



Australian  
Human Rights  
Commission

# Public Consultation on Exposure draft – Aged Care Bill 2023

Australian Human Rights Commission

Submission to the Department of Health and Aged Care

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# 1 Introduction

The Australian Human Rights Commission (Commission) welcomes the 14 December 2023 release of the exposure draft of the Aged Care Bill 2023 as recommended by the Royal Commission into Aged Care Quality and Safety (RCAC) and the Department of Health and Aged Care (the Department's) public consultation process.

This brief submission is made jointly by the Acting Age Discrimination Commissioner and Disability Discrimination Commissioner at the Commission.

The Commission commends the Australian Government's ongoing efforts to develop a new Aged Care Act that aims to ensure older people who seek and need aged care services are at the centre of the aged care system within a rights-based framework that recognises person-centred care.

The Commission also notes the Department's November 2023 final draft of Strengthened Aged Care Quality Standards, which form an important corollary to the draft Aged Care Bill 2023.

We draw your attention to the Commission's submission on 19 September 2023 to the public consultation on the foundational elements of a new Aged Care Act. This referred extensively to the Commission's submission to the Royal Commission into Aged Care Quality and Safety (RCAC) on 18 July 2019, 'A Human Rights Perspective on Aged Care'.<sup>1</sup>

The Commission's consistent view is that a human rights-based approach to aged care – where human rights norms and principles are integrated into the planning, provision and monitoring of services – is fundamental to addressing systemic problems and the aspiration of continually improving the quality of aged care in line with the Royal Commission's findings.

The Commission understands the urgency with which the Exposure Draft Bill is being presented for comment, and the balancing required to ensure that any reform also ensures adequacy of funding, a smooth transition for older persons and providers, a sufficient and trained workforce, and regulatory incentives to promote cultural change towards a focus on rights and outcomes, and aspirations for continuous improvement towards 'high quality care'.

The key chapters of the public consultation paper this submission focuses on are Chapters 1, 2, 5, 6, and 7. The Commission recognises that others are better placed to comment on other segments of the draft Bill.

## 2 Summary of Recommendations

**Recommendation 1:** The Australian Government strengthen the rights-based framework of the new Act by taking a more holistic approach to embedding international human rights instruments and incorporating principles and standards relevant to the human rights of older persons in the Act.

**Recommendation 2:** The Australian Government strengthen the definition of ‘high quality care’ to include a commitment to ongoing service improvement and respecting older people’s right to receive visitors.

**Recommendation 3:** The Australian Government fund and facilitate education and training for aged care providers on ‘high quality care’ and commit to regular review and monitoring of community understanding and application of this standard in practice.

**Recommendation 4:** The Australian Government pilot an opt-in audit of aged care providers against the standard of ‘high-quality care’ and collect relevant data to monitor and measure the impact of the new definition on aged care practices and service delivery.

**Recommendation 5:** The Australian Government should:

- clarify and ensure consistent interpretation of the concept of ‘choice and control’ in the new Act, including in the Objects, Statement of Rights, Code of Conduct and under Part 2 Division 2 (Key Concepts);
- strengthen recognition of this concept and embed opportunities for co-design in the Act, including under ss 44(2), 47 and 92(2).

**Recommendation 6:** The Australian Government ensure that any use of computer programs to make decisions in the aged care system is closely monitored, audited and there are appropriate safeguards and processes in place to enable active and informed human oversight and scrutiny of computer driven outcomes.

**Recommendation 7:** The Australian Government reframe terminology in the Act away from ‘sickness’ to reflect a more person-centred approach consistent with the CRPD, ICESCR and Recommendation 25(a) of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Final Report.

**Recommendation 8:** ‘Ageism’ should be recognised and addressed as a key concept in the new Act, including in the Statement of Principles and with respect to the education and engagement functions of the Aged Care Quality and Safety Commissioner.

**Recommendation 9:** The Australian Government strengthen provisions in the Act that recognise and respond to diversity including by:

- (a) specifically recognising women and the gendered nature of ageing under s 22 and in the Aged Care Diversity Framework;
- (b) amending s 22(4) to ensure suitable aged care services are ‘tailored to’ individuals’ location, background and life experiences;
- (c) adding the ‘diversity of a person’s background and experiences’ to the list of factors to be considered by aged care assessors under s 44(2)(b);
- (d) prescribing, in relation to the rules relating to s 44(1) the use of culturally appropriate assessment tool and methods;
- (e) strengthening the System Governor’s annual reporting requirements under s 411 to include report on the extent to which the needs of diverse older people are being met by funded aged care services;
- (f) strengthening s 334 to require regular monitoring and reporting on how funded aged care services are meeting the needs of diverse older populations
- (g) amending s 392(2) to ensure that addressing the needs of specific diverse populations is incorporated as one of the purposes for which the System Governor may make or administer a grant.

**Recommendation 10:** The Australian Government ensure that aged care providers’ accreditation is contingent on their implementation of the Aged Care Diversity Framework and that a new Action Plan for older people with disability is included under the Aged Care Diversity Framework in consultation with people with disability.

**Recommendation 11:** The Australian Government closely consider Recommendation 72 of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and Action 2.11 of the Independent Review into the National Disability Insurance Scheme, and take steps to ensure equitable access and service outcomes for older people with disability across the NDIS and aged care systems.

**Recommendation 12:** The Australian Government introduce a national Human Rights Act and Framework, based on the model proposed by the Australian Human Rights Commission’s *Free and Equal Agenda: An Australian Conversation on Human Rights*.

**Recommendation 13:** The Australian Government consider embedding the Statement of Rights within the Aged Care Quality Standards, the Code of Conduct and the rules so that the rights apply and place obligations on all registered providers, including for Support at Home.

**Recommendation 14:** The Australian Government consider introducing a positive duty on registered aged care providers under the new Act and refer to the positive duty under the *Sex Discrimination Act 1984* (Cth) as a possible model.

