



**MONASH**  
University

CASTAN  
CENTRE FOR  
HUMAN RIGHTS  
LAW

# **Violence, Abuse and Neglect of Older Persons**

*Submission to the United Nations Independent Expert on the Enjoyment of All Human Rights by Older Persons*

## **Prepared by**

Scott Walker  
Researcher, Castan Centre for Human Rights Law

Dr Ronli Sifris  
Deputy Director, Castan Centre for Human Rights Law

Professor Melissa Castan  
Director, Castan Centre for Human Rights Law

**March 2023**

## Contents

<b>Part 1: Background</b>	2
1.1 About the Castan Centre for Human Rights Law	2
1.2 Terms of Reference	2
<b>Part 2: Older Persons in Aged Care in Australia</b>	2
2.1 The System of Aged Care in Australia: An Overview	3
2.2 Experiences of violence, abuse and neglect	3
2.3 Impact of COVID-19 on Aged Care in Australia	4
<b>Part 3: Protections of Older Persons</b>	6
3.1 National and provincial human rights law	6
3.2 Oversight mechanisms	7
3.2.1 Aged care-specific oversight	7
3.2.2 The Optional Protocol to the Convention against Torture and the National Preventive Mechanism	7
3.3 Strategies, policies, and practices	8
3.3.1 Response to the Royal Commission	8
3.3.2 Australian Human Rights Commission	9
<b>Part 4: Conclusions and Recommendations: A Human Rights-Based Approach to Aged Care</b>	10

## Part 1: Background

### 1.1 About the Castan Centre for Human Rights Law

The [Castan Centre for Human Rights Law](#) (**Castan Centre**), based in the Faculty of Law at Monash university in Australia, is a research, education, and policy centre which aims to create a more just world where human rights are respected, protected, and fulfilled, allowing all people to flourish in freedom and dignity. The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia. It was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, [Ron Castan AM QC](#).

### 1.2 Terms of Reference

This submission addresses the terms of reference as follows:

<i>The following terms of reference relevant to our submission</i>	<i>Part/ Section</i>
Q1: What are the <b>legal, policy, and institutional frameworks</b> to prohibit discrimination, violence, abuse and/or neglect of older persons?	<b>Part 3</b>
Q2: What <b>forms of violence, abuse, and neglect</b> are older persons facing and in what settings does it occur?	<b>Part 2</b> <i>Sections 2.2-2.3</i>
Q5: How does the state fulfil its obligations to ensure older persons' <b>access to justice and remedies and reparations when</b> their human rights have been violated as a result of violence, abuse, and neglect?	<b>Part 3</b>
<b>Q6: How is access to information</b> about violence against older people and essential services (such as healthcare, legal assistance, social services, access to shelters) made accessible and available for older persons?	<b>Part 3</b> <i>Section 3.3</i>
Q7: Please provide <b>examples of good practices</b> for preventing, monitoring, and addressing violence and abuse against older persons.	<b>Parts 3 &amp; 4</b>

In this submission we focus especially on the experiences and rights of older persons in residential aged care in Australia, which has been a significant site of much community and political debate in recent times.

## Part 2: Older Persons in Aged Care in Australia

Australia is an increasingly ageing population and, consequently, the issue of violence, abuse, and neglect of older persons has never been more pressing. Data from the Australian Institute of Health and Welfare shows that older persons are a significant group within Australia's population, with an estimated

4.2 million people aged 65-years and over in the country as at June 2020 (1 in 6 persons).<sup>1</sup> The number of older people in Australia is expected to double by 2057, due largely to increasing life expectancy, and sustained low fertility.<sup>2</sup> Data from the most recent Australian Census conducted in 2021 confirms this trend: 19.3% of the Australian population is aged between 40-54 years, 21.5% are aged between 55-74 years, and 7.5% of the population is aged 75-years and over. A large number of older persons live in aged care. On 30 June 2021, approximately 371,000 people were living in residential aged care, home care, or transition care in Australia of which 191,000 people were living in permanent or respite residential aged care.<sup>3</sup> This data showed that around two in three aged care service users were women, and that the number of people living in aged care had increased more than threefold between 2011 and 2021.<sup>4</sup>

