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## **The Human Rights of Older Australians: A Background report for Liberty Victoria with a focus on health care, accommodation and treatment with dignity.**

**Jo Hambling.**

The world's elderly population is the fastest growing segment of society and by 2050 there will be more elderly people in the world than children.<sup>1</sup> Many of these elderly people face discrimination and are denied their basic rights.<sup>2</sup>

In Australia, 13.5 percent of the population is aged over 65 and by 2050 nearly one quarter of the population will be over 65.<sup>3</sup> Within the public sphere older Australians may be at risk of being discriminated against on the basis of age, of being subjected to degrading treatment and of being denied other basic rights such as the right to privacy, the right to protection of family, the right to adequate housing and healthcare or the right to be free from financial abuse. Additionally, within the private sphere the elderly are at risk of being harmed by people they know and trust such as family, friends and carers. This phenomenon is described as 'elder abuse'<sup>4</sup> and it is increasingly being acknowledged as a serious social concern.<sup>5</sup> A report by the Victorian Government notes that rates of elder abuse are likely to increase due Australia's ageing population, increasing longevity and an increase in the number of people suffering from dementia.<sup>6</sup>

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<sup>1</sup> Human Rights Council Advisory Committee, *The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person: Working paper* by Ms Chinsung Chung, Member of the Human Rights Council Advisory Committee, UN Doc A/HRC/AC/4/CRP.1, 2009, 3, <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/session4/documentation.htm>

<sup>2</sup> Ibid, p. 4.

<sup>3</sup> Department of Treasury Australia, *Australia to 2050: Future Challenges*, Intergenerational Report, January 2010, p. 9, [http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR\\_2010.pdf](http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf)

<sup>4</sup> Seniors Rights Victoria, *Recognising the Rights of Older Australians*, Submission to the Human Rights Consultation, June 2009, p. 16, [http://www.pilch.org.au/Assets/Files/SRV\\_NHRC\\_Final\\_Submission\\_150609.pdf](http://www.pilch.org.au/Assets/Files/SRV_NHRC_Final_Submission_150609.pdf)

<sup>5</sup> Victorian Government, *With respect to age — 2009 Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse*, June 2009, p. ix, [http://www.health.vic.gov.au/agedcare/downloads/with\\_respect\\_to\\_age.pdf](http://www.health.vic.gov.au/agedcare/downloads/with_respect_to_age.pdf)

<sup>6</sup> Ibid.

Australia has an ‘obligation to ensure that all men and women enjoy all economic, social, cultural, civil, and political rights – regardless of their age.’<sup>7</sup> However, in Australia we are not adequately protecting the human rights of the growing number of older Australians. In a briefing paper on ‘Key Issues on the Right to Health in Australia’ the Human Rights Law Resource Centre Ltd remarks that ‘Australia remains the only developed nation without comprehensive constitutional or legislative protection of human rights, whether in the form of a Bill of Rights, a Charter of Rights or a Human Rights Act.’<sup>8</sup> ‘In the absence of a comprehensive legislative or constitutional instrument at the national level, the legal protection of human rights in Australia is variously piecemeal and deficient... Australian domestic law on the whole fails to entrench many basic human rights, particularly economic and social rights such as the right to health.’<sup>9</sup>

The areas of law which cover the rights of older Australians include all areas of law where the potential exists for abuse and discrimination against older people such as: (a) age discrimination; (b) guardianship; (c) social security, pensions and superannuation; (d) wills and powers of attorney; (e) employment and retirement; (f) housing (including retirement villages and aged care homes); (g) elder abuse; (h) healthcare and long-term care (both institutional and community-based); (i) consumer rights; (j) estate and financial planning; and (k) family law (including family care agreements and custody of grandchildren).<sup>10</sup> This research report will focus on health care, accommodation and treatment with dignity.

There is no legislated right to health in Australia. The Australian Charter of Healthcare Rights (ACHR) sets out principles that specify the way in which health care should be delivered.<sup>11</sup> The Charter does include a right to health, however it is not a statutory document and does not have a legal basis.<sup>12</sup> If patients believe their rights under the Charter have not been upheld and are unsatisfied with the response they receive from their healthcare provider they can make a complaint to the Health Care Complaints Commissioner in their state or territory.<sup>13</sup> In Australia there is also appears to be no right to residential or other care or a general right to be treated with dignity.

Towards the end of 2008 the Commonwealth Attorney-General, the Hon. Robert McClelland MP, launched the National Human Rights Consultation (‘Consultation’). Several interest groups made submissions to the Consultation specifically dealing with the issue of human rights and older Australians. The submission from *Seniors Rights Victoria*

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<sup>7</sup> Human Rights Council Advisory Committee, above n 1, p. 10.