**Recommendation 15: The Australian Government consider revising provisions relating to the complaints framework in the new Act to allow complainants to have recourse to judicial processes and for the Complaints Commissioner to be an independent statutory appointment.**

**Recommendation 16: The Australian Government embed supported-decision making and the ‘will and preferences’ model in the new Act, consistent with the National Decision-Making Principles and Commonwealth decision-making model recommended by the Australian Law Reform Commission and Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.**

**Recommendation 17: The Australian Government ensure that the Act’s provisions on supporters and representatives more closely align with Recommendations 4.3 and 4.4 of the Australian Law Reform Commission Report 124 and its National Decision Making Principles. The distinction between supporters and representatives should further be clarified in the Act to ensure that supported decision-making is the primary and preferred approach and substitute decision-making is activated only as the last resort.**

**Recommendation 18: The Australian Government engage with state and territory governments to support parallel legislative reforms to give effect to supported decision-making, in line with Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Recommendation 6.6.**

**Recommendation 19: The Australian Government strengthen the new Act’s provisions and regulations relating to restrictive practices to align with Recommendations 4-10 and 4-11 of the Australian Law Reform Commission Report 131, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Final Report Recommendation 17 and the Review of National Aged Care Regulatory Processes.**

**Recommendation 20: The Australian Government include specific examples, such as physical, chemical, electronic and mechanical restraints, to further clarify the scope of the definition of restrictive practices in the new Act.**

**Recommendation 21: The Australian Government enshrine a commitment in the Act to reduce and eliminate, over time, the use of restrictive practices in aged care.**

**Recommendation 22: The Australian Government more closely align the new Act’s provisions and regulations on ‘reportable incidents’ with Recommendations 4-1 to 4-6 of the Australian Law Reform Commission Report 131.**

**Recommendation 23: The Australian Government develop appropriate indicators, processes and policies for monitoring the new Act’s implementation and consider**

a shorter review timeframe, particularly during the Act’s inception years, than the 5-year period proposed.

## **3 Objects, Statement of Rights and Statement of Principles**

### **3.1 Specific reference to human rights instruments**

The Commission welcomes the specific inclusion of references to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD) in conjunction with other laws in the Objects of the draft Bill, noting that they will provide future direction to the courts in the interpretation of the Act (including the yet to be finalised rules).

The Commission continues to suggest that more extensive reference to relevant human rights instruments is desirable in the Objects. While acknowledging the constitutional rationale behind the specific inclusion of ICESCR and the CRPD in the Objects, the Commission is of the view that this should not preclude a more holistic approach to recognising and referencing other international human rights instruments that relate to the rights of older persons.

While there is currently no binding international instrument dedicated to the human rights of older persons, there are a number of binding and non-binding instruments that contain important provisions relevant to the human rights of older persons.<sup>2</sup> In line with the broader intent of the new Act to shift from a service provider-focussed to a rights-based approach, further embedding of the human rights language, principles and standards recognised internationally under these instruments as they apply and pertain to older persons is strongly encouraged.

For example, under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), ‘places where persons are or may be deprived of their liberty’ may include prisons, juvenile detention centres, immigration detention centres, hospitals, mental health facilities, aged care facilities and facilities for people with disability.<sup>3</sup> The Commission has recommended that the Australian Government ensure all places covered by OPCAT are included in monitoring by the National Preventive Mechanism.<sup>4</sup> Although the Australian Government has indicated that it will take an incremental approach to OPCAT implementation, with an initial focus on ‘primary places of detention’ – which the UN Committee Against Torture noted with concern as contrary to OPCAT article 4 – it does not prevent other jurisdictions from ‘taking a broader approach’, within their mandate, to prioritising the type of places of detention to visit.<sup>5</sup> The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (DRC) also recommended that the Australian Government enact legislation incorporating a wider definition of ‘places of detention’ to ensure all places where people with disability may be deprived of their liberty are



monitored by National Preventative Mechanism bodies and that it should be a matter for the jurisdictions to determine the places of detention they prioritise.<sup>6</sup>

The International Convention on Civil and Political Rights (ICCPR) further enshrines: the rights to liberty and security; liberty of movement and freedom to choose one's own place of residence; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from arbitrary or unlawful interference with privacy, family and home; right to enjoy their own culture, to progress and practice their own religion, or to use their own language; equality before the law without discrimination; not be arbitrarily deprived of life and other important rights.<sup>7</sup> These are universal rights that apply to all persons, not only persons with disabilities as might be the case for some rights captured only under the CRPD in the current framing of the draft Bill.

Additionally, the United Nations Principles on the Rights of Older Persons groups principles relevant to older people under the five headings of Independence, Participation, Care, Self-fulfillment and Dignity, which governments are encouraged to incorporate into national programs.<sup>8</sup> Other non-binding international instruments dedicated to the human rights of older persons include the Vienna International Plan of Action on Ageing, endorsed by the United Nations General Assembly in 1982 and the Madrid International Plan of Action on Ageing, adopted in 2002.<sup>9</sup>

Further, the Universal Declaration on Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination, United Nations Declaration on the Rights of Indigenous Peoples and others, as listed in the Commission's previous submission to the RCAC, each contains important principles and standards which would provide a firm foundation for setting expectations and obligations in the aged care system that are grounded in international human rights.<sup>10</sup>

**Recommendation 1: The Australian Government strengthen the rights-based framework of the new Act by taking a more holistic approach to embedding international human rights instruments and incorporating principles and standards relevant to the human rights of older persons in the Act.**

### **3.2 High quality care**

In line with RCAC Recommendation 13, the Commission supports embedding the concept of 'high quality care' in the new Act to foster a change in culture within the aged care sector – from mere compliance with minimum standards to continuous striving for excellence, innovation and 'high quality care' that is person-centred and consistent with the Statement of Rights.<sup>11</sup>

The Commission recommends strengthening the definition of 'high quality care' to include 'a commitment to ongoing service improvement' and 'respecting older people's right to receive visitors', which are also specified in the Statement of Rights, Statement of Principles and in line with the broader intentions of the new Act. Education and training

of service providers as well as regular review and monitoring will be important to enable community understanding and application of this new standard in practice.

It is also recommended that the concept and definition of ‘high quality care’ be considered in conjunction with recommendations from the Final Reports of the DRC and Independent Review into the National Disability Insurance Scheme (NDIS Review) to ensure an equitable level of care and support across both disability and aged care settings.<sup>12</sup> See section 4 on ‘Ensuring equitable access and respect for diversity’ below.

Noting that the concept of ‘high quality care’ is only ‘encouraged and promoted’ in the draft Bill, some stakeholders have suggested that those registered providers who wish to promote their services as offering ‘high quality care’ should be required to voluntarily consent to be audited by the Aged Care Quality Safety Commission against the ‘high-quality care’ definition. The Commission would also support this measure as a way to strengthen compliance with the new standard, enable the collection of relevant data for monitoring and evaluation purposes and encourage a proactive culture of change among providers.<sup>13</sup>

**Recommendation 2: The Australian Government strengthen the definition of ‘high quality care’ to include a commitment to ongoing service improvement and respecting older people’s right to receive visitors.**

**Recommendation 3: The Australian Government fund and facilitate education and training for aged care providers on ‘high quality care’ and commit to regular review and monitoring of community understanding and application of this standard in practice.**

**Recommendation 4: The Australian Government pilot an opt-in audit of aged care providers against the standard of ‘high-quality care’ and collect relevant data to monitor and measure the impact of the new definition on aged care practices and service delivery.**

### **3.3 Choice and control**

‘Choice and control’ was a key theme that emerged from the Department’s aged care consultations.<sup>14</sup> The Commission welcomes the inclusion of ‘choice and control’ in the Objects of the draft Bill to give effect to Article 3(a) and Article 12 of the CRPD but recommends clarification of this concept within the legislation under Part 2, Division 2 (Key Concepts), to ensure the consistent interpretation of this concept across the aged care system. It is the Commission’s view that the concept of ‘choice and control’ reflect the human rights principles of individual autonomy and independence, right to legal capacity, the freedom to make one’s own choices, and the opportunity to be actively involved in decision-making processes about policies and programmes directly concerning the service recipient.

