

12 November 2019

Professor R Croucher AM
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

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Dear President

Free and equal in dignity and rights: A national conversation on human rights

Relationships Australia welcomes the opportunity to participate in the national conversation on human rights.

The work of Relationships Australia

This submission is written on behalf of Relationships Australia's eight member organisations.

We are an Australian federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia provides a range of family services to Australian families, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others.

Relationships Australia has provided family relationships services for more than 70 years. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Family Relationship Centres (FRCs) across the country. In addition, Relationships Australia Queensland operates the national Family Relationships Advice Line and the Telephone Dispute Resolution Service.

The core of our work is relationships – through our programs we work with people to enhance and improve relationships in the family, whether or not the family is together, with friends and colleagues, and within communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable.

We respect the rights of all people, in all their diversity, to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships. These rights permeate all of our work.

For the purposes of this submission, Relationships Australia focuses on current issues in two vital areas of Commonwealth activity – the aged care system and the family law system - to illustrate how a positive human rights framework¹ could, and should, underpin Australia's laws, policies and services. Accordingly, this submission draws from Relationships Australia's previous submissions to:

- the Parliamentary Joint Committee on Human Rights, in its inquiry into the *Quality of Care (Minimising the Use of Restraints) Principles 2019*
- the Royal Commission into Aged Care Quality and Safety, and
- the inquiry by the Australian Law Reform Commission (ALRC) into Australia's family law system.

Each of these submissions is available on our website at <https://www.relationships.org.au/national/submissions-and-policy-statements>.

Relationships Australia is committed to:

- Working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.
- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, young people and children. We recognise that often a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is needed by people affected by family violence and other complexities in relationships.
- Enriching family relationships, including providing support to parents, and encouraging good and respectful communication.
- Ensuring that social and financial disadvantage is not a barrier to accessing services.
- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective supports to families.

Our submissions to inquiries such as this draw upon:

- our direct service delivery experience across urban, regional, rural and remote locations
- evidence-based programs and research

¹ Whether set out in a Constitutional Bill of Rights or a Human Rights Act, and which is 'principled, comprehensive and enforceable': AHRC Discussion Paper, *A Model for Positive Human Rights Reform*.

- our leadership and policy development experience, and
- the voices of our practitioners.

A positive human rights framework as a remedy to an ageist aged care system

The *Principles for Older Persons*, adopted by the United Nations General Assembly in 1991, should be the foundation, and permeate the fabric, of Australia's aged care arrangements. However, the Carnell-Paterson Review observed in 2017 that

The Aged Care Act is a *weak framework for promoting the rights of older people*, including the right to be free from abuse and exploitation, since it only provides for the reporting of serious physical and sexual assaults.² [emphasis added]

The truth of this observation is brutally underscored at hearings of the Royal Commission. Evidence presented thus far portrays long-entrenched tolerance of:

- 'inhumane, abusive and unjustified' use of restrictive practices,³ largely free of scrutiny and accountability⁴
- preventable deaths in residential aged care facilities (RACF), also largely free of scrutiny and accountability.⁵

That tolerance has been afforded by legislators, regulators and providers – and the community at large. Community tolerance begets tolerance by legislators and regulators, who assume

² At 111.

³ See the Interim Report of the Royal Commission, p 194, noting that the use of restrictive practices in Australia has been an identified problem in Australia for 'more than 20 years'. The use of restrictive practices is of significant concern to Relationships Australia because it (1) inhibits making and maintaining social and emotional connection (with its well-established physical and mental health benefits: see, for example, L Grenade and D Boldy, 'Social isolation and loneliness among older people: issues and future challenges in community and residential settings', *Australian Health Review*, August 2008, vol 32 no 3, 468), and (2) exacerbates the equally well-established physical and mental health risks of isolation and loneliness: see, eg, Liesl M Heinrich, Eleonora Gullon, 'The clinical significance of loneliness: A literature review', *Clinical Psychology Review* 26, (2006): 695-718. A Dean, 'Elder abuse – Key issues and emerging evidence', CFCA Paper No. 51, 1, 12-13, citing Dong, 2015; Dow & Joosten, 2012; