



# OPAN Submission on an Australian Human Rights Act

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## About OPAN

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

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

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

OPAN's free services support older people and their representatives to understand and address issues related to Commonwealth funded aged care services. We achieve this through the delivery of education, information and individual advocacy support. In 2021/22, OPAN delivered information and advocacy support to over 27,000 people across the nation.

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

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

OPAN's submission focuses intentionally on the implications of a National Human Rights Act on older people as they are often a missing piece of human rights given the lack of an international convention on the rights of older people.



## Recommendations

OPAN's recommendations relate to a Human Rights Act from the perspective of older people. There are many other reasons for an Australian Human Rights Act, including in supporting the human rights of Aboriginal and Torres Strait Islander people, people living with a disability and other diverse and marginalised groups.

1. That the Australian Government legislate a national Human Rights Act and establish robust mechanisms to evaluate its impact and provide accountability and transparency and responses to breaches of rights.
2. OPAN strongly supports a Human Rights Act (the Act), that includes protections of the rights of older people and for those accessing aged care services.
3. The Act must apply broadly across Australian society and not be limited to public entities.
4. That the Australian Government includes specific human rights relating to older persons in any statutory human rights Act or Charter that reflect the specific circumstances of older persons lives.
5. OPAN urges the inclusion of fundamental economic and social rights and acute and primary health rights in any federal charter of rights, in addition to the list of civil and political rights that appear in the AHRC model and the existing human rights acts in the ACT, Queensland and Victoria. The right to social and community connection must be upheld.
6. OPAN strongly recommends the government support a comprehensive international statement of the human rights of older persons in the form of a new United Nations Convention on the Human Rights of Older Persons.

## Are Human Rights Protected in Australia?

Human rights are the basic rights and freedoms that every person in the world, regardless of age, is entitled to. Human rights are:

- **Inalienable**, which means that they cannot be lost as they are a part of being human. In some circumstances the enjoyment of some rights may be suspended or restricted, as we observed during the COVID-19 pandemic when freedom of movement was curtailed;
- **Indivisible**, interdependent and interrelated, which means that different rights are connected with each other and cannot be considered in isolation from one another. The "enjoyment of one right depends on the enjoyment of many other rights and no one right is more important than the rest."
- **Universal**, which means that they apply to all people, everywhere in the world and at all times.

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, sets out the basic rights and freedoms that apply to all people. Developing from this is a series of conventions that the Australian Government has agreed to uphold and respect including the:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;



- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of the Child;
- Convention on the Rights of Persons with Disabilities.

The non-discrimination obligations in the above conventions are in large part enacted into Australian law through the various federal Anti-Discrimination laws including the Age Discrimination Act 2004 (Cth), Racial Discrimination Act 1975 (Cth), the Disability Discrimination Act 1992 (Cth) and the Sex Discrimination Act 1984 (Cth). There are also State and Territory based Anti-Discrimination or Equal Opportunity Acts. However, the focus is on the prohibition of discrimination in certain areas of social life; and not all of the rights and freedoms in the conventions have been included or reflected within these laws. There is no specific Act that explicitly and comprehensively protects the human rights of older people.

Nor is there any Commonwealth bill of rights that provides for the protection of fundamental rights and freedoms for all. Only Queensland, Victoria and the ACT have Human Rights Acts and in some instances these protections only apply to public entities leaving people open to having their rights breached by other private entities. These Human Rights Acts include specific rights for children but not for older people.

The National Disability Insurance Scheme Act 2013 (NDIS Act 2013) has a series of rights-based principles for disability services funded by the NDIS, taken from both the Convention on the Rights of Persons with Disabilities and Australia's other international treaty obligations. Older people, including people living with dementia, who started accessing disability services under the age of 65 would have their rights, in respect of service provision from NDIS disability service providers, protected through the NDIS Act 2013 as they age. These rights to NDIS support do not continue under the NDIS Act 2013 once the person enters aged care. In addition, the NDIS Act 2013 specifically excludes older people with a disability who seek assistance from the NDIS after they reach the age of 65. These exclusions raise issues under various human rights treaties, in particular the International Covenant on Civil and Political Rights (ICCPR), the ICESCR and the CRPD, all of which prohibit discrimination on the basis of age.

## The Rights of Older People

The rights of older people are the same universal rights afforded to all adults, though the specific ways in which some rights apply to older persons may vary; hence the need for explicit, tailored protections. As we age, we experience an erosion in the enjoyment of our rights in many areas. This fact is evidenced by the United Nations General Assembly 'Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons' (OEWGA), which has recognised the need to consider older persons as specific rights holders in order to "allow for their participation in social, economic, cultural, civil and political life". Similarly, the Australian Charter of Aged Care Rights restates rights that are already enshrined in law e.g. to live without abuse, the right to privacy, right to control over one's financial affairs and possessions etc.



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

The erosion of rights is an artefact of ageism. Ageism involves the withdrawal of the underlying assumptions of a person's capacity, of their competency in every-day life, and failure to uphold their rights, leading ultimately to the loss the person's self-determination. It often involves making assumptions that older persons are losing or have lost the capacity to make their own decisions.

## The Right to Health and Health Care

COVID-19 impacted on all of us but especially on older people. Their perceived increased susceptibility to the virus led to targeted responses designed to protect them.

Unfortunately, these responses led to a greater level of stigma and discrimination within the broader community. This was exacerbated by media, with their simplified messages of "older people more likely to die" and coverage of the situations in other countries, where overwhelmed health resources were being rationed, and it was being reported that older people were more likely to be the ones that were denied interventions.

Every day we heard the public debate about "competition for ventilators" and "older people taking up beds" as though their lives were negotiable and expendable. OPAN was hearing, through our member advocates, that some older people were deciding not to seek treatment for general illnesses or for existing chronic conditions. They were not wanting to be a "burden" on the health system, they didn't want to "use" resources that younger people could need, or they considered themselves as not worthy of care. This is the result of ageism, the stereotyping, prejudice, and discrimination against older people on the basis of their age, which became dominant in these debates. This is not to say that an older person cannot choose not to receive care as this is within their rights to autonomy, choice and control, but OPAN was concerned that there were now external factors pressuring older people to make these decisions.

All older people have a right to receive quality healthcare treatment when and if they need it. Whether this is for existing health care needs, chronic conditions, other illnesses or because they have, or think they may have, COVID-19. Health care must be age friendly, responsive to older people's needs and take "into account the diversity of older people, as they are not a homogeneous group but face varying health risks and circumstances". Recognising the right to health also highlights the needs and issues of more marginalised and vulnerable older people such as lesbian, gay, bisexual, trans and intersex people (LGBTI), Aboriginal and Torres Strait Islander people, care leavers, people with disability, people who are homeless or at risk of homelessness, people from culturally and linguistically diverse backgrounds and people from low socio-economic backgrounds.

OPAN's position is that a new Human Rights Act must stipulate that access to health care is a basic human right and that all older people have the right to access and receive quality healthcare. That the delivery of health care, especially for marginalised and vulnerable older people, must be non-discriminatory and health resource allocation



decisions must be based within an ethical framework not be based solely on a person's age.

## UN Convention on the Human Rights of Older Persons

Despite long standing principles and plans for action on the rights of older people, there is no dedicated global human rights treaty that explicitly protects their rights and under which States accept internationally legally binding obligations.

The benefits that thematic international human rights frameworks bring can be seen in the proposal from the Australian Human Rights Commission (AHRC): its proposed Human Rights Act includes specific provisions that draw on or implement existing comprehensive international frameworks on the rights of the child (CRC), the rights of women (CEDAW), the rights of persons with disabilities (CRPD) and the rights of indigenous peoples (UNDRIP). If a new UN Convention on the Human Rights of Older Persons were adopted, governments would have an explicit legal and policy framework that would provide clear guidance and support enabling them to ensure that older people's rights are realised in domestic law and policy.

In Australia's response to the United Nations Questionnaire on the Rights of Older Persons (2011), the federal government stated that it recognised that older persons may be subject to multiple discrimination and that it is necessary to ensure an integrated approach to human rights protections. However, the Australia government has continued to oppose the elaboration of a UN Convention on the Human Rights of Older Persons, arguing that "there is already a range of existing international human rights treaties that provide protection for all people." The Australian Human Rights Commission has acknowledged the need for a specific convention to protect the rights of older persons.

Australia has ratified the Conventions on the Rights of Persons with Disabilities and on the Rights of the Child, indicating that the Government recognises that there are particular rights that people have that are not captured by existing human rights documents. In addition, in considering the existing human rights conventions we can see that there are no rights to care and support for independent living in older age or to autonomy and independence in older age.