Further, the Commission recognises an opportunity to strengthen section 44(2) of the Bill to legislate for a more fully engaged, mutually determined needs assessment process where the individual is placed at the centre of decision-making and is involved in co-designing a service plan. Following this, it is suggested that section 47 be amended to ensure the System Governor must have regard to the individual's wishes and preferences as expressed in the service plan when determining access to funded aged care services.

Section 92(2) could be strengthened to ensure that a condition of registration for providers is that they demonstrate an understanding that advancing the independence and personal autonomy of individuals, including the freedom to make one's own choices, are primary considerations in the delivery of funded aged care services in addition to the safety, health, wellbeing and quality of life of individuals.

The Commission recommends making provision for proactive mechanisms in the Bill to strengthen and embed co-design activities in aged care system service planning and review, working in partnership with regulators, to provide opportunities for service users to participate in decision-making about the design and delivery of services. A good starting point would be to outline this commitment in the Objects of the Bill.

**Recommendation 5: The Australian Government should:**

- **clarify and ensure consistent interpretation of the concept of 'choice and control' in the new Act, including in the Objects, Statement of Rights, Code of Conduct and under Part 2 Division 2 (Key Concepts);**
- **strengthen recognition of this concept and embed opportunities for co-design in the Act, including under ss 44(2), 47 and 92(2).**

### **3.4 Use of computer programs**

The Commission notes that under s 398 of the Exposure Draft Bill, the System Governor may arrange for computer programs to make decisions on classification and prioritisation. The Commission acknowledges that computer programs are already in use for classification functions under the current system.

As noted in the Commission's 2021 *Final Report: Human Rights and Technology*, the adoption of computer programs (such as artificial intelligence or automated decision making) in government carries with it significant risk.<sup>15</sup> For example, the Royal Commission into the Robodebt Scheme demonstrated the harm which can occur where computer programs are not developed and deployed safely.<sup>16</sup>

Consistent with a human rights-based approach, any use of computer and other automated assessment and decision-making processes requires an informed 'human in the loop' trained to scrutinise computer driven outcomes.<sup>17</sup> The use of such computer programs should be closely monitored, audited and regularly reported to ensure older

people’s rights and autonomy are respected and there is overall system transparency and accountability.

The Commission would caution against any further or future expanded use of computer programs without first consulting with older persons and affected communities, considering appropriate safeguards and building in relevant processes for active and informed human oversight and intervention.

**Recommendation 6: The Australian Government ensure that any use of computer programs to make decisions in the aged care system is closely monitored, audited and there are appropriate safeguards and processes in place to enable active and informed human oversight and scrutiny of computer driven outcomes.**

### 3.5 Sickness

Eligibility for residential aged care services as stipulated in s 8(6)(a) and (b) and s 48(b) of the Bill is geared towards people who have ‘sickness’. Using this terminology to categorise service recipients reinforces a medicalised deficit model of care which is inconsistent with the objects of the Act, including giving effect to Australia’s obligations under the ICESCR and the CRPD; assisting individuals to live active, self-determined and meaningful lives; and promoting positive community attitudes to ageing.

To fully realise a human rights-based approach, the Commission supports Recommendation 25(a) from the RCAC Final Report to develop a common set of eligibility criteria for services based on an older person’s social, psychological, and physical needs where access to services is aimed at preventing or delaying deterioration in a person’s capacity to function independently, or ameliorating the effects of such deterioration, and enhancing the person’s ability to live independently as well as possible, for as long as possible.<sup>18</sup> While not denying that, as people age, they can and do experience health conditions and sickness, it would represent a more person-centred approach to reframe the Act around priorities of re-ablement, rehabilitation, quality of life and wellness.

**Recommendation 7: The Australian Government reframe terminology in the Act away from ‘sickness’ to reflect a more person-centred approach consistent with the CRPD, ICESCR and Recommendation 25(a) of the RCAC Final Report.**

### 3.6 Ageism

There is currently no reference to ‘ageism’ in the draft Bill, despite evidence showing the prevalence of ageism and the relevance of addressing ageist attitudes in the aged care system.<sup>19</sup> The link between ageism and elder abuse has also been noted in a number of reports.<sup>20</sup>

Recognising and addressing ageism is a critical component, in the Commission’s view, to achieving cultural and behavioural change in an aged care system that respects and supports the rights of older persons.

The World Health Organisation has highlighted the impacts of ageism on older people’s human rights, including their rights to health and adequate standard of living, as well as the importance of addressing ageism in laws and policies.<sup>21</sup> It has also pointed to the potential for intergenerational and educational interventions to reduce ageism and counter its negative impacts. The Commission’s 2023 research, for example, demonstrated the impact that a one-off ageism awareness workshop can have on shifting attitudes and changing people’s behaviours towards older people.<sup>22</sup>

**Recommendation 8: ‘Ageism’ should be recognised and addressed as a key concept in the new Act, including in the Statement of Principles and with respect to the education and engagement functions of the Aged Care Quality and Safety Commissioner.**

## **4 Ensuring equitable access and respect for diversity**

### **4.1 Recognition and response to diversity**

The Commission welcomes the Exposure Draft Bill’s recognition and consideration of diversity in the Statement of Rights, definition of ‘high quality care’, and the System Governor’s designated functions to facilitate equitable access to aged care services for individuals who come from diverse backgrounds. While these inclusions are important, the Commission recommends further strengthening provisions in the Act that recognise and respond to diversity.

#### **(a) Aged Care Principles**

The Commission is concerned that women are omitted from the list of groups specified in the Bill as warranting special consideration within the aged care system. Women’s experience of, and access to, quality and appropriate aged care services can differ significantly to men. As recognised by the Committee on the Elimination of Discrimination Against Women, the impact of gender inequality throughout a woman’s lifespan is exacerbated in old age and is often based on deep-rooted cultural and social norms.<sup>23</sup> Women generally have a higher life expectancy than men and are therefore more likely to need aged care support.<sup>24</sup> The gender pay gap and less time spent in the workforce can lead to lower retirement incomes, financial insecurity and increasing rates of homelessness for older women which can also detrimentally impact their access to quality aged care services. Women, along with a number of other vulnerable groups, also have a heightened vulnerability to elder abuse.<sup>25</sup> The Commission recommends

that women, and the gendered nature of ageing be specifically recognised in section 22(4)(a-m) of the Act.