## 2.1 The System of Aged Care in Australia: An Overview

In Australia all people aged 65-years-old or older (50-years or older if they identify as Aboriginal or Torres Strait Islander) and who need assistance are eligible for government-funded aged care services.<sup>5</sup> In this submission, we focus primarily on residential aged care, which is residential care for older Australians unable to live in their own home.<sup>6</sup> Such care includes accommodation and personal care for 24-hours a day, combined with nursing and general health care services.<sup>7</sup> Residential aged care facilities (RACFs) which are government-funded are subsidised and regulated by the federal government primarily through the *Aged Care Act 1997* (Cth) and the *Quality of Care Principles 2014* (Cth). RACFs are run by approved providers which may be public (run by State governments), not-for-profit community, faith-based or charitable entities, or a private company.

## 2.2 Experiences of violence, abuse, and neglect

In April 2021, research conducted by the Australian Institute of Family Studies (AIFS) on the national prevalence of elder abuse was published.<sup>8</sup> The definition of 'elder abuse' adopted by the AIFS for the purposes of the report was 'a single or repeated act or failure to act, including threats, that results in harm or distress to an older person ... where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person'.<sup>9</sup> Although the report goes

---

<sup>1</sup> 'Older People', Australian Government, Australian Institute of Health and Welfare (Web Page) <<https://www.aihw.gov.au/reports-data/population-groups/older-people/overview>>.

<sup>2</sup> 'Older Australians: About', Australian Government, Australian Institute for Health and Welfare (Web Page, 30 November 2021) <<https://www.aihw.gov.au/reports-data/population-groups/older-people/overview>>.

<sup>3</sup> 'People Using Aged Care', Australian Institute of Health and Welfare (Web Page, 29 April 2022) <<https://www.gen-agedcaredata.gov.au/Topics/People-using-aged-care>>.

<sup>4</sup> Ibid.

<sup>5</sup> 'What is Aged Care?', Australian Government Department of Health and Aged Care (Web Page) <<https://www.health.gov.au/topics/aged-care/about-aged-care/what-is-aged-care>>.

<sup>6</sup> 'About Residential Aged Care', Australian Government Department of Health and Aged Care (Web Page) <<https://www.health.gov.au/our-work/residential-aged-care/about-residential-aged-care>>.

<sup>7</sup> Ibid.

<sup>8</sup> Australian Institute of Family Studies, *National Elder Abuse Prevalence Study: Final Report* (Report, April 2021).

<sup>9</sup> Ibid 17.

beyond the experience of older persons living in RACFs, the key findings of the report are no less alarming. The AIF found, among other things, that:

- one in six older Australians reported experience abuse between February and May 2020;
- psychological abuse is the most prevalent form of abuse (12%), followed by neglect (3%), financial abuse (2%), physical abuse (2%), and sexual abuse (1%);
- family members are the most common perpetrators of elder abuse, but perpetrators can also be friends, neighbours, and acquaintances; and
- almost two thirds (61%) of older persons do not seek help when they face elder abuse.<sup>10</sup>

A key limitation of data in this area is that such studies are often voluntary disclosures of violence, abuse, and neglect from the older person themselves. It is therefore likely that due to various factors such as potential difficulties in communication and the insidious nature of elder abuse and the control it can exercise over older persons, some elder abuse goes under reported. Yet, we know that the issue of violence, abuse, and neglect of older persons in Australia is present even in situations in which older persons should be entitled to treatment with care and dignity. The Royal Commission into Aged Care Quality and Safety (**Royal Commission**),<sup>11</sup> which delivered its final report in 2021, uncovered evidence of substandard care in both routine and complex care ‘worthy of national shame’.<sup>12</sup> Among key findings, the Royal Commission found evidence of unacceptable use of restrictive practices without adequate clinical indication and clear justification,<sup>13</sup> a lack of access to specialist mental health services, ‘severely lacking’ end-of-life care,<sup>14</sup> and assistance with activities of daily living—diet, nutrition, and hydration—below the standard expected.<sup>15</sup>