The Aged Care Royal Commission also acknowledges and reflects on the lack of protection for the rights of older people.

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

One hundred and forty-six Member States have recognised these violations and committed to fully promoting and respecting the rights of older persons in their support for the UN Secretary General's policy brief on the impact of COVID-19 on older persons.





## An Australian Human Rights Act and Protection of Older Peoples' Rights

An Australian Human Rights Act could legislate such rights and make an explicit universal statement that reaffirms the essential truth that older persons are entitled to human rights and fundamental freedoms on the same basis as everyone else. Such a statement should be an enforceable right in any Human Rights Act. Without protection from external frameworks there is an even greater imperative for a Human Rights Act and a system that enforces, enables and protects the rights of older people. OPAN strongly supports the urgent need for a Human Rights Act, that includes protections of the rights of older people and for those accessing aged care services.

Rights must be framed to support active, informed and empowered citizenship for older people. This includes the right to equitable access and outcomes, the right to exercise choice, the right to autonomy, the right to the presumption of legal capacity, and in particular the right to make decisions about one's life including about one's care and support and the quality of one's lives including the right to joy and pleasure and the rights to social participation, as well as the right to fair, equitable and non-discriminatory treatment including in receiving care.

There will be a need for increased monitoring and enforceability mechanisms for the human rights approach in any Act. Rights must be enforceable and there must be consequences for breaching these rights. The governance model for the Act must reflect this with appropriate mechanisms to monitor, respond and ensure the rights of older people are upheld. This must include direct engagement with older people themselves and the organisations and people that represent them.

*"A Human Rights Act would mean that awareness and consideration of rights would be fundamental rather than something additional to be considered. It would help achieve decisions, policy, and laws consistent with human rights."* (Member of OPAN's National Older Person's Reference Group)

OPAN is strongly supportive of measures and strategies which embed and translate a human rights-based approach into practice, with appropriate investment required to transition to this new framework.

## Breaches of Older Persons Rights – Case Examples

### Case Example 1: Restrictive Practices

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

OPAN has argued that the same safeguards that exist in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) should exist in aged care settings. OPAN acknowledges that the NDIS model still has many issues,



however learnings can be taken from this and applied to ensure older people have their rights better protected.

Aged Care Providers must apply to use restrictive practices, which must be part of an agreed-to care plan after all other interventions have been tried. Consent must be received from the older person or, if they are unable to give consent, even with supported decision-making, their representative, and recorded before the restraint is used. Any medication being used as a chemical restraint, such as antipsychotic medications, must be approved by the Chief Clinical Advisor before it can be administered. The oversight, monitoring and review of restrictive practices for human rights consistency must be embedded in the oversight responsibilities of the Aged Care Quality and Safety Commission (ACQSC).

Recent changes to legislation on the use of restraints has improved protections for older people, but not to the full extent of the NDIS and the current regulation still falls short of full compliance with human rights standards. On 15 March 2023 the Parliamentary Joint Committee on Human Rights tabled its out-of-session Report 3 of 2023 on the Quality-of-Care Amendment (Restrictive Practices) Principles 2022. The Committee found:

- *This instrument specifies who can give consent to the use of restrictive practices on persons in aged care who are assessed as lacking decision-making capacity. The committee considers this instrument risks being incompatible with a range of human rights, particularly the rights of persons with disability, noting that there is no requirement to provide for supported, rather than substitute, decision-making; much depends on unknown safeguards in state and territory legislation; there is some uncertainty for providers as to the applicable law in their jurisdiction; and there is a broad-ranging immunity from liability.*
- *The committee has recommended some amendments to the instrument and that extensive consultation be undertaken to consider the broader legislative scheme in which this instrument operates, including whether the consent model to the use of restrictive practices in aged care is the best approach to protect the rights of aged care residents.*

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

## Case Example 2: People Living with Dementia and the Optional Protocol to the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment

In December 2017 the Australian Government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). As noted by the Australian Human Rights Commission in its Report on Implementing OPCAT in Australia (2020):

*“Australia became bound under international human rights law to take additional practical steps to uphold the inalienable rights of people who are deprived of their liberty. Specifically, Australia has committed to establish and run a coordinated system of independent inspections for all Australian places of detention, with oversight from the United Nations. The aim of the OPCAT inspection system is to identify practices that can*