Section 22(4) of the Exposure Draft Bill currently states:

The Commonwealth aged care system offers accessible, culturally safe, culturally appropriate, trauma-aware and healing-informed funded aged care services ... *regardless of the individual's location, background, and life experiences.* [italics added]

The RCAC Final Report noted that to deliver high quality and safe care, service providers must respect the diverse backgrounds and life experiences of every older person, and 'tailor' the delivery of care to meet the individual needs.<sup>26</sup> To ensure the aged care system fully recognises, respects, and values the differences in older people, the Commission recommends strengthening section 22(4) of the draft Bill by replacing the words 'regardless of', with 'tailored to' to reflect the Aged Care Royal Commission's recommendation.

#### (b) Aged Care Diversity Framework

The Australian Government's Aged Care Diversity Framework and four provider Action Plans provide guidance on how to embed diversity in the design and delivery of aged care services. It is up to governing bodies and executives to ensure that their provider's strategy aligns with culturally safe governance best practice.<sup>27</sup> The Commission recommends that the rules provided for under the Act stipulate that provider registration is to be contingent on their implementation, including requiring that re-registration considers the provider's performance against outcomes in the Action Plans with a particular focus on:

- service user/community co-design in the planning, development, implementation, and evaluation of services
- the use of culturally appropriate assessment methods and tools
- training for aged care workers in cultural safety, anti-discrimination, and trauma informed service delivery
- the recruitment and retention of culturally competent and appropriately skilled aged care workers.

The Commission also recommends the recognition of women within the Aged Care Diversity Framework and inclusion of a new Action Plan that addresses the unique barriers and challenges faced by older people with disability. The Action Plan should address important concepts such as accessibility, non-discrimination, reasonable adjustments and supports for people with disability and should incorporate the National Decision-Making Principles and Guidelines recommended by the Australian Law Reform Commission.<sup>28</sup>

(c) Assessment

Diversity considerations should also be strengthened in the aged care needs assessment requirements under section 44 of the Act. To ensure inclusive and non-discriminatory aged care needs assessments, section 44(2)(b) of the Act should be amended so that in addition to the current requirement to understand the individual's 'preferences and goals', the 'diversity of a person's background and experiences' should also be considered by assessors as part of the person-centred planning process.

The Commission additionally recommends that in relation to section 44(1), the rules prescribe the use of culturally appropriate assessment tools and methods to address assessment needs as identified by the Australian Association of Gerontology and the Aboriginal and Torres Strait Islander Ageing Advisory Group.<sup>29</sup>

(d) Monitoring and resourcing

In applying a human rights-based approach to the monitoring of aged care services, the Commission recommends strengthening the System Governor's annual reporting requirements under section 411(1) and (2) to include reporting on the extent to which the needs of diverse older people are being met by funded aged care services, and the further steps needed to better recognise and respond to their unique needs.

Additionally, the Australian Government should collect, analyse, and disseminate data to enable the monitoring of services. To facilitate this, the Commission recommends strengthening section 334 of the Act to enable monitoring, reporting on (without publishing personal information) and conducting research into the extent to which the needs of diverse older people are being met by funded aged care services.

The Commission further recommends amending section 392(2) of the Act to ensure the System Governor may, on behalf of the Commonwealth, make or administer a grant of financial assistance for the purposes of providing additional supports to address the needs of specific diverse populations.

**Recommendation 9: The Australian Government strengthen provisions in the Act that recognise and respond to diversity including by:**

- (h) specifically recognising women and the gendered nature of ageing under s 22 and in the Aged Care Diversity Framework;**
- (i) amending s22(4) to ensure suitable aged care services are 'tailored to' individuals' location, background and life experiences;**
- (j) adding the 'diversity of a person's background and experiences' to the list of factors to be considered by aged care assessors under s 44(2)(b);**
- (k) prescribing, in relation to the rules relating to s 44(1) the use of culturally appropriate assessment tool and methods;**

- (l) strengthening the System Governor’s annual reporting requirements under s 411 to include report on the extent to which the needs of diverse older people are being met by funded aged care services;**
- (m) strengthening s 334 to require regular monitoring and reporting on how funded aged care services are meeting the needs of diverse older populations**
- (n) amending s 392(2) to ensure that addressing the needs of specific diverse populations is incorporated as one of the purposes for which the System Governor may make or administer a grant.**

**Recommendation 10: The Australian Government ensure that aged care providers’ accreditation is contingent on their implementation of the Aged Care Diversity Framework and that a new Action Plan for older people with disability is included under the Aged Care Diversity Framework in consultation with people with disability.**

## **4.2 Interface with disability and other sectors**

The Objects and Principles of the Act are intended to facilitate a more person-centred aged care system by facilitating access to integrated services for older people. This includes building strong linkages in other sectors like health, mental health, veterans, community services and disability when required.<sup>30</sup>

This approach is critical to delivering an ecosystem of services that work together to ensure older people can access the right mix of supports, at the right time, in a connected and inclusive way.

Greater detail is needed in the Act to outline the access and interface arrangements between the aged care system and other sectors to deliver more integrated services. This would include consideration of other mechanisms that may be needed to support the Objects of the Act, such as Intergovernmental Agreements, measures to ensure better coordination between sectors and to make it easier for older people and their families to navigate, access and achieve consistent service outcomes across different support systems.

The interface issues between the aged care and the NDIS sector, for example, have been well documented, including concerns about the adequacy of current aged care services in supporting older people with disability over the age of 65 years.<sup>31</sup> In line with Recommendation 72 of the RCAC, the Commission’s view is that there should be no distinction in the type and level of service available to a person with disability, whether responsibility for those services lie with either the disability or aged care systems.<sup>32</sup> The NDIS Review recently recommended (Action 2.11) that the Australian Government implement legislative change to allow NDIS participants, once they turn 65, to receive supports in both the NDIS and the aged care system concurrently and clarify when aged care supports are reasonable and necessary.<sup>33</sup>



With respect to the age care system’s interface with NDIS services, the Commission strongly encourages the Department to closely consider recommendations from the RCAC and NDIS Review. The Commission notes the urgency of progressing towards the 1 July 2024 timetable for commencement of the new Act and acknowledges that the Government’s formal response to some of these reports may not be delivered until after that date. Against these timeframes, the Commission’s view is that early consideration and the provision of future opportunities to take into account the Act’s alignment with these reports and interaction with other sectors will be crucial to ensuring sufficient linkages, equitable access and smooth delivery of services across systems.

**Recommendation 11: The Australian Government closely consider Recommendation 72 of the RCAC and Action 2.11 of the NDIS Review, and take steps to ensure equitable access and service outcomes for older people with disability across the NDIS and aged care systems.**

## **5 A Human Rights Act for Australia – enforcement, regulation and safeguarding of rights in aged care**

While the Commission fully supports the shift to a rights-based person-centred approach in the new Act, it is important that these rights are enforceable, and that there are accessible avenues for redress and remedy when rights are violated.

### **5.1 A Human Rights Act for Australia**

The Commission proposes a model for a Human Rights Act and Framework in Australia, as part of its *Free and Equal Agenda: An Australian Conversation on Human Rights* (Free and Equal), informed by extensive consultation and research.<sup>34</sup>

In its final report, *Revitalising Australia’s commitment to human rights: Free and Equal Final Report* (2023) the Commission makes 12 recommendations focusing on structural reforms at the national level, advanced through a revitalised National Human Rights Framework, which would improve government accountability, increase awareness about human rights and improve access to justice for all Australians.<sup>35</sup>

The Commission outlines the necessity for embedding human rights into federal law to increase the responsibility of governments to consider how laws, policies and actions affect people’s human rights, and to respect, protect and fulfil these. A federal Human Rights Act would comprehensively incorporate Australia’s international obligations domestically and codify the fundamental common law rights reflected in international instruments.

A national Human Rights Act and Framework would introduce, among other measures, a more robust assessment of the compatibility of legislation and policies, including the new Aged Care Act and its related instruments, to be scrutinised in the context of domestic and international human rights protections. While the current draft Bill does not refer to the rights of older persons beyond the provision of Commonwealth-funded aged care providers, a national Human Rights Act would place obligations on all aged care service providers and others to uphold the rights of older persons more generally. It would also ensure that there are potential consequences for not adequately considering human rights and that there are avenues for complaint and redress when rights are infringed.

**Recommendation 12: The Australian Government introduce a national Human Rights Act and Framework, based on the model proposed by the Australian Human Rights Commission’s *Revitalising Australia’s Commitment to Human Rights: Free & Equal Final Report* (2023).**

## 5.2 Protecting rights under the new Aged Care Act

Until the goal of a national Human Rights Act and a sustainable National Human Rights Framework is realised, the new Aged Care Act, its Objects, Statement of Rights, Statement of Principles, the rules, Code of Conduct, Aged Care Quality Standards, safeguarding measures, regulatory and enforcement mechanisms, whistleblower protections and complaints framework must go as far as possible and work together as part of a broader ecosystem that enables individual rights to be recognised and upheld.

### (a) Commonwealth-funded aged care providers

It is noted that under the new Act, the Statement of Rights and Principles apply only to Commonwealth-funded aged care providers. The focus is on registered providers to demonstrate they understand these rights and have in place practices to ensure delivery of services is ‘not incompatible’ with the Statement, which will largely be enforced through the regulatory framework.<sup>36</sup>

In this context, and in the absence of a Human Rights Act that would have broader application beyond the limited scope of Commonwealth-funded providers, it is recommended that the Statement of Rights be tightly encompassed and cross-referenced within the Aged Care Quality Standards, the Code of Conduct and other regulatory mechanisms so that the rights apply and place obligations on all funded registered providers.

While the Support at Home program is only expected to be introduced from 1 July 2025, it will be important to consider and ensure in the early stages of the Act’s development, the inclusion of ‘providers of personal care or care planning for older persons residing in

the home’ among the ‘service categories’ of registered providers who will have obligations under the rules to recognise and uphold rights under the new Act. As noted in the Commission’s previous submission to the RCAC, older persons receiving support at home are equally, if not more vulnerable to abuse or neglect as those living in residential aged care.<sup>37</sup>

**Recommendation 13: The Australian Government consider embedding the Statement of Rights within the Aged Care Quality Standards, the Code of Conduct and the rules so that the rights apply and place obligations on all registered providers, including for Support at Home.**

(b) Positive duty

Neither the Statement of Rights nor Statement of Principles ‘create rights or duties that are enforceable by proceedings in a court or tribunal’.<sup>38</sup> Further, failure to comply with the Statement of Principles ‘does not affect the validity of any decision, and is not a ground for the review or challenge of any decision’.<sup>39</sup> While the Inspector General of Aged Care exists to have oversight over systemic issues in the aged care system, the Aged Care Quality Safety Commission is currently the only avenue for individual complaint.

The Commission is concerned that this approach will be insufficient to bring about a change in culture in an aged care system where the intent is to shift away from a service-based, reactive, risk adverse approach to a rights-based approach where the sector strives for excellence and works proactively towards continual improvement and systemic uplift in standards and outcomes.

The Commission supports the introduction of a positive duty on registered aged care providers under the new Act. The positive duty obligations under the *Sex Discrimination Act 1984* (Cth) (SDA) may provide a model of reference for the Department.<sup>40</sup> The positive duty was a key recommendation of the Commission’s *Respect@Work Report* and the Commission has published a range of resources outlining the Commission’s approach to regulating these new legal obligations under the SDA.<sup>41</sup>

A positive duty would, in the Commission’s view, contribute to a safer, more respectful and more inclusive aged care system as it would require registered providers to take proactive steps to prevent harm from occurring in the first place. Furthermore, the introduction of a positive duty would not require a complaint to be made by a vulnerable person for the registered provider to be held accountable. A positive duty shifts the burden for change from vulnerable people experiencing unlawful conduct, to those responsible for keeping people safe.

This approach is especially suitable to aged care, where reliance on a complaints-driven model from often very vulnerable people – including older people with cognitive impairment and those who may not have access to a supporter or representative – poses obvious challenges. A positive duty would better promote understanding of rights,

standards and expectations among providers, and shift their focus to actively preventing, rather than responding to, incidents.

**Recommendation 14: The Australian Government consider introducing a positive duty on registered aged care providers under the new Act and refer to the positive duty under the Sex Discrimination Act 1984 (Cth) as a possible model.**

(c) Complaints process

A new positive duty should not inhibit the inclusion of a robust complaints mechanism and framework in the aged care system. The Commission notes that the new Act provides for expanded complaints functions of the Aged Care Quality Safety Commissioner.<sup>42</sup>

With the Aged Care Quality and Safety Commission being the primary and only avenue for individual service user complaint, the role of the Complaints Commissioner becomes central. The draft Bill's provisions state that an SES employee of the of the Aged Care Quality and Safety Commission will be appointed as Complaints Commissioner to assist in the complaints functions of the Aged Care Quality and Safety Commissioner.<sup>43</sup>

The Commission suggests the Department consider the option of appointing the Complaints Commissioner under separate statutory authority, even though the appointee may be situated within, and share resources with the Aged Care Quality and Safety Commission/er. The Complaints Commissioner should be required to report separately to the Minister as such an arrangement would likely better inform accountability and adaptive resourcing of the Complaints Commissioner's function.

The Commission is also concerned that the lack of recourse to judicial processes may present a risk or impediment to delivering an effective complaints process for the aged care system. Under federal discrimination law, if a person is unable to resolve their complaint by conciliation they may be able to take their complaint to the Federal Circuit and Family Court or the Federal Court of Australia. In some situations, the relevant court's permission is required.<sup>44</sup> In the Commission's experience, the potential for consideration through judicial processes has a role to play in creating leverage or incentive for a meaningful conciliatory process.

**Recommendation 15: The Australian Government consider revising provisions relating to the complaints framework in the new Act to allow complainants to have recourse to judicial processes and for the Complaints Commissioner to be an independent statutory appointment.**

(d) Supported decision-making

With Australia's ageing population, aged care is becoming an increasingly important area of federal responsibility that touches the lives of many. A real opportunity exists for the

aged care sector to provide leadership in driving supported-decision making practice across the public sector.<sup>45</sup>

The Commission strongly supports embedding supported decision-making in legislation in line with recommendations made by the DRC and the Australian Law Reform Commission (ALRC) in its 2014 report on *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124). This would give further effect to Article 12 of the CRPD and enable people who may 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.<sup>46</sup>

It is reassuring to see that the Bill incorporates objects related to self-determination and choice and control, as well as provisions for the appointment of supporters and representatives for people accessing, or seeking to access, funded aged care services. While a step in the right direction, the Bill does not go far enough to embed supported decision-making principles in the actions and duties of these appointments. In a first instance, the Commission strongly recommends that the Bill espouse the ALRC's National Decision-Making Principles.

Further, recommendation 4.3 of the ALRC Report 124 was that relevant Commonwealth laws and legal frameworks should include the concept of a supporter and reflect the National Decision-Making Principles in providing that:

- (a) a person who requires decision-making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;
- (b) where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support; and
- (c) supported decisions should be recognised as the decisions of the person who required decision-making support.

The Bill implements the first part of the recommendation, that is, it includes supporters, but fails to address the remaining components that provide guidance on what supported decision-making looks like in practice. Importantly, while section 24 of the Bill relates to the actions of supporters, at present, it is not clear from these provisions that the final decision ultimately lies with the person who is accessing the decision-making support. This is a critical point to be made to ensure that the role of supporter and representative are distinct.

The duties of a supporter in section 26 of the Bill are to:

- (a) act in a manner that promotes the will, preferences and personal, cultural and social wellbeing of the individual; and
- (b) act honestly, diligently and in good faith; and

- (c) support the individual only to the extent necessary for the individual to do the thing, applying the supporter's best endeavours to maintain the ability of the individual to make the individual's own decisions.

Recommendation 4.4. of the ALRC Report 124 proposed duties of a supporter, and go further than the above in advancing supported decision-making:

A supporter assists a person who requires support to make decisions and may:

- (a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;
- (b) provide advice to the person about the decisions they might make;
- (c) assist the person to communicate the decisions; and
- (d) endeavour to ensure the decisions of the person are given effect.

The Commission recommends the Bill align with ALRC Report 124's recommendations 4.3 and 4.4.

With regards to representatives, as these are substitute decision-makers, it is crucial that, where appointed, representatives be recognised as a last resort and do not preclude supported decision-making from being the primary and preferred approach.

Under sections 374(5) and 376(7), the Bill prohibits the appointment of both a supporter and representative for an individual at the same time. It is not clear why this provision exists and clarification is required, particularly when there is no restriction on an individual having more than one supporter or two or more representatives.

It also appears as though a person who is appointed under State or Territory law (e.g. as guardian or donee of a Power of Attorney) may be able simultaneously to fulfil the functions of a supporter or representative. The ALRC dealt with the issue of interaction between Commonwealth and State and Territory appointments. Where there is a State or Territory appointment in place, this will require a case-by-case analysis, with particular regard being given to the nature and scope of the State or Territory appointment and whether the authority exists to make the full range of decisions as a representative.<sup>47</sup>

Further, to address the potential conflict between Commonwealth and state and territory systems, further engagement with appointed decision-maker agencies is recommended.<sup>48</sup> The Commission supports parallel reforms in state and territory guardianship and administration laws to align with the Commonwealth decision-making model and decision-making principles which give effect to the 'will and preferences' approach. This recommendation aligns with Recommendation 6.6 (a) from the DRC.<sup>49</sup>

Adequate funding for supported decision-making initiatives together with close consultation and involvement of those requiring support and their supporters will be critical to the successful implementation of a national decision-making framework.

**Recommendation 16: The Australian Government embed supported-decision making and the ‘will and preferences’ model in the new Act, consistent with the National Decision-Making Principles and Commonwealth decision-making model recommended by the ALRC and DRC.**

**Recommendation 17: The Australian Government ensure that the Act’s provisions on supporters and representatives more closely align with Recommendations 4.3 and 4.4 of ALRC Report 124 and the ALRC’s National Decision Making Principles. The distinction between supporters and representatives should further be clarified in the Act to ensure that supported decision-making is the primary and preferred approach and substitute decision-making is activated only as the last resort.**

**Recommendation 18: The Australian Government engage with state and territory governments to support parallel legislative reforms to give effect to supported decision-making, in line with DRC Recommendation 6.6.**

(e) Restrictive practices

The Commission recommends strengthening elements in the draft Bill related to restrictive practices. RCAC Commissioner Briggs noted:

Restrictive practices have been identified as a problem in aged care in Australia for more than 20 years. The inappropriate use of unsafe and inhumane restrictive practices in residential aged care has continued, despite multiple reviews and reports highlighting the problem. It must stop now.<sup>50</sup>

The Commission has previously expressed concern that older people, and in particular those with disability, including dementia, are at heightened risk of being restrained inappropriately or confined in aged care facilities.<sup>51</sup>

The need for adequate regulation of restrictive practices is further supported by the fact that the use of restrictive practices may at times amount to elder abuse.<sup>52</sup> It bears repeating that the identification of these issues in aged care services was one of the drivers for the Royal Commission.

If an older person is placed in an aged care facility without their free and informed consent or is not free to leave, they are deprived of their liberty. Such deprivation of liberty occurs not only where there is a physical barrier to exist, but also where a person is physically or chemically restrained, or subjected to solitary confinement in an aged care facility or their own home.<sup>53</sup>

Section 16 (a) of the Bill defines ‘restrictive practices’ as follows:

In relation to an individual is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual.

The Commission welcomes the broad definition of restrictive practices, but nonetheless recommends that it provide specific examples of what is in scope, for the avoidance of doubt. This should include physical, chemical, mechanical and electronic restraint and other restrictive practices used in aged care settings.