<sup>8</sup> Human Rights Law Resource Centre Ltd, Briefing Paper on Key Issues on the Right to Health in Australia, September 2009, <http://www.hrlrc.org.au/files/Briefing-Paper-Health-in-Australia-September-2009.pdf>

<sup>9</sup> Ibid.

<sup>10</sup> United Nations Department of Economic and Social Affairs Division for Social Policy and Development Programme on Ageing, Report of the Expert Group Meeting “Rights of Older Persons”, May 2009, p. 8, [http://www.globalaging.org/agingwatch/desa/aging/mipaa/egm\\_report.pdf](http://www.globalaging.org/agingwatch/desa/aging/mipaa/egm_report.pdf)

<sup>11</sup> Victorian Government, The Australian Charter of Healthcare Rights in Victoria

[http://www.health.vic.gov.au/patientcharter/downloads/australian\\_charter\\_healthcare\\_rights\\_web.pdf](http://www.health.vic.gov.au/patientcharter/downloads/australian_charter_healthcare_rights_web.pdf)

<sup>12</sup> Dunbar, Nicola. The Australian Charter of Healthcare Rights and the Victorian Charter of Human Rights and Responsibilities: Convergence and Divergence [online]. *Health Issues*, No. 101, Summer 2009: 31-32.

<sup>13</sup> Australian Commission of Safety and Quality of Healthcare, The Australian Charter of Healthcare Rights, A guide for patients, consumers, carers and families, [http://www.health.gov.au/internet/safety/publishing.nsf/Content/com-pubs\\_ACHR-pdf-01-con/\\$File/17501-ConsumerGuide.pdf](http://www.health.gov.au/internet/safety/publishing.nsf/Content/com-pubs_ACHR-pdf-01-con/$File/17501-ConsumerGuide.pdf)

helpfully outlines Federal legislation which provides ‘a degree of protection to the rights of older people’.<sup>14</sup> The following section draws strongly on this submission.

## **What current federal legislation exists which protect the rights of older Australians?**

### **The Aged Care Act 1997**

Part 4.2 of the *Aged Care Act 1997* (Cth) (‘ACA’) is about the responsibilities of an approved provider of aged care services.<sup>15</sup> Approved providers are organisations approved by the Australian Government, to receive subsidies for the provision of aged care, services and accommodation to residents within an aged care home, or care and services to people in the community.<sup>16</sup> Once someone is receiving a service from an approved provider they have a range of rights under the Act. Part 4.2 sets out a number of user rights, and the provider's related responsibilities. These are mainly to do with financial matters.

Other rights and responsibilities are set out in the *Users Rights Principles 1997* (Cth), including the Charter or Residents Rights and Responsibilities which is found within schedule 1.<sup>17</sup> Sections 56-1(l), 56-2(i) and 56-3(j) of the Aged Care Act require approved providers of residential care, community care and flexible care respectively, to act in a manner consistent with the rights and responsibilities of residents specified in the User Rights Principles. Many of the rights set out in the Charter relate to the right to be treated with dignity. Schedule 2 of the *Users Rights Principles* sets out the Charter of Rights and Responsibilities for Community Care. This Charter applies to people in receipt of Australian Government *funded packages* legislated under the *Aged Care Act 1997*.<sup>18</sup> A copy of each charter can be found at the end of this report.

An approved provider's failure to meet its responsibilities may lead to sanctions being imposed under Part 4.4 of the Aged Care Act. The *Aged Care Act 1997* also specifies the Accreditation Standards that approved providers of publicly-subsidised aged care homes must meet before they can receive public funding.

### **Mandatory Reporting**

Since July 2007, under changes to the Aged Care Act, physical or sexual assaults on residents by staff, residents or others have to be reported. The new legislation requires reporting of allegations or suspicions of unlawful sexual contact with a resident, or

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<sup>14</sup> Seniors Rights Victoria, above n 4, p. 21

<sup>15</sup> See the Law Hand Book <http://www.lawhandbook.org.au/handbook/ch19s02.php> for explanations of the different kinds of services provided.

<sup>16</sup> I could not find any statistics on the number of providers which are approved.

<sup>17</sup> The *User Rights Principles 1997* (Cth) are made under subsection 96-1 (1) of the *Aged Care Act 1997* (Cth).