### 2.3 Impact of COVID-19 on Aged Care in Australia

The COVID-19 pandemic has disproportionately impacted upon older persons in Australia, with this age group at the highest risk of contracting the disease and developing serious injury as a result.<sup>16</sup> Older persons living in RACFs have been particularly at risk, given challenges in practising social distancing in shared spaces, between older persons and their carers, and for older persons with cognitive impairments.<sup>17</sup> Because of the impact of COVID-19, including the conditions caused by the various measures instituted to suppress outbreaks in RACFs, it is itself a site of, and situation into which, violence, abuse, and neglect of older persons occurs.

---

<sup>10</sup> Australian Institute of Family Studies, *National Elder Abuse Prevalence Study: Summary Report* (Report, April 2021) 1.

<sup>11</sup> The Royal Commission into Aged Care Quality and Safety was established on 8 October 2018 to enquire into a number of matters relating to the delivery of aged care services in Australia, including the extent of substandard care provided, forms of abuse, and systemic failures in the system.

<sup>12</sup> *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021) vol 1, 68 (‘Aged Care Royal Commission Final Report’).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* 69.

<sup>15</sup> *Ibid.* 69-71.

<sup>16</sup> Coronavirus (COVID-19) Advice for Older People and Carers’, *Australian Government Department of Health* (Web Page) <<https://www.health.gov.au/node/18602/coronavirus-covid-19-advice-for-older-people-and-carers>>.

<sup>17</sup> Joseph E Ibrahim et al, ‘Characteristics of Nursing Homes Associated with COVID-19 Outbreaks and Mortality Among Residents in Victoria, Australia’ (2021) *Australasian Journal on Ageing* 00:1–10, 2.

As we addressed in our submissions to you on 1 April 2022 on older persons and the right to adequate housing,<sup>18</sup> COVID-19 spread rapidly through RACFs on numerous occasions between 2020-2022, which was exacerbated by staffing shortages, undelivered staff training and inadequate personal protective equipment. Concerns in the care provided to older persons in RACFs were raised during lockdowns and periods in which visits by family, friends, loved ones, and support persons were unable to take place. As has already been noted by the Independent Expert, the challenges highlighted over the COVID-19 pandemic in aged care are not new challenges. Rather, they reflect 'existing protection gaps' stemming from long-standing and systemic exclusion of older persons in society.<sup>19</sup> As will become apparent in our discussion in Section 2.4 below, these structural and systemic issues were prevalent in the residential aged care system in Australia well before the pandemic.

In early February 2023, Australia recorded more than 5,000 deaths from COVID-19 among residents of RACFs since the start of the pandemic.<sup>20</sup> Between 22 December 2022 and 25 January 2023 547 individuals living in residential aged care died from COVID-19.<sup>21</sup> In early January 2023, the numbers of COVID-19-related deaths in aged care surpassed 100 per week across Australia.<sup>22</sup> With the removal of many government-enforced mandates concerning COVID-19 in late 2022, this has meant that aged care providers have had to enforce their own rules on COVID-19 protective measures such as masking and requiring rapid antigen testing before visiting an aged care facility. Such changes, together with increases in wider community transmission of COVID-19 in late 2022 have likely contributed to the increase in residential aged care COVID-19-related deaths.<sup>23</sup> A fifth COVID-19 booster is being rolled out to all adults after 65-years and older from 20 February 2023.<sup>24</sup>

---

<sup>18</sup> Ronli Sifris, Andrea Olivares Jones and Scott Walker, *Submission to the Independent Expert on the Enjoyment of All Human Rights by Older persons on Older Persons and the Right to Adequate Housing* (Submission, April 2022).

<sup>19</sup> Claudia Mahler, *Report of the United Nations Independent Expert on the Rights of Older Persons: Impact of the Coronavirus Disease (COVID-19) on the Enjoyment of All Human Rights by Older Persons*, UN Doc A/75/205 (21 July 2020) para 22.

