter the prevailing ‘false binary’ of having or lacking capacities with more nuanced sensibilities, articulate dignity of risk, and offer a vigorous riposte to so-called ‘benevolent’ ageism, which recognises older people not as rights-bearers, but as beings to be the objects of ‘care’ and ‘protection’.

Benefits to older people of services and supports to maintain relationships are well-documented. The State should prioritise investment in service responses that mitigate against stigma, segregation, loneliness and social isolation, and that actively promote ongoing user-centred participation in outside (as well as on-site) activities and public life. Segregation, stigma and isolation pose significant risks to physical and mental health and that healthy family and broader social relationships are protective factors against abuse and neglect.<sup>9</sup> De-institutionalisation is vital. To give effect to rights to participate in family, social, cultural and community life, and the right to health, State measures should prioritise universal access to services which promote social connection, through:

- individual, family and group counselling and psycho-social supports
- culturally safe and appropriate services (including complaints and remedies)
- support to build capacity for effective problem solving and communication to help older people to flourish through life transitions and maintain connections to family, friends, neighbourhood and community.

### The right to health and access to health services

#### Question 1 Definition

In the absence of an international convention on the rights of older people, Australians’ rights as we age are customarily viewed – if they are recognised at all - through reductionist lenses characterised by notions of

<sup>6</sup> See <https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/the-hugh-stretton-oration-with-minister-butleruniversity-of-adelaide-27-april-2023> [accessed 28 June 2023]

<sup>7</sup> See the Final Report of the Royal Commission into Aged Care Quality and Safety, 2021; Qu, L., Kaspiew, R., Carson, R., Roopani, D., De Maio, J., Harvey, J., Horsfall, B. (2021). National Elder Abuse Prevalence Study: Final Report. (Research Report). Melbourne: Australian Institute of Family Studies.

<sup>8</sup> See, eg, Herro & Byrnes, 2021, *ibid*.

<sup>9</sup> See, eg, Heinrich L & Gullone E (2006). The clinical significance of loneliness: A literature review. *Clinical Psychology Review* 26:695–718; Dean, A. (2019) Elder Abuse: Key Issues and Emerging Evidence. CFCA Paper No. 51. <https://aifs.gov.au/cfca/publications/cfca-paper/elder-abuse>; Pillemer, K., Burnes, D., Rife, C., & Lachs, M. S. (2016). Elder abuse: Global situation, risk factors, and prevention strategies. *Gerontologist*, 56, S194–S205. doi:10.1093/geront/gnw00

inevitable deficit and decline, and a focus on containment. This impoverished understanding facilitates ongoing ageism and age discrimination, as well as amply-documented violence, abuse, neglect and exploitation.<sup>10</sup> Older persons in Australia suffer from violations to their rights to life, privacy, social and cultural participation, and the family life, as well as the right to freedom from cruel, inhuman or degrading treatment. Key settings where ageist attitudes prevail are the workplace, family and local community settings, as well as in the provision of health and aged care.<sup>11</sup> The Royal Commission reported that deliberate acts of harm and forms of abuse occur in residential aged care, including physical and sexual abuse.<sup>12</sup> Physical and sexual violence in residential aged care sometimes occurs at the hands of staff members, and there are situations in which residential aged care providers do not protect residents from abuse by other residents. The Royal Commission Final Report states: 'This is a disgrace and should be a source of national shame. Older people receiving aged care should be safe and free from abuse at all times.'<sup>13</sup>

We support the final recommendation of the United Nations report into COVID-19 and its effect on older persons was that stronger legal frameworks are required at both national and international levels to protect the human rights of older persons, including by accelerating the efforts of the General Assembly's working group to develop proposals for an international legal instrument to promote and protect the rights and dignity of older persons.<sup>14</sup>

Human rights to health should be viewed within a positive quality of life paradigm, and eschew innately deficit and pathologising paradigms of ageing and older persons. These rights should acknowledge ability and reablement as socially sanctioned goals for older persons.

### Question 3 d) Scope of the Right

Ongoing misuse of 'rights language' such as 'informed consent' in legislation normalising restrictive practices obscures the inherently non-consensual application of restrictive practices to older persons living in institutional settings. The use of delegated legislation minimises the human rights violations involved, and shields them from Parliamentary scrutiny.

