



Australian
Human Rights
Commission

Normative content on the right to health and access to health services

Australian Human Rights Commission

Input to Open-Ended Working Group on Ageing

12 April 2024

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1 Definition of the right to health

1.1 How the right is defined in national and local legislation

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

There is no national/Commonwealth law that explicitly protects the right of older persons to the highest attainable standard of physical and mental health. Three State/Territories in Australia have human rights laws that apply at the State/Territory level but only one of these specifically protects the right to health services.²

The right to health is contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ 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, which includes ICESCR.⁴

1.2 How such a right should be defined

In considering how the right to health should be defined, close reference and alignment with the guidance of the UN Committee on Economic Social and Cultural Rights on the scope of the right is recommended, including that the right should encompass enjoyment of a variety of facilities, goods, services and conditions necessary for individuals to realise their highest attainable standard of health.⁵

A specific right to long-term and palliative care should also be included.⁶ Additionally, there should be specific measures to support groups who face or have faced entrenched discrimination so they can have to equal access to healthcare and appropriate services that meet their needs.⁷ This includes older people with disability, Indigenous populations, culturally and racially marginalised communities and neurodiverse people.

Noting the impacts of ageism on all aspects of older people's health, the right to health should further include appropriate measures to address and combat ageism and age discrimination.⁸

1.3 Relevant national legal provisions and protections

The *Health Insurance Act 1973* (Cth) underpins Australia's universal health insurance scheme, Medicare, which provides all Australians access to free or subsidised health and hospital services.⁹

The *National Health Act 1953* (Cth) provides for pharmaceutical, sickness and hospital benefits, as well as medical and dental services.¹⁰

The Commonwealth Seniors Health Card is available for Australians who are of Age Pension age, but do not receive Centrelink payments. The card entitles holders to additional refunds for medical expenses, and greater discounts on prescription medicines.¹¹

The Pensioner Concession Card is available for recipients of the Age Pension and entitles holders to various concessions at the national, state/territory and local levels including refunds for medical expenses, assistance with hearing services, reduction on energy bills and reduced fares on public transport.¹²

The *Aged Care Act 1997* (Cth) governs government-funded aged care in Australia.¹³ The Australian Government is currently developing a new *Aged Care Act* to strengthen Australia's aged care system and ensure the rights and needs of older persons are at the centre of the aged care system.¹⁴

2 Scope of the right – existing national legal standards

(a) At the national level, the *Age Discrimination Act 2004* (Cth) makes it unlawful to discriminate against older persons on the basis of age in specific areas of public life, including goods and services which can cover matters relating to health.¹⁵ Similar legislation prohibiting age discrimination exists in each State and Territory.¹⁶

(b) In Australia there are various preventative health care services available to older persons. These include free annual flu immunisations for Australians 65 and older, free pneumonia immunisations for Australians 65 and older and Aboriginal and Torres Strait Islander peoples aged 50 and older, free Shingles immunisation for adults aged 70 to 79, free Bowel Cancer Screening for Australians aged 50 to 74 and free Breast Cancer Screening for all women over 40.¹⁷

(c) The National Safety and Quality Health Service Standards (NSQHS Standards) aims to protect the public from harm and improve the quality of health service provision in Australia. Developed by the Australian Government in collaboration with the private sector, clinical experts, patients and carers, the NSQHS Standards provide a nationally consistent statement about the level of care consumers can expect from health services.¹⁸

(d) There is no uniform standard or approach to legal capacity nor substitute and supported decision-making in Australia.¹⁹ The Australian Human Rights Commission (the Commission) has consistently advocated for a national supported decision-making framework and the adoption of uniform principles to guide decision-making.

(e) Each State and Territory has a specialised complaints handling body for complaints about the provision of health services by a health professional or hospital. In cases where there are reportable incidents in connection with the provision of aged care under the *Aged Care Act 1997* (Cth), such as unreasonable use of force, neglect or use of restrictive practice in relation to a care recipient, these incidents may be reported to the Aged Care Quality and Safety Commission.²⁰

3 State obligations

Australia should introduce a national Human Rights Act and Framework to respect, protect and fulfil the human rights of older persons. Informed by extensive consultation and research, the Commission's five-year project *'Free and Equal: An Australian conversation on human rights'* proposes a model for a national human rights law and framework. This model, if adopted, would incorporate Australia's international obligations domestically and create legal protections for the human rights of all Australians. This model would also increase the responsibility that governments have, to consider how their laws, policies, and actions might affect people's human rights, including older people's right to health.²¹

The Australian Government should also support the development of an international Convention on the Rights of Older Persons to strengthen existing international and domestic frameworks for protecting the rights of older persons.

4 Special measures and considerations

The right to health of older persons should guarantee the provision of equitable, high-quality, safe, timely, reliable and affordable healthcare. Special consideration should be given to enable equitable access, including reducing wait times and providing subsidised services for older people who may face barriers to accessing health services, including older people with disability and those from Indigenous, culturally and linguistically diverse and lower socio-economic backgrounds.²²

Older people over 65 years old have been ranked the most digitally excluded age group in Australia.²³ It will be important to consider in the development of a right to health, the impacts that the increased digitisation of health services, such as online booking systems and the digitisation of health records, may have on older people's access to healthcare.²⁴

Ageism has been linked to poorer physical and mental health and earlier death among older people.²⁵ The impacts of ageism and measures to address and combat age discrimination must be considered in development of normative content on older persons' right to health.