<sup>20</sup> Henry Belot, 'Deaths from Covid in Australian Aged Care Pass 5,000 After Monthly Fatalities Double in January', *The Guardian Australia* (online, 3 February 2023) <<https://www.theguardian.com/australia-news/2023/feb/03/deaths-from-covid-in-australian-aged-care-pass-5000-after-monthly-fatalities-double-in-january>>.

<sup>21</sup> Australian Government Department of Health and Aged Care, 'COVID-19 Outbreaks in Australian Residential Aged Care Facilities: National Snapshot' (Fact Sheet, 25 January 2023) <[https://www.health.gov.au/sites/default/files/2023-01/covid-19-outbreaks-in-australian-residential-aged-care-facilities-27-january-2023\\_0.pdf](https://www.health.gov.au/sites/default/files/2023-01/covid-19-outbreaks-in-australian-residential-aged-care-facilities-27-january-2023_0.pdf)>.

<sup>22</sup> Christopher Knaus, 'Covid Deaths in Australian Aged Care Surpass 100 a Week, the Highest Rate Since August', *The Guardian Australia* (online, 6 January 2023) <<https://www.theguardian.com/australia-news/2023/jan/06/covid-deaths-in-aged-care-surpass-100-a-week-the-highest-rate-since-august>>.

<sup>23</sup> Belot (n 20).

<sup>24</sup> Australian Government Department of Health and Aged Care, 'Protecting Older Australians - COVID-19 Update 15 February 2023' (Web Page, 14 February 2023) <<https://www.health.gov.au/news/newsletters/protecting-older-australians-covid-19-update-14-february-2023>>.

## Part 3: Protections of Older Persons

### 3.1 National and provincial human rights law

Australia does not have a federal Human Rights Act.<sup>25</sup> The *Aged Care Act 1977* (Cth) primarily focuses on the responsibilities and regulation of aged care providers rather than the human rights of individuals living in and utilising the aged care system. This means that, except for limited protections under State and Territory human rights law, the protection of the human rights of older persons in Australia operates predominantly through anti-discrimination law as well as various strategies, policies, and practices chiefly led through independent oversight mechanisms.

While there is human rights legislation in the jurisdictions of the Australian Capital Territory,<sup>26</sup> Victoria,<sup>27</sup> and Queensland,<sup>28</sup> the obligation on 'public authorities' to act consistently with and give proper consideration to the rights recognised in the instruments does not apply to private non-profit and for-profit providers of aged care services.<sup>29</sup> In Victoria (which has the highest public sector delivery of aged care), only 10 per cent of the State's residential aged care capacity is run by public sector residential aged care services.<sup>30</sup> This means that the overwhelming majority (90 per cent) of aged care providers are not bound by the obligation to act consistently with and give proper consideration to rights recognised in human rights instruments in these three jurisdictions.

The final piece in Australia's patchwork of human rights protections is anti-discrimination legislation. At a federal level, the *Age Discrimination Act 2004* (Cth) (**ADA**) protects individuals from direct or indirect discrimination on the basis of age.<sup>31</sup> While the ADA does not create any criminal offence,<sup>32</sup> it does provide a path to dispute resolution through the Australian Human Rights Commission (**AHRC**). However, the ADA only covers discrimination and not violence, abuse, or neglect in aged care.<sup>33</sup> Similarly, State and Territory jurisdictions also have anti-discrimination law which provides limited recourse for aged-based discrimination, but does not cover situations of violence, abuse, or neglect in aged care.<sup>34</sup>

---

<sup>25</sup> 'How are Human Rights Protected in Australian Law?', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>>.

<sup>26</sup> *Human Rights Act 2004* (ACT).

<sup>27</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter').

<sup>28</sup> *Human Rights Act 2019* (Qld).

<sup>29</sup> See, eg, Victorian Charter (n 31) s 38. This provision is replicated across each of the three human rights instruments.

<sup>30</sup> Victorian Government Department of Health, 'Strengthening Public Sector Residential Aged Care Services Initiative' (Fact Sheet) <[https://amavic.com.au/files/amavic\\_strengthening\\_PSRACS\\_initiative.pdf](https://amavic.com.au/files/amavic_strengthening_PSRACS_initiative.pdf)>.

<sup>31</sup> *Age Discrimination Act 2004* (Cth) ss 14-5 ('ADA').

<sup>32</sup> *Ibid* s 49.

<sup>33</sup> There are penalty provisions in relation to unlawful advertising and victimisation offences: see ss 50-1.

<sup>34</sup> See, eg, *Equal Opportunity Act 2010* (Vic) ss 4(a)-(b), 7-9.

## 3.2 Oversight mechanisms

### 3.2.1 Aged care-specific oversight

The national regulator of aged care services in Australia is the Aged Care Quality and Safety Commissioner which is assisted by the Aged Care Quality and Safety Commission (**ACQSC**).<sup>35</sup> The Commission has a number of functions, including:

- to protect and enhance the safety, health, well-being and quality of life of aged care consumers;
- ensure compliance by aged care providers;
- regulatory functions; and
- education functions.<sup>36</sup>

The ACQSC's work is largely based around the Quality of Care Principles,<sup>37</sup> and the Aged Care Quality Safety Standards.<sup>38</sup> Consumer dignity and choice is described as a 'foundation standard' and requires that consumers be treated with dignity and respect, are able to maintain their identity, and can make informed choices about their care and services, living the life that they choose to live.<sup>39</sup> The Royal Commission considered that the ACQSC's assessment of providers against the Quality Standards on a binary 'met' or 'not met' basis fails to provide 'a meaningful comparison of the performance of different services', nor does it 'provide meaningful information for older people and their families or offer incentives for providers to strive for excellence, or do more than deliver adequate care'.<sup>40</sup> Concerns about the ACQSC's ability to respond to complaints on time were also identified.<sup>41</sup>

### 3.2.2 The Optional Protocol to the Convention against Torture and the National Preventive Mechanism

Australia ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* on 21 December 2017.<sup>42</sup> To comply with its obligations under the OPCAT, the Australian Government has adopted a federated model for the National Preventive Mechanism (**NPM**). That means that each State and Territory jurisdiction in Australia, as well as the Commonwealth, has separate preventive mechanisms to provide oversight in accordance with the OPCAT of compliance with fundamental human rights of persons detained in places, including older persons in aged care facilities, social care institutions, places of detention and prisons, and mental

---

<sup>35</sup> *Aged Care Quality and Safety Commission Act 2018* (Cth) s 11.

<sup>36</sup> *Ibid* s 16.

<sup>37</sup> *Quality of Care Principles 2014* (Cth). These are made under s 96(1) of the *Aged Care Act 1997* (Cth).

<sup>38</sup> 'Quality Standards', *The Aged Care Quality and Safety Commission* (Web Page) <<https://www.agedcarequality.gov.au/providers/standards>>.

<sup>39</sup> 'Standard 1. Consumer Dignity and Choice', *The Aged Care Quality and Safety Commission* (Web Page) <<https://www.agedcarequality.gov.au/providers/standards>>.

<sup>40</sup> Aged Care Royal Commission Final Report (n 15) vol 1, 138.

<sup>41</sup> *Ibid* vol 1, 139.