<sup>18</sup> Community Aged Care Packages (CACPs); Extended Aged Care at Home (EACH); and Extended Aged Care at Home Dementia (EACHD) packages. Sections 23.24 , 23.25, 23.26A and 23.26B *User Rights Principles 1997*.

unreasonable use of force with a resident, to the police and Australian Department of Health & Ageing within 24 hours.<sup>19</sup>

### **Aged Care Complaints Investigation Scheme**

The Aged Care Complaints Investigation Scheme (CIS) was established in 2007.<sup>20</sup> It is a free service available to anyone who wishes to raise a complaint or concern about an Australian Government subsidised aged care service.<sup>21</sup> The complaint must be related to a potential breach of the Aged Care Act and/or the *Investigative Principles 2007* (Cth).<sup>22</sup> Following complaints, delegates from the Office of Aged Care Quality and Compliance may choose to investigate an allegation. The way in which the investigation will be conducted is entirely within the CIS's discretion. If a determination is made that an approved provider has breached their responsibilities then a *Notice of Required Action* (NRA) is issued to the provider. If the complainant is unhappy with the response they can have the decision referred to the Aged Care Commissioner.

The CIS has been criticised for a number of reasons. *Seniors Rights Victoria* raise a number of criticisms which are of particular concern for the protection of rights.<sup>23</sup> An independent review of the CIS, commissioned by the Government, provides a number of recommendations for addressing these concerns, among others.<sup>24</sup> These concerns are examined towards the end of this report.

### **Age Discrimination Act 2004**

The *Age Discrimination Act 2004* (Cth) came into operation in June 2004. The Act 'prohibits direct and indirect discrimination on the basis of age in key areas of public life'.<sup>25</sup> The Act prohibits discrimination on the basis of age generally, and is not specifically aimed at older people or younger people.<sup>26</sup>

In September, Attorney-General, Robert McClelland, introduced legislation to establish an Age Discrimination Commissioner in the Australian Human Rights Commission. 'This will mean that a stand-alone Age Discrimination Commissioner will be able to advocate

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<sup>19</sup> Paul Sadler, Aged Care Amendment (Security and Protection) Act 2007, Elder Abuse: One Report Too Many?

Results of the ACSA online survey on compulsory reporting of assaults, 6 October 2009, <http://www.agedcare.org.au/PUBLICATIONS-&-RESOURCES/General-pdfs-images/Elder%20Abuse%20Reporting%20survey%20report%20Oct09%20edits.pdf>

<sup>20</sup> Seniors Rights Victoria, above n 4, 21.

<sup>21</sup> Department of Health and Ageing, Information Sheet: Rights and Responsibilities of Residents of Aged Care Homes, [http://www.health.gov.au/internet/main/publishing.nsf/Content/D7F398C32354B146CA256F190010056E/\\$File/Info08.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/D7F398C32354B146CA256F190010056E/$File/Info08.pdf)

<sup>22</sup> Seniors Rights Victoria, above n 4, 22.

<sup>23</sup> Ibid.

<sup>24</sup> Merrilyn Walton, Review of the Aged Care Complaints Investigation System, October 2009 <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-review-cis.htm>

<sup>25</sup> Submission Of The Human Rights And Equal Opportunity Commission To The House Of Representatives Standing Committee On Legal And Constitutional Affairs On The Inquiry Into Older People And The Law 15<sup>th</sup> December 2006 p. 10

<sup>26</sup> Ibid.

for the rights of older Australians in the community and workplace and handle complaints under the Age Discrimination Act.<sup>27</sup>

The Age Discrimination Act does not specifically prohibit age discrimination in relation to the right to health or aged care services. However it does generally prohibit age discrimination by someone who provides goods or services, or makes facilities available, which should include health or aged care services.<sup>28</sup> Nor does the Age Discrimination Act protect an older person from age discrimination if it is done by a voluntary body or done in direct compliance with certain other laws (such as taxation and superannuation laws). Also unlike other anti-discrimination laws, relatives and people who are carers of older people are not protected from discrimination.

### **Examples of other federal legislation relevant to the rights of Older Australians**

#### **Trade Practices Act 1974**

Seniors Rights Victoria lists parts IVA and V of the *Trade Practices Act 1974* (Cth) ('TPA') as an example of federal legislation which may assist the protection of the rights of older Australians in their dealings with providers of goods and services.<sup>29</sup> However, these rights protections are not targeted specifically at older persons.

#### **Fair Work Act (Cth) 2009**

The Fair Work Act contains some provisions which prohibit discrimination on the basis on age within an employment context.<sup>30</sup> For example s 153 prohibits discriminatory terms, including a term which discriminates against an employee because of age, from being included in a modern award.

#### **Australian Human Rights Commission Act (Cth) 1986**

The Australian Human Rights Commission Act established the Australian Human Rights Commission. The Commission has the responsibility for investigating alleged infringements under Australia's anti-discrimination legislation, including the Age Discrimination Act.