The Commission supports DRC Recommendations 6.35-6.37 and 6.39, RCAC Recommendation 17, Recommendations 4-10 and 4-11 from the Australian Law Reform Commission’s 2017 Report *Elder Abuse – A National Legal Response* (ALRC Report 131) and recommendations in the Review of National Aged Care Regulatory Processes for the regulation of restrictive practices in residential aged care, including the development of a national approach to the regulation of restrictive practices in aged care.<sup>54</sup>

While the new Act goes some way towards meeting these recommendations, the Commission is concerned that too much detail is being deferred to the Rules to be made for s 106. This includes who may give consent for the use of a restrictive practice if the individual lacks capacity to give that consent, and the level of reporting and monitoring required.

The Commission recommends that provisions for restrictive practices are strengthened in the new Act and embedded in the accompanying rules to ensure that providers must report in a timely manner (such as monthly) including for short-term or emergency use of restrictive practices, that such restraints are based on a behaviour support plan approved and reviewed regularly by a senior clinician and are reported on and reviewed for provider monitoring and accreditation purposes. For reference, the Commission refers to the ‘senior practitioner’ model proposed by the Queensland Public Advocate for regulating restrictive practices.<sup>55</sup>

The sharing of whistleblower and other complaints received by the Complaints Commissioner should be prioritised if they include the use of restrictive practices, and information shared where privacy and due process allows.

Finally, the Commission recommends that provision be added to the Bill to indicate a commitment to reduce and eventually eliminate the use of restrictive practices. This should be met with sector specific targets and performance indicators be set to drive the reduction and elimination of restrictive practices over time, as recommended by the DRC. The Victorian *Mental Health and Wellbeing Act 2022* (Vic) is a good example of enshrining such a commitment in legislation.

**Recommendation 19: The Australian Government strengthen the new Act’s provisions and regulations relating to restrictive practices to align with Recommendations 4-10 and 4-11 of the ALRC Report 131, RCAC Final Report**



**Recommendation 17, DRC Recommendations 6.35-6.37 and 6.39 and the Review of National Aged Care Regulatory Processes.**

**Recommendation 20: The Australian Government include specific examples, such as physical, chemical, electronic and mechanical restraints, to further clarify the scope of the definition of restrictive practices in the new Act.**

**Recommendation 21: The Australian Government enshrine a commitment in the Act to reduce and eliminate, over time, the use of restrictive practices in aged care.**

(f) Reportable incidents

The Commission suggests a more robust approach to reportable incidents in the new Act, in line with Recommendations 4-1 to 4-6 from the ALRC Report 131, to ensure, for example, resident-on-resident incidents are not excluded from reporting, unexplained serious injury is included in the definition of reportable incident and there is an obligation on providers to report on follow up actions and investigations undertaken after the report.<sup>56</sup> The regulator then has a role to review incident reports and to intervene where necessary, including to build capacity of providers in this regard.

The Commission welcomes the introduction of two new concepts ‘significant failure’ and ‘systemic pattern of conduct’ to registered providers’ obligations in relation to ‘reportable incident’ and ‘restrictive practices’.

However as outlined above, the Commission maintains that a new positive duty is preferable to apply a preventative and proactive approach to the safety and well-being of older people rather than an approach that focuses only on deficits and failures of the system after incidents occur.

**Recommendation 22: The Australian Government more closely align the new Act’s provisions and regulations on ‘reportable incidents’ with Recommendations 4-1 to 4-6 of the ALRC Report 131.**

(g) Monitoring and review

A human rights-based approach requires regular monitoring and review of how people’s rights are affected in practice. The complexity of transitioning a large and diverse aged care system into the prism of the new Act should warrant, in the Commission’s view, very close monitoring and evaluation to ensure that it is meeting people’s needs. While the draft exposure bill currently commits to reviewing the Act every five years, the Commission suggests that a shorter timeframe may be appropriate, especially during the inception years, and that it will be important to develop indicators, policies and processes to enable effective monitoring and adjustments to be made throughout the new Act’s implementation.

**Recommendation 23: The Australian Government develop appropriate indicators, processes and policies for monitoring the new Act's implementation and consider a shorter review timeframe, particularly during the Act's inception years, than the 5 year period proposed.**

(h) Other relevant considerations

While this submission does not comment on these aspects in detail as it has been covered in Commission's previous submission to the RCAC, other important components to supporting the realisation of the rights under the new Act would include, among others, continued consultation with community members allowing appropriate timeframes for response and the allocation of sufficient resources to educate aged care service users and providers about rights under the Act, the Code of Conduct, Aged Care Quality Standards, Aged Care Diversity Framework and its associated action plans, ageism, supported decision-making, enduring powers of attorney and guardianship and other relevant topics.<sup>57</sup>

## 6 Next steps

The Commission supports progression of the new Act to commence on 1 July 2024, acknowledging that this is already 12 months beyond the timeframe recommended in the RCAC Final Report and noting that the rules (referred to in the draft Bill), Support at Home and other details are yet to be finalised.

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- <sup>1</sup> Australian Human Rights Commission, 'A Human Rights Perspective on Aged Care: Submission to the Royal Commission on Aged Care Quality and Safety' (18 July 2019), accessed 3 January 2024 <<https://agedcare.royalcommission.gov.au/system/files/2020-06/AWF.500.00267.0002.pdf>>.
- <sup>2</sup> See Office of the United Nations High Commissioner for Human Rights (OHCHR), *United Nations Principles for Older Persons*, United Nations Human Rights Council resolution 48/3 (2021) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons>>; Office of the High Commissioner of Human Rights, International standards and principles: Independent Expert on the enjoyment of all human rights by older persons, <<https://www.ohchr.org/en/special-procedures/ie-older-persons/international-standards-and-principles>> (accessed 13 February 2024); 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) <<https://www.ohchr.org/en/documents/thematic-reports/ahrc4970-normative-standards-and-obligations-under-international-law>>; and World Health Organisation *Global Report on Ageism* (2021), p1-12 <<https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>>.
- <sup>3</sup> Australian Human Rights Commission, *Roadmap to OPCAT Compliance* (Report, 17 October 2022) <[https://humanrights.gov.au/sites/default/files/opcat\\_road\\_map\\_0.pdf](https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf)>. See also Draft General Comment of UN SPT para 36, CAT/OP/GC/R.1 <<https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/call-inputs/draft-GC1-on-art1-for-public-consultation-en.pdf>>.
- <sup>4</sup> Australian Human Rights Commission, *Roadmap to OPCAT Compliance* (Report, 17 October 2022) rec 4 <[https://humanrights.gov.au/sites/default/files/opcat\\_road\\_map\\_0.pdf](https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf)>.
- <sup>5</sup> UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Comments of Australia on the recommendations and observations addressed to it in connection with the Subcommittee visit undertaken from 16 to 23 October 2022* CAT/OP/AUS/CSPRO/1 (16 January 2024) para 14 <[tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FAUS%2FCSPRO%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FAUS%2FCSPRO%2F1&Lang=en)>; UN Committee against Torture, *Concluding observations on the sixth periodic report of Australia* CAT/C/AUS/C/6 (5 December 2022) para 41 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2587&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2587&Lang=en)>; Australian Human Rights Commission, *Road Map to OPACT Compliance* (Report, 17 October 2022) p10-11 <[https://humanrights.gov.au/sites/default/files/opcat\\_road\\_map\\_0.pdf](https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf)>.
- <sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Final Report – Volume 11* (September 2023) p108 and see also rec 11.7 and p110 <<https://disability.royalcommission.gov.au/system/files/2023-09/Final%20Report%20-%20Volume%2011%2C%20Independent%20oversight%20and%20complaint%20handling.pdf>>.
- <sup>7</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>8</sup> *United Nations Principles for Older Persons*, GA Res 46/91 (16 December 1991) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons>>.
- <sup>9</sup> United Nations, *Report of the World Assembly on Aging*, A/CONF.113/31 (1982) p84 <<https://www.un.org/esa/socdev/ageing/documents/Resources/VIPEE-English.pdf>> and Madrid