<sup>42</sup> 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' *United Nations Treaty Collection* (Web Page) <[https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002804e0fea&clang=\\_en](https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002804e0fea&clang=_en)>.



health facilities.<sup>43</sup> Australia has been slow to implement its NPM.<sup>44</sup> In October 2022, the United Nations Subcommittee on Prevention of Torture (SPT) visited Australia in pursuance of its mandate under the OPCAT to oversee human rights compliance in closed environments. However, the SPT was denied access in Queensland and New South Wales to 'several places where people are detained, experienced difficulties in carrying out a full visit at other locations, and was not given all the relevant information and documentation it had requested'.<sup>45</sup> New South Wales refused the SPT's access to any state-run place of detention.<sup>46</sup> Accordingly the SPT suspended its visit to Australia.<sup>47</sup> On 20 February 2023, the SPT terminated its visit to Australia because assurances of cooperation had not been provided by Queensland and New South Wales to enable the SPT to resume its visit within a reasonable timeframe.<sup>48</sup>

Older persons can face violence, abuse, and neglect in aged care settings in particular as discussed in Section 2 above. However, experiences of violence, abuse, and neglect are not confined to aged care settings: the Royal Commission into Violence, Abuse Neglect, and Exploitation of Persons with Disabilities has uncovered such treatment in disability, social care, and mental health settings as well.<sup>49</sup> These are systems in which older persons engage (both voluntarily and involuntarily) and through which older persons are particularly vulnerable to violence, abuse, and neglect. We are therefore deeply disappointed in the failure by provincial governments to guarantee access by the SPT to conduct its oversight activities.

### 3.3 Strategies, policies, and practices

#### 3.3.1 Response to the Royal Commission

The Royal Commission made 148 recommendations, and each of the two Commissioners differed in many of those recommendations.<sup>50</sup> This disagreement—which went to the heart of the creation of a new aged care system—is a reflection of the complexity of the issues in aged care and made even more difficult the government's work in responding to the Royal Commission.<sup>51</sup> In May 2021, the former

---

<sup>43</sup> See, Australian National Preventive Mechanism, 'Joint Statement' (Media Release, October 2022) <[https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0024/117744/NPM-statement-SPT-engagement.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0024/117744/NPM-statement-SPT-engagement.pdf)>.

<sup>44</sup> See, Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020).

<sup>45</sup> United Nations Office of the High Commissioner for Human Rights, 'UN Torture Prevention Body Suspends Visit to Australia Citing Lack of Cooperation' (Press Release, 23 October 2022) <https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation> ('Suspension Announcement').

<sup>46</sup> Attorney-General of Australia, 'Suspension of Visit by UN Subcommittee on Prevention of Torture' (Media Release, 24 October 2022) <<https://ministers.ag.gov.au/media-centre/suspension-visit-un-subcommittee-prevention-torture-24-10-2022>>.

<sup>47</sup> Suspension Announcement (n 45).

<sup>48</sup> United Nations Office of the High Commissioner for Human Rights, 'UN Torture Prevention Body Terminates Visit to Australia' (Press Release, 20 February 2023) <<https://www.ohchr.org/en/press-releases/2023/02/un-torture-prevention-body-terminates-visit-australia-confirms-missions>>.

<sup>49</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 60. The Royal Commission must deliver its final report to the federal government by 29 September 2023: 'About the Royal Commission', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <<https://disability.royalcommission.gov.au/about-royal-commission>>.

<sup>50</sup> See Royal Commission Final Report (n 12) vol 1.

<sup>51</sup> Jack Snape, 'What the Split Between Royal Commissions Means for the Future of Aged Care', *ABC News* (online, 1 March 2021) <<https://www.abc.net.au/news/2021-03-01/aged-care-royal-commission-division-split/13203698>>.

federal government released its response to the Royal Commission's final report.<sup>52</sup> The government accepted a number of the Royal Commission's recommendations, including enacting a new, consumer-focused Aged Care Act and committed to working towards the drafting of such legislation.<sup>53</sup> Following a federal general election on 21 May 2022, there was a change of federal government in Australia. Accordingly, responsibility for implementing the recommendations of the Royal Commission shifted to the incoming government. Aged care was a key election issue, including pay for aged care workers.<sup>54</sup>