### **What Victorian legislative rights protections exist for older Australians?**

#### **Victorian Charter of Human Rights and Responsibilities ('Victorian Charter')**

The Victorian Charter (and the ACT's Human Rights Act) expressly protects only civil and political rights. There is no express right to health or aged care or other accommodation. However the 'civil and political rights contained in the Victorian Charter could be used to protect economic, social and cultural rights, including the right

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<sup>27</sup> Attorney-General Hon Robert McClelland MP, Tackling age discrimination (Press release, 30 September 2010)

[http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_ThirdQuarter\\_30September2010-Tacklingagediscrimination](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_30September2010-Tacklingagediscrimination)

<sup>28</sup> *Age Discrimination Act 2004* (Cth), s 28.

<sup>29</sup> Seniors Rights Victoria, above n 4, p. 23.

<sup>30</sup> For example see *Fair Work Act (Cth)* 2009, ss 153, 195, 351 and 772.

to health.<sup>31</sup> For example, in the Victorian case of *Kracke v Mental Health Review Board & Others*,<sup>32</sup> Mr Kracke's right to health was not able to be considered, but the circumstances of his medical treatment and health care were able to be considered in the context of his right to a fair hearing.<sup>33</sup> The Victorian Charter also contains provisions which are related to the right to be treated with dignity such as the protection from torture and cruel, inhuman or degrading treatment, freedom of movement, privacy, and the protection of families and children.

### **The Retirement Villages Act 1986 (Vic)**

Retirement villages have a particular definition in Victorian law and are covered by the Retirement Villages Act 1986, which confers rights and obligations that are unique to this type of accommodation.<sup>34</sup> The purpose of the Act is to clarify and protect the rights of persons who live in, or wish to live in, retirement villages. The Act gives a broad framework regulating the relationships between residents, village owners and managers and mainly covers consumer protection type matters.

### **The Health Services Act 1988 (Vic)**

In Victoria, if you live in a supported residential service (SRS), you have rights under the Health Services Act 1988. An SRS does not receive government funding but must be registered with the State Government and are monitored to ensure they provide certain standards of care and accommodation.

For example: 108A Privacy, dignity and security of residents

(1)The proprietor of a supported residential service must, in accordance with the regulations, take reasonable steps to ensure that residents are treated with dignity and respect and with regard to their entitlement to privacy.

(2)The proprietor of a supported residential service must not accommodate a resident in any room of the service other than a bedroom.

### **Equal Opportunity Act (Vic) 2010**

The Equal Opportunity Act includes age as one of the attributes on the basis of which discrimination is prohibited.<sup>35</sup>

### **International protections**

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<sup>31</sup> Human Rights Law Resource Centre Ltd, above n 8, p. 5.

<sup>32</sup> [2009] VCAT 646 (23 April 2009). For a case summary of this case and a link to the full text of the decision, see

<http://www.hrlrc.org.au/content/topics/esc-rights/kracke-mental-health-review-board/>

<sup>33</sup> Human Rights Law Resource Centre Ltd, above n 8, p. 5.

<sup>34</sup> Consumer Affairs Victoria, Guide for Retirement Village Living, Edition 2 June 2009

[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Retirement\\_Villages/\\$file/guide\\_retirementvillages.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Retirement_Villages/$file/guide_retirementvillages.pdf)

<sup>35</sup> *Equal Opportunity Act (Vic)* 2010, s 6.

There is a need to better protect the rights of old people at the international level. In article 25(1), the Universal Declaration of Human Rights makes its only reference to older persons in relation to the right to security in old age. The rights of older persons are not expressly mentioned in either the International Covenant on Civil and Political Rights, or the International Covenant on Economic Social and Cultural Rights. For example, the rights contained in the International Covenant on Civil and Political Rights apply to individuals regardless of distinctions such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or ‘other status’. There is no mention of age.<sup>36</sup> The international community needs to recognise that elderly people have particular needs and care, and require special protection. The advisory committee to the United Nations Human Rights Council, the Madrid report to the 2009 General Assembly and the UN Department on Economic and Social Affairs have all emphasised the need to better protect older peoples’ rights at the international level.<sup>37</sup>

However, there are many international instruments that recognise specific rights of all persons that are clearly applicable to elderly people. For more information on how the following rights are relevant to elderly people see; ‘The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person’, a report prepared for the Human Rights Council Advisory Committee.<sup>38</sup> The following list has been taken from that report.