The healthcare system in Australia is a complex mix of direct healthcare and allied service providers. It is provided and paid for by a combination of governments, public and private insurers, private sector service providers, and individuals.²⁶ The obligations under the right to health should be extended to non-state parties, by incorporation into domestic laws or otherwise, to ensure safe, effective, accessible, timely and affordable health outcomes that respond to the individual needs of older persons. The rights of older persons receiving health services should be at the centre of any healthcare system, regardless of whether it is provided by the State or private sector.

5 Implementation – best practices and key challenges

The Australian Government is in the process of developing a new *Aged Care Act* that aims to ensure older people who seek and receive aged care services are at the centre of the aged care system. The new law proposes to introduce a Statement of Rights outlining the rights that older people receiving aged care should expect and a Statement of Principles to guide decisions and actions in the aged care system.²⁷

A key challenge is that in the absence of a Human Rights Act in Australia, there are limited avenues for enforcing rights and accessing appropriate redress and remedy when an older person's human rights are infringed, whether in the context of aged care or in accessing health services generally.

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 *Human Rights Act 2019* (QLD) s 37.

³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) Art 12(2).

⁴ 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>>.

⁵ See also the Australian Human Rights Commission's proposed model for a national Human Rights Act which considers the right to health: Australian Human Rights Commission, *Free & Equal – Position Paper: A Human Rights Act for Australia* (2023) <<https://humanrights.gov.au/human-rights-act-for-australia>>.

⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Update to the 2012 analytical outcome study on the normative standards in international human rights law in relation to older persons, Working paper prepared by OHCHR* (March 2021) 38-42 <<https://social.un.org/ageing-working-group/documents/eleveth/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>>.

⁷ Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (2021).

⁸ World Health Organisation, *Global Report of Ageism* (2021) 48 <<https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>>; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, UN Doc A/HRC/49/70 (2022) 5; United Nations Human Rights Council, *Resolution adopted by the Human Rights Council on 7 October 2021* (14 October 2021) A/HRC/RES/48/3, 2 <<https://documents.un.org/doc/undoc/gen/g21/287/79/pdf/g2128779.pdf?token=kRwWs3lz43nT92cCYF&fe=true>>.

⁹ *Health Insurance Act 1973* (Cth); Australian Human Rights Commission, *Your Rights at Retirement* (2019) 149 <<https://humanrights.gov.au/our-work/age-discrimination/publications/your-rights-retirement-2019>>.

¹⁰ *National Health Act 1953* (Cth).

¹¹ Australian Human Rights Commission, *Your Rights at Retirement* (2019) 153 <<https://humanrights.gov.au/our-work/age-discrimination/publications/your-rights-retirement-2019>>.

¹² Australian Human Rights Commission, *Your Rights at Retirement* (2019) 153 <<https://humanrights.gov.au/our-work/age-discrimination/publications/your-rights-retirement-2019>>.

¹³ *Aged Care Act 1997* (Cth).

- ¹⁴ Department of Health, *Consultation on the new Aged Care Act* (2024) <<https://www.health.gov.au/our-work/aged-care-act/consultation>>.
- ¹⁵ *Age Discrimination Act 2004* (Cth).
- ¹⁶ 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).
- ¹⁷ Australian Human Rights Commission, *Your Rights at Retirement* (2019) 161-162 <<https://humanrights.gov.au/our-work/age-discrimination/publications/your-rights-retirement-2019>>.
- ¹⁸ Australian Commission on Safety and Quality in Health Care, *'The NSQHS Standards'* (Webpage 2024), accessed 25 March 2024 <<https://www.safetyandquality.gov.au/standards/nsqhs-standards>>.
- ¹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper 44, November 2011).
- ²⁰ *Aged Care Act 1997* (Cth) s 54.3; and Aged Care Quality and Safety Commission, *'Complaints & concerns'* (Webpage), accessed 2 April 2024 <<https://www.agedcarequality.gov.au/contact-us/complaints-concerns>>.
- ²¹ Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (2023) <<https://humanrights.gov.au/free-and-equal>> and Australian Human Rights Commission, *Free and Equal – Position paper: A Human Rights Act for Australia* (2023) <<https://humanrights.gov.au/human-rights-act-for-australia>>.
- ²² COTA, *'New research: things are getting worse for older Australians'* (Webpage 13 May 2023), accessed 3 April 2024 <<https://cota.org.au/news-items/new-research-things-are-getting-worse-for-older-australians/>>.
- ²³ Australian Digital Inclusion Index, *'Key findings and next steps'* (Webpage 2023), accessed 21 March 2024 <<https://www.digitalinclusionindex.org.au/key-findings-and-next-steps/>>.
- ²⁴ Australian Institute of Health and Welfare, *'Digital health'* (Webpage 7 July 2022), accessed 22 March 2024 <<https://www.aihw.gov.au/reports/australias-health/digital-health>>.
- ²⁵ World Health Organisation, *Global Report of Ageism* (2021) 49 and 51 <<https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>>.
- ²⁶ Australian Institute of Health and Welfare, *'Health system overview'* (Webpage 7 July 2022), accessed 2 April 2024 <<https://www.aihw.gov.au/reports/australias-health/health-system-overview>>; Office of the United Nations High Commissioner for Human Rights and the World Health Organisation, *The Right to Health – Fact Sheet No. 31* (2008) 27-28 <<https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>>.
- ²⁷ Department of Health and Aged Care, *A new Aged Care Act: exposure draft – Consultation paper No.2* (December 2023) 10 <<https://www.health.gov.au/sites/default/files/2024-02/a-new-aged-care-act-exposure-draft-consultation-paper-no-2.pdf>>.