International Plan of Action on Ageing, A/CONF.197/3 (8-12 April 2002)  
<<https://unece.org/DAM/pau/MIPAA.pdf>>.

- <sup>10</sup> Australian Human Rights Commission, *A Human Rights Perspective on Aged Care Submission to the Royal Commission into Aged Care Quality and Safety* (18 July 2019).
- <sup>11</sup> Royal Commission into Aged Care Quality and Safety *Final Report: Care, Dignity and Respect* (1 March 2021) rec 13 <<https://www.royalcommission.gov.au/system/files/2021-03/final-report-recommendations.pdf>>.
- <sup>12</sup> Royal Commission into Aged Care Quality and Safety *Final Report: Care, Dignity and Respect* (1 March 2021) rec 72 and 73 <<https://www.royalcommission.gov.au/system/files/2021-03/final-report-recommendations.pdf>>; Independent Review into the National Disability Insurance Scheme *Working together to deliver the NDIS* (Final Report, October 2023) <<https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf>>.
- <sup>13</sup> COTA Australia, Older Persons Advocacy Network, et al. *Aged Care Exposure Draft: Key Issues Paper* (January 2024), 20-21, <[https://cota.org.au/wp-content/uploads/2024/01/Aged-Care-Act-Exposure-Draft-Key-Issues-Paper\\_Jan-2024\\_FINAL\\_v1.pdf](https://cota.org.au/wp-content/uploads/2024/01/Aged-Care-Act-Exposure-Draft-Key-Issues-Paper_Jan-2024_FINAL_v1.pdf)>.
- <sup>14</sup> See Department of Health and Aged Care *Real control and real choice* <<https://agedcareengagement.health.gov.au/reforms/choice/>>.
- <sup>15</sup> Australian Human Rights Commission *Final Report: Human Rights and Technology* (1 March 2021) <<https://humanrights.gov.au/our-work/technology-and-human-rights/publications/final-report-human-rights-and-technology>>.
- <sup>16</sup> Royal Commission into the Robodebt Scheme, *Royal Commission into the Robodebt Scheme Report* (11 July 2023) <<https://robodebt.royalcommission.gov.au/publications/report>>.
- <sup>17</sup> Australian Human Rights Commission, *Final Report: Human Rights and Technology* (1 March 2021) p69, 71 and 103 <<https://humanrights.gov.au/our-work/technology-and-human-rights/publications/final-report-human-rights-and-technology>>. See also Lorna McGregor, Daragh Murray & Vivian Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' (2019) 68(2) *International and Comparative Law Quarterly* p317, 338-339; and Michael Pizzi, Mila Romanoff and Tim Engelhardt, 'AI for Humanitarian Action: Human Rights and Ethics' (2020) 102(913) *International Review of the Red Cross* p145 and 172.
- <sup>18</sup> Royal Commission into Aged Care Quality and Safety *Final Report: Care, Dignity and Respect* (1 March 2021) rec 25 <<https://www.royalcommission.gov.au/system/files/2021-03/final-report-volume-3a.pdf>>.
- <sup>19</sup> Royal Commission into Aged Care Quality and Safety, Research Paper 5 – *They look after you, you look after them: community attitudes to ageing and aged* (13 July 2020). See also, Australian Human Rights Commission, *What's Age Got To Do With It* (2021) <<https://humanrights.gov.au/our-work/age-discrimination/publications/whats-age-got-do-it-2021>>.
- <sup>20</sup> Australian Human Rights Commission, *A Human Rights Perspective on Aged Care: Submission to the Royal Commission on Aged Care Quality and Safety* (18 July 2019) <<https://agedcare.royalcommission.gov.au/system/files/2020-06/AWF.500.00267.0002.pdf>>; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No. 35, November 2018); Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (14 June 2017); Seniors Rights Service, *Abuse of Older People: A Community Response* (Final Report, 1 May 2018).
- <sup>21</sup> World Health Organisation *Global Report on Ageism* (2021) <<https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>>.

- <sup>22</sup> Australian Human Rights Commission, *Changing Perspectives: testing an ageism intervention* (2023) <[https://humanrights.gov.au/sites/default/files/document/publication/changing\\_perspectives\\_2023\\_.pdf](https://humanrights.gov.au/sites/default/files/document/publication/changing_perspectives_2023_.pdf)>.
- <sup>23</sup> United Nations Committee on the Elimination of Discrimination Against Women, General Comment No. 27 on older women and protection of their human rights, 42<sup>nd</sup> sess. CEDAN/C/GC/27 (16 December 2010) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-27-older-women-and>>.
- <sup>24</sup> Australian Bureau of Statistics, Australian Demographic Statistics, ABS Cat. No. 3101.0 (June 2016); Australian Institute of Health and Welfare, *GEN Aged Care Data Factsheet* (2017-18) <<https://www.gen-agedcaredata.gov.au/getmedia/95e3238e-404c-41a6-b85b-dd4e140146cf/Admissions-into-aged-care-fact-sheet-2017%E2%80%932018.pdf?ext=.pdf>>.
- <sup>25</sup> Australian Law Reform Commission, *Elder Abuse Discussion Paper*, Discussion Paper No 83 (2016) para 1.36, 1.73 and 7.6; Australian Institute of Family Studies, *Elder Abuse: Understanding issues, frameworks and responses*, Research Report No 35 (2016); Australian Institute of Family Studies (December 2021) *National Elder Abuse Prevalence Study: Final Report* <[https://aifs.gov.au/sites/default/files/publication-documents/2021\\_national\\_elder\\_abuse\\_prevalence\\_study\\_final\\_report\\_0.pdf](https://aifs.gov.au/sites/default/files/publication-documents/2021_national_elder_abuse_prevalence_study_final_report_0.pdf)>.
- <sup>26</sup> Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (1 March 2021) p155 <<https://www.royalcommission.gov.au/system/files/2021-03/final-report-volume-3a.pdf>>.
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