- (a) Right to be free from discrimination.<sup>39</sup>
- (b) Right to freedom from violence and abuse.<sup>40</sup>
- (c) Right to equal treatment before the law.<sup>41</sup>
- (d) Right to dignity.<sup>42</sup>
- (e) Right to food, water, shelter, and clothing.<sup>43</sup>
- (f) Right to health.<sup>44</sup>
- (g) Right to work and financial independence.<sup>45</sup>
- (h) Right to property.<sup>46</sup>
- (i) Right to social security.<sup>47</sup>
- (j) Right to freedom of thought, conscience, and religion.<sup>48</sup>
- (k) Right to freedom of opinion and expression.<sup>49</sup>

<sup>36</sup> Elizabeth Broderick, ‘Is it Time for a Convention on the Rights of Older People’, (Speech at International Federation of Ageing, Melbourne, Thursday 6 May 2010)

[http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506\\_rights\\_older.html](http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506_rights_older.html)

<sup>37</sup> Ibid.

<sup>38</sup> Human Rights Advisory Committee, above n 1.

<sup>39</sup> As enshrined in many human rights documents including the Universal Declaration of Human Rights (UDHR), Article 2; Convention on the Rights of Persons with Disabilities(CRPD), Article 5; International Covenant on Civil and Political Rights (ICCPR), Article 2.

<sup>40</sup> UDHR, Article 3; Convention on the Rights of the Child (CRC), Article 2; CRPD, Article 16.

<sup>41</sup> UDHR, Article 6; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 15; CRPD, Article 5; CRPD, Article 12; ICCPR, Article 26 .

<sup>42</sup> UDHR, Article 1.

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 11.

<sup>44</sup> UDHR, Article 25; CRPD, Article 25; ICESCR, Article 12.

<sup>45</sup> As stated in many human rights declarations including the UDHR, Article 23; CRPD, Article 27.

<sup>46</sup> UDHR, Article 17.

<sup>47</sup> UDHR, Article 22; ICESCR, Article 9.

<sup>48</sup> UDHR, Article 18; CRC, Article 14; ICCPR, Article 18.

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| <ul style="list-style-type: none"> <li>(l) Right to autonomy.<sup>50</sup></li> <li>(m) Right to participate in public affairs.<sup>51</sup></li> <li>(n) Right to education.<sup>52</sup></li> </ul> |
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**How do Australia’s protections compare with legislative protections for the elderly in other countries? (Which rights are protected and how. Who is responsible for ensuring those rights, and what are the penalties/remedies for a breach.)**

As already mentioned, Australia is the only developed nation which lacks constitutional or legislative protection of human rights, whether in the form of a Bill of Rights, a Charter of Rights or a Human Rights Act.<sup>53</sup>

In many States, human rights are included in the constitution and in some States specific reference is made to older persons as a group. A UN report has found this to be the case in a broad cross-section of countries, among them, Armenia, Austria, Bangladesh, Cameroon, China, Finland, Ghana, Nepal, the former Yugoslav Republic of Macedonia and Uganda. ‘In Uganda, for instance, the Constitution recognizes the rights of older persons and provides the basis for the enactment of laws to address their rights and needs. The Constitution of Finland goes a step further, and stipulates that the public authorities must provide each resident with adequate social, health and medical services.’<sup>54</sup>

**The Constitution of Finland 11 June 1999 (731/1999) Section 19 - The right to social security**

Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider. The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children. The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.<sup>55</sup>

In many countries specific rights are also included in ordinary legislation. A good source of information on legislation related to elderly people within Europe is the Council of Europe website:

[http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/CountryTable\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/CountryTable_en.asp)

The European Social Charter contains a number of rights relating to health, aged care and treatment with dignity. The Council of Europe website countries information on how

<sup>49</sup> UDHR, Article 19; CRC, Article 13; CRPD, Article 21.

<sup>50</sup> ICESCR, Article 1; ICCPR, Article 1.

<sup>51</sup> CRC, Article 15; CRPD, Article 29.

<sup>52</sup> CRC, Article 28; CRPD, Article 24; ICESCR, Article 13.

<sup>53</sup> Human Rights Law Resource Centre Ltd, above n 8.

<sup>54</sup> Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General, Submitted to the United Nations General Assembly, A/64/127, July 2009, p 11, <http://www.globalaging.org/agingwatch/GA/SGreport64.pdf>

<sup>55</sup> The Constitution of Finland 11 June 1999 (Unofficial translation) [http://www.om.fi/uploads/54begu60narbnv\\_1.pdf](http://www.om.fi/uploads/54begu60narbnv_1.pdf)



State's are implementing these rights. For example, article 23 requires States to adopt or encourage policies to guarantee the social protection of elderly persons.