The absence of therapeutic benefit for those subjected to restrictive practices has been plainly demonstrated, including in evidence to the Royal Commission, as has the use of restrictive practices to benefit persons other than the individual subjected to them.<sup>15</sup> Yet Australian Governments have responded merely by constructing dubious 'authorisation' arrangements, enabling 'decision-makers' with neither therapeutic expertise, or even an intimate knowledge of the older person, to 'authorise' restrictive practices to ease the burden on intolerably over-burdened staff, protect third parties (including staff, other residents and other third parties), and remove liability risk from providers.

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<sup>10</sup> See the Final Report of the Royal Commission into Aged Care Quality and Safety, *ibid*; Qu et al, 2021, *ibid*.

<sup>11</sup> EveryAGE Counts, 'The drivers of ageism: Foundational research to inform a national advocacy campaign tackling ageism and its impacts in Australia' (Full Report, 2017) 9. See also EveryAGE Counts, 'Ageism Report 2021' (Full Report, 2021); Leah Nemiroff, 'We can do better: Addressing ageism against older adults in healthcare' (2022) 35(2) Healthcare Management Forum 118-122.

<sup>12</sup> Royal Commission Report Final Report, 2021, *ibid* (n 36); Royal Commission into Aged Care Quality and Safety (2019) Interim Report <https://agedcare.royalcommission.gov.au/publications/interim-report>; Royal Commission into Aged Care Quality and Safety, 'Aged Care in Australia: A Shocking Tale of Neglect' (Media Release, 31 October 2019).

<sup>13</sup> Royal Commission Final Report, 2021, *ibid*, 68

<sup>14</sup> United Nations Sustainable Development Group (2020). Policy Brief: The Impact of COVID-19 on older persons, 14. See also Inter-American Commission on Human Rights, Resolution No. 01/20: Pandemic and Human Rights in the Americas (10 April 2020)

<sup>15</sup> Common law jurisdictions, including Australia, have long accepted that stricter criteria apply to establishing consent to interventions that are to benefit a third party, rather than the person subjected to them: see, eg, McLean and Petersen, 1996, 332; Oberman, 2000, 468. See also *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961; *State of Queensland v Nolan and Anor* [2001] QSC 174 (31 May 2001); *McFall v Shimp* 10 Pa.D&C.3d 90 (1978), accepted in *In re AC 573 A.2d 1235* (1990), 1244; *St George's NHS Trust v S* [1998] 3 All ER 673; *GWW and CMW* (1997) FLC 92-748.

The protections of older people in respect of restrictive practices are markedly inferior to those of people with disability. It is a further example of structural ageism and it is state-sanctioned elder abuse.

**Question 3 e) Remedies and redress**

Normative standards must provide meaningful and accessible remedies for breaches of all rights – including decision-making rights that protect autonomy. Aged care legislation offers no remedy to an individual whose human rights (including decisional rights) have been breached, in the absence of physical harm. While the draft includes a statement of rights, it expressly excludes recourse to a court or tribunal to enforce rights. Society must recognise that infringements of autonomy, dignity, and self-determination are *per se* harmful.

**Question 4 State obligations**

The State must commit to eliminating the use of restrictive practices. Relationships Australia has commended to Governments' urgent attention proposals made by the Queensland Public Advocate, which centre on an authorisation process, as well as Recommendations 4-10 and 4-11 of ALRC Report 131,<sup>16</sup> with which the Queensland proposals are consistent. Relationships Australia emphasises that restrictive practices can only be eradicated if caregivers are properly supported within a safe work environment.

**Question 7 Implementation: main challenge**

The principal challenge is to persuade legislators and the broader community that all persons have rights to health and health care that are not contingent on their age.

**CONCLUSION**

Thank you again for the opportunity to contribute to the Working Group's 14<sup>th</sup> Session. Should you wish for further elaboration on the matters canvassed here, please do not hesitate to contact me at [ntebbey@relationships.org.au](mailto:ntebbey@relationships.org.au), or our National Policy Manager, Dr Susan F Cochrane, at [scochrane@relationships.org.au](mailto:scochrane@relationships.org.au).

Kind regards



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<sup>16</sup> Australian Law Reform Commission (2017) Elder Abuse – A National Legal Response: Final Report <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>