Following its election, the current federal government introduced to Parliament a Bill to require registered nurses to be on site in every RACFs 24 hours a day, seven days a week.<sup>55</sup> This legislation was passed by both Houses of Parliament in November 2022, with the registered nursing requirement commencing on 1 April 2023.<sup>56</sup> The government has also introduced a Code of Conduct for Aged Care, setting the standards of behaviour for aged care providers, their governing persons, and aged care workers in an effort to ensure, safe, respectful and quality care.<sup>57</sup> In December 2022, the Minister for Aged Care announced the appointment of an Interim Inspector-General of Aged Care to engage with stakeholders on the development of a program for systemic investigations, deliver education and awareness-raising activities.<sup>58</sup> The government has consulted on draft legislation to establish the statutory office of the Inspector-General of Aged Care, which is expected to be introduced to Parliament in mid-2023.<sup>59</sup> Once established, the Office of the Inspector-General of Aged Care will oversee the Australian Government's administration, regulation, and funding of aged care, providing independent oversight of the system through reviews, ongoing monitoring, and reports.<sup>60</sup> The current government is still planning consultation on a new Aged Care Act, and it is unclear when such a process will be underway or proposed legislation will be introduced to the Parliament.<sup>61</sup>

### 3.3.2 Australian Human Rights Commission

The ADA establishes the Aged Discrimination Commissioner as a Commissioner of the Australian Human Rights Commission (**AHRC**), Australia's national human rights institution.<sup>62</sup> In September 2022,

---

<sup>52</sup> Australian Government Department of Health, *Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety* (Report, May 2021).

<sup>53</sup> *Ibid* 1.

<sup>54</sup> Kerrin Binnie and Emily Baker, 'Overwhelming Support for Federal Government to Pay for Aged Care Wage Increase, Vote Compass Shows', *ABC News* (online, 8 May 2022) <<https://www.abc.net.au/news/2022-05-08/vote-compass-aged-care-and-health/101044854>>; Paul Karp, 'Cost of Living and Fixing Aged Care are Top Concerns as Election Nears, ANU Poll Shows', *The Guardian Australia* (online, 6 May 2022) <<https://www.theguardian.com/australia-news/2022/may/06/cost-of-living-and-fixing-aged-care-are-top-concerns-as-election-nears-anu-poll-shows>>.

<sup>55</sup> Minister for Health and Aged Care, 'Delivering Labor's Plan to Fix Aged Care' (Media Release, 27 July 2022) <<https://www.health.gov.au/ministers/the-hon-mark-butler-mp/media/delivering-labors-plan-to-fix-aged-care>>.

<sup>56</sup> *Aged Care Amendment (Implementing Care Reform) Act 2022* (Cth) cl 2, sch 1.

<sup>57</sup> *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022* (Cth).

<sup>58</sup> Minister for Aged Care, 'Mr Ian Yates Am Appointed as Interim Inspector-General of Aged Care' (Media Release, 13 December 2022) <<https://www.health.gov.au/ministers/the-hon-anika-wells-mp/media/mr-ian-yates-am-appointed-as-interim-inspector-general-of-aged-care?language=en>>.

<sup>59</sup> 'Inspector-General of Aged Care', *Australian Government Department of Health and Care Care*, (Web Page) <<https://www.health.gov.au/our-work/inspector-general-of-aged-care>>.

<sup>60</sup> *Ibid*.

<sup>61</sup> 'Aged Care Legislative Reform', *Australian Government Department of Health and Aged Care* (Web Page) <<https://www.health.gov.au/our-work/aged-care-reforms/aged-care-legislative-reform>>.

<sup>62</sup> ADA (n 31) s 6A.

the AHRC launched a new campaign ('Elder Abuse: Shift Your Perspective') in order 'to prompt perpetrators to consider how their behaviour might be affecting older people in their lives'. It directs individuals to the National Elder Abuse phone line for free and confidential information, support, and referrals.<sup>63</sup>