#### **The European Social Charter Article 23 - The right of elderly persons to social protection**

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular to enable elderly persons to remain full members of society for as long as possible, by means of:

- a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
- b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
- b. the health care and the services necessitated by their state; to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

In Norway, the Municipal Health Services Act instructs the municipalities to establish different health services, long term care, home care service and nursing homes. The right to primary health service is regulated through the Municipal Health Services Act which states; 'Everyone has the right to necessary medical aid in his municipality of residence or in the municipality where he is staying.'<sup>56</sup>

In Norway the Patients Rights Act also sets out a number of guaranteed rights for the population in relation to health services.<sup>57</sup> For example, under the Act a patient who is referred to specialist care has the right to be assessed within 30 days. Patients are then prioritised according to need and those regarded as a high priority have the right to have a time-limit on when treatment will begin. Patients also have the right to a second opinion. The Act also provides for:<sup>58</sup>

- The right to choose a hospital and receive necessary transportation
- The right to information and participation in the implementation of their care
- The right to an individual plan for patients who require long-term, co-ordinated health services
- The right to access medical records
- The right to give consent or refuse treatment
- An Ombudsman in every county

<sup>56</sup> 6th National Report on the implementation of the European Social Charter (revised) submitted by the Government Of Norway, 2009

[http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Norway6\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Norway6_en.pdf)

<sup>57</sup> Kathleen Robson, Scottish Parliament Information Centre, Briefing Patient Rights (Scotland) Bill, 2 September 2010, p. 18, <http://scottish-parliament.tv/business/research/briefings-10/SB10-52.pdf>

<sup>58</sup> Ibid.

‘A patient who feels his/her rights have not been met can complain to the county medical officer (CMO). The CMO can withdraw any decision by a healthcare provider which they judge not to be in accordance with the Act. Decisions of the CMO can be appealed to the Norwegian Board of Health Supervision and patients may also pursue their case in the civil courts although there are no sanctions directly provided for in the Act.’<sup>59</sup>

There are many different examples of how States implement laws which guarantee the rights of older persons. ‘In Germany, for example, the Charter of Rights for People in Need of Long-term Care and Assistance ensures the legal status of such people and their families and provides information and proposals for shaping the care and assistance process. In the Netherlands, legislation states that everyone has the right to long-term care in the case of illness or disability.’<sup>60</sup>

National legislation exists in several instances with respect to elder abuse. For example, Canada has been recognized internationally as a leader in raising public awareness of abuse of older adults and in developing innovative approaches to dealing with the issue. In many American states and some Canadian provinces legislation makes it mandatory to report abuse of older people.<sup>61</sup> For a good overview of legal responses in other jurisdictions see *Elder Abuse: How well does the law in Queensland cope?*<sup>62</sup>

### **How could the current (Australian) federal legislative framework be improved to provide rights guarantees for older Australians?**

The submission from *Seniors Rights Victoria* to the National Human Rights Consultation concludes by recommending the introduction of a Human Rights Act and by illustrating how it would be beneficial for older people.<sup>63</sup> The submission also includes other recommendations for ensuring the effectiveness of a Human Rights Act such as community education and access to legal rights and services. However, following the consultation the Australian Government decided not to implement the Committee’s major recommendation for a Human Rights Act.

In the absence of a Human Rights Act, Australia could improve the rights of older Australians by inserting rights into ordinary legislation. Currently, there is no legislative right to healthcare, aged care services or accommodation or a general right to be treated with dignity. Australia’s Charter of Healthcare Rights could be made legislative and the rights could be expanded to increase human rights protections. A right to certain aged care services could also be included in legislation and the rights included in the Charter or Residents Rights and Responsibilities could be reformed to apply to a wider range of services.

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<sup>59</sup> Ibid.

<sup>60</sup> Follow-up to the Second World Assembly on Ageing, above n 54, p. 12.

<sup>61</sup> Paul Sadler, above n 19, p. 2.

<sup>62</sup> Office of the Public Advocate (Qld) and Queensland Law Society, *Elder Abuse: How well does the law in Queensland cope?*, June 2010,

[http://www.qls.com.au/content/lwp/wcm/resources/file/eb89e1043274b31/elder-abuse\\_issues-paper%20v6.pdf](http://www.qls.com.au/content/lwp/wcm/resources/file/eb89e1043274b31/elder-abuse_issues-paper%20v6.pdf)

<sup>63</sup> *Seniors Rights Victoria*, above n 4, p. 25.

Legislative reform in areas relevant to elderly people should be scrutinised from a human rights perspective. There are many criticisms of the current CIS system and the protection of rights contained in the Charter of Residents Rights and Responsibilities and the Charter of Resident Rights and Responsibilities for Community Care.