*cause mistreatment of people in detention. This will give Australia a more effective 'early warning system', so that governments can prevent human rights abuses arising or worsening."*

Article 4(2) of the OPCAT states that "For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

Therefore, the OPCAT applies to any place where an individual is unable to leave of their own free will. This has been broadly interpreted as including residential aged care, (where locked doors and passcodes prevent older people leaving, but especially those with secure dementia units), a position shared by the UN Committee against Torture and the UN Sub-Committee for the Prevention of Torture (which is primarily responsible for supervising the implementation of the OPCAT).

However, the Australian Government "*has stated that it considers aged care facilities and offshore immigration detention facilities fall outside the scope of OPCAT.*" (AHRC, 2020). In addition, the Australian Government has said that "the National Preventative Mechanisms (NPMs) will focus on "*primary places of detention*", which they say excludes residential aged care and that "*over time*" residential aged care facilities will be included". (AHRC, 2020).

The UN Subcommittee on the Prevention of Torture decided to cease its visit to Australia, which was suspended on 23 October 2022, due to obstacles in carrying out its mandate under the OPCAT. It was noted in the media at the time that Australia still did not consider Residential Aged Care as a place of detention.

People living with dementia who move into residential aged care (RAC) are often segregated into "Dementia Care Units". These units are inevitably locked, thus preventing the person living with dementia from interacting with the people in the RAC facility and in the broader community. Segregation means that the person living with dementia is not afforded the same opportunities, considerations or treatment as people in the RAC or the broader community. The continuation of the use of locked units involves detention, is contrary to human rights obligations and goes against the policies of deinstitutionalisation that have been adopted and implemented for people with disability, people with mental health concerns/mental illness and children. Increasingly research is demonstrating the negative impacts of being confined in locked units on the health and well-being of people living with dementia.

While there is currently no convention explicitly addressing the human rights of older persons comprehensively, older people are entitled to the same rights as other persons under international human rights law. The non-legally binding United Nations Principles for Older Persons also set out general principles, which apply to the rights and needs of all older persons, including the standards that should guide policies and programmes developed for older persons deprived of their liberty.

In October 2022, Claudia Mahler, Independent Expert on the enjoyment of all human rights by older persons, presented a report to the UN Human Rights Council titled "Older persons deprived of liberty". The report noted that the right to liberty is a core human right. This right may be overridden and states can deprive people of their liberty in



circumstances that are necessary and proportionate, for example imprisonment of someone who has committed a crime. However, the Independent Expert noted that,

*“Although the right to personal liberty can be lawfully restricted, such limitation or denial should not be based on discriminatory grounds, including age or disability, or implemented through discriminatory procedures. Deprivation of liberty is therefore considered arbitrary when it is unjustified, disproportionate or discriminatory or where due process has not been afforded to individuals deprived of their liberty.”*

She continued:

*“older persons may be considered to have been deprived of their liberty if they are confined to a specific space or placed in a public or private institution, for different reasons, without permission to leave at will, and when the arrangements taken to restrict their freedom were made without their free and informed consent.”*

The Independent Expert made several recommendations, the first two of which apply in this instance:

- a) *All laws and regulations justifying the deprivation of the personal liberty of older persons based on their age or on perceived or actual needs for care and allowing for “substituted decision-making” must be repealed, including so-called “mental health legislation”;*
- b) *Age-related adequate care arrangements should be developed and appropriately funded by States to ensure that older persons may live independently in their communities, with dignity, in line with their will and preferences, in accordance with the concept of “ageing in place” and with the objective of ending the institutionalization of older persons.*

The implementation of a Human Rights Act in Australia, that includes the right to personal liberty, would provide protections to older people, especially those living with dementia. It would provide better protections and enable older people living with dementia, or their advocates or representatives to work with aged care providers to remove locked units. In addition, it would assist older people living in residential aged care more generally as often there are locks or pass codes on entry/exit doors that are not given to the older person making them reliant on others to give them “permission” to leave the facility. A Human Rights Act, combined with a commitment by the Australian Government to include residential aged care homes within the OPCAT, would provide much greater protection to some of the most marginalised, and therefore most vulnerable, of older people – those living with dementia and cognitive decline.