## **Part 4: Conclusions and Recommendations: A Human Rights-Based Approach to Aged Care**

Australia's aged care system continues to be at a point of crisis due to a number of systemic issues, exacerbated by the COVID-19 pandemic. It requires comprehensive overhaul to make it a system which allows older persons to live in freedom and dignity. The Royal Commission envisaged that the new Aged Care Act 'must enshrine the rights of older persons who are seeking or receiving aged care' which 'will leave no doubt about the importance placed on these rights'.<sup>64</sup> The Royal Commission recommended that the rights recognised are to be coherent with Australia's international human rights obligations, and must contain rights of access and choice for individuals seeking aged care, and rights for people receiving aged care including right to freedom from inhuman or degrading treatment, and right to autonomy, liberty, and freedom of movement (among other fundamental rights).<sup>65</sup> Rights of access to end-of-life care and right to access to support were also recommended.<sup>66</sup> We strongly endorse this recommendation, but go further: the rights recognised in a new Aged Care Act must be supported by a federal Human Rights Act which recognises the human rights of all Australians, and begins to foster a culture of human rights across areas of service delivery, including in health and aged care service delivery.

In addition to legislative change, aged care regulators (including the ACQSC and the Inspector-General) must begin to embed a human rights-based approach in their work and require aged care providers to explicitly do the same. This is consistent with Standard 1 (consumer dignity and choice) of the Quality Standard. A human rights-based approach must be based on respect for the dignity, humanity, and equality of all people. While there is no single definition, such approaches have the following elements: the participation of rights-holders in decision-making processes; clear links to human rights; accountability for duty-bearers with respect to human rights; respect for principles of equality and non-discrimination of rights-holders; the empowerment of rights-holders to understand and enjoy their human rights, and participate in decision-making; the formulation of laws, policies, and practices that impact upon them; and transparency for all stakeholders involved.<sup>67</sup> Key to a human rights-based

---

<sup>63</sup> Australian Human Rights Commission, 'New Campaign Seeks to Reduce Abuse of Older Australians' (Media Release, 30 September 2022) <<https://humanrights.gov.au/about/news/media-releases/new-campaign-seeks-reduce-abuse-older-australians>>.

<sup>64</sup> Aged Care Royal Commission Final Report (n 12) vol 3A pp 17-18

<sup>65</sup> Ibid (Recommendation 2).

<sup>66</sup> Ibid.

<sup>67</sup> See, Swedish International Development Agency ('SIDA'), 'Human Rights Based Approach' (Web Page) <<https://www.sida.se/en/for-partners/methods-materials/human-rights-based-approach>>; AHRC, 'Human Rights Based Approaches' (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-based-approaches>>; Scottish Human Rights Based Approach, *Scottish Human Rights Commission* (Web Page) <<https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach/>>.

approach is the re-framing of older persons in aged care as rights-holders, not passive recipients of care; thus transforming them into autonomous human rights-bearers, empowering them to see their rights realised through support networks. So understood, human rights-based approaches seek to ‘promote, protect and fulfil human rights’ in practice and enable the integration of international human rights norms, standards, and principles into the development of law, policy, and practice at a domestic level.<sup>68</sup>

We therefore seek the Independent Expert’s support in conveying these recommendations to the Australian Government:

**Recommendation 1:** The Australian Government should recognise rights of older persons in the new Aged Care Act, consistent with recommendations of the Royal Commission.<sup>69</sup>

**Recommendation 2:** The Australian Government should embed a human rights-based approach to aged care in all its work, including regulatory and oversight work. Such an approach should also be embedded in the work of aged care service providers, and monitored by independent oversight mechanisms established by the Australian Government.

**Recommendation 3:** Consistent with a human rights-based approach, the Australian Government should widely and meaningfully consult older persons and their representative bodies on the new Aged Care Act, including the human rights to be recognised therein.

**Recommendation 4:** The Australian Government should enact a comprehensive, national Human Rights Act which includes rights relevant to all Australians, including older Australians.

**Recommendation 5:** The Australian Government, working with State and Territory Governments, should ensure adequate independent oversight of all places of detention and other closed environments where older persons are held (voluntarily and involuntarily). This is consistent with a human rights-based approach to aged care and older persons more generally.

---

<sup>68</sup> See SIDA (n 67).

<sup>69</sup> The Commissioners agreed in their recommendation for a new Aged Care Act.