### **Lack of procedural fairness**

Seniors Rights Victoria believes the current investigative process may be in breach of the right to a fair hearing, under administrative law principles.<sup>64</sup> The Investigation Principles are generally considered to impose inadequate requirements on the CIS to ensure that determinations are made in an appropriate way.

### **Lack of independence of the CIS**

‘The CIS is the only complaints body that sits within the agency responsible for regulating the same services that it investigates.’<sup>65</sup> Seniors Rights Victoria is concerned that the lack of independence on the part of delegates investigating complaints is a breach of the obligation to provide independent investigation.<sup>66</sup> Additionally, delegates are unlikely to make determinations which go against government policy.

The Walton Review’s recommends the establishment of a new Aged Care Complaints Commission to facilitate greater independence between the CIS and the Department. ‘Conflicts of interest, or, at a minimum, a perception of a possible conflict of interest, are real in the circumstances where the Department is responsible for maintaining quality aged care services.’<sup>67</sup>

### **The Commissioner’s lack of powers**

The role of the Commissioner is to review the handling of complaints by the CIS. However the Commissioner does not have determinative powers, meaning the Department is not currently required to implement any recommendations made by the Commissioner.<sup>68</sup>

The Walton Review recommends that the Aged Care Act and the Investigation Principles 2007 be amended to empower the Commissioner to direct the Department to implement its recommendations. As highlighted by Seniors Rights Victoria,<sup>69</sup> this is particularly important given that in 2008-2009 the Commissioner recommended that 51% of the Scheme’s decisions be varied or set aside.<sup>70</sup>

Other major areas of concern include the qualifications and competence of CIS investigators and communication between the CIS and other parties.<sup>71</sup>

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<sup>64</sup> Seniors Rights Victoria, above n 4, p. 23.

<sup>65</sup> Merrilyn Walton, above n 25, p. 75.

<sup>66</sup> Seniors Rights Victoria, above n 4, p. 22.

<sup>67</sup> Merrilyn Walton, above n 25, p. 75.

<sup>68</sup> Seniors Rights Victoria, above n 4, p. 22.

<sup>69</sup> Ibid.

<sup>70</sup> Aged Care Commissioner Annual Report, 1 July 2008 – 30 June 2009, p. 24

<http://www.agedcarecommissioner.net.au/pdf/08-09-annual-report.pdf>

<sup>71</sup> Merrilyn Walton, above n 25.

As part of the Federal Government's reform of Australia's health care system, the Government has announced that it will 'invest \$50.6 million to better equip the Aged Care Complaints Investigation Scheme to protect the most frail and vulnerable people in our society from poor quality care or abuse.'<sup>72</sup> The Government is yet to announce the details of how the CIS will be improved.

## **The Charter**

Seniors Rights Victoria notes that the rights contained in the Charter are 'often breached for a variety of reasons including lack of awareness on the part of service providers and a limited understanding of the scope of these rights.'<sup>73</sup> Additionally the Charter only applies to Commonwealth approved facilities, and not to State government homes, psychiatric hospitals, boarding houses or private nursing homes which do not receive federal funding. People should not have different rights depending on which service they are receiving, especially as many people admitted to residential care have little choice and little understanding of their rights within different institutions.<sup>74</sup>

### **Users Rights Principles 1997 (Cth) Schedule 1: Charter of residents' rights and responsibilities**

#### **Each resident of a residential care service has the right:**

- to full and effective use of his or her personal, civil, legal and consumer rights
- to quality care appropriate to his or her needs
- to full information about his or her own state of health and about available treatments
- to be treated with dignity and respect, and to live without exploitation, abuse or neglect
- to live without discrimination or victimisation, and without being obliged to feel grateful to those providing his or her care and accommodation
- to personal privacy
- to live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction
- to be treated and accepted as an individual, and to have his or her individual preferences taken into account and treated with respect
- to continue his or her cultural and religious practices, and to keep the language of his or her choice, without discrimination
- to select and maintain social and personal relationships with anyone else without fear, criticism or restriction
- to freedom of speech
- to maintain his or her personal independence

<sup>72</sup> Department of Health and Aging, Building a Better Aged Care Complaints Investigation Scheme: Protecting Aged Care Recipients,

<http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/factsheet-agedcare-09>

<sup>73</sup> Seniors Rights Victoria, above n 4, p. 24.

<sup>74</sup> HREOC Human Rights and Mental Illness Report of the National Inquiry into the Human Rights of People with Mental Illness [http://www.hreoc.gov.au/disability\\_rights/inquiries/mental/Volume%202.txt](http://www.hreoc.gov.au/disability_rights/inquiries/mental/Volume%202.txt)

- to accept personal responsibility for his or her own actions and choices, even though these may involve an element of risk, because the resident has the right to accept the risk and not to have the risk used as a ground for preventing or restricting his or her actions and choices
- to maintain control over, and to continue making decisions about, the personal aspects of his or her daily life, financial affairs and possessions
- to be involved in the activities, associations and friendships of his or her choice, both within and outside the residential care service
- to have access to services and activities available generally in the community
- to be consulted on, and to choose to have input into, decisions about the living arrangements of the residential care service
- to have access to information about his or her rights, care, accommodation and any other information that relates to the resident personally
- to complain and to take action to resolve disputes
- to have access to advocates and other avenues of redress
- to be free from reprisal, or a well-founded fear of reprisal, in any form for taking action to enforce his or her rights.

**Each resident of a residential care service has the responsibility:**

- to respect the rights and needs of other people within the residential care service, and to respect the needs of the residential care service community as a whole
- to respect the rights of staff and the proprietor to work in an environment free from harassment
- to care for his or her own health and well-being, as far as he or she is capable
- to inform his or her medical practitioner, as far as he or she is able, about his or her relevant medical history and current state of health.

**Users Rights Principles 1997 (Cth) Schedule 2: Charter of Rights and Responsibilities for Community Care**

**Rights**

**As a care recipient I have the following rights:**

**1. GENERAL**

- a) to be treated and accepted as an individual, and to have my individual preferences respected
- b) to be treated with dignity, with my privacy respected
- c) to receive care that is respectful of me, my family and home
- d) to receive care without being obliged to feel grateful to those providing my care
- e) to full and effective use of all my human, legal and consumer rights, including the right to freedom of speech regarding my care
- f) to be treated without exploitation, abuse, discrimination, harassment or neglect

**2. PARTICIPATION**

- a) to be involved in identifying the community care most appropriate for my needs
- b) to choose the care and services that best meet my assessed needs, from the community care able to be provided and within the limits of the resources available
- c) to participate in making decisions that affect me
- d) to have my representative participate in decisions relating to my care if I do not have capacity

**3. CARE AND SERVICES**

- a) to receive reliable, coordinated, safe, quality care and services which are appropriate to my assessed needs
- b) to be given before, or within 14 days after I commence receiving care, a written plan of the care and services that I expect to receive

- c) to receive care and services as described in the plan that take account of my lifestyle, other care arrangements and cultural, linguistic and religious preferences
- d) to ongoing review of the care and services I receive (both periodic and in response to changes in my personal circumstances), and modification of the care and services as required

#### 4. PERSONAL INFORMATION

- a) to privacy and confidentiality of my personal information
- b) to access my personal information

#### 5. COMMUNICATION

- a) to be helped to understand any information I am given
- b) to be given a copy of the Charter of Rights and Responsibilities for Community Care
- c) to be offered a written agreement that includes all agreed matters
- d) to choose a person to speak on my behalf for any purpose

#### 6. COMMENTS AND COMPLAINTS

- a) to be given information on how to make comments and complaints about the care and services I receive
- b) to complain about the care and services I receive, without fear of losing the care or being disadvantaged in any other way
- c) to have complaints investigated fairly and confidentially, and to have appropriate steps taken to resolve issues of concern

#### 7. FEES

- a) to have my fees determined in a way that is transparent, accessible and fair
- b) to receive invoices that are clear and in a format that is understandable
- c) to have my fees reviewed periodically and on request when there are changes to my financial circumstances
- d) not to be denied care and services because of my inability to pay a fee for reasons beyond my control

### **Responsibilities**

#### **As a care recipient I have the following responsibilities:**

##### 1. GENERAL

- a) to respect the rights of care workers to their human, legal and industrial rights including the right to work in a safe environment
- b) to treat care workers without exploitation, abuse, discrimination or harassment

##### 2. CARE AND SERVICES

- a) to abide by the terms of the written agreement
- b) to acknowledge that my needs may change and to negotiate modifications of care and service when my care needs do change
- c) to accept responsibility for my own actions and choices even though some actions and choices may involve an element of risk

##### 3. COMMUNICATION

- a) to give enough information to assist the approved provider to develop, deliver and review a care plan
- b) to tell the approved provider and their staff about any problems with the care and services

##### 4. ACCESS

- a) to allow safe and reasonable access for care workers at the times specified in my care plan or otherwise by agreement
- b) to provide reasonable notice if I do not require a service

5. FEE

- a) to pay any fee as specified in the agreement or negotiate an alternative arrangement with the provider if any changes occur in my financial circumstances
- b) to provide enough information for the approved provider to determine an appropriate level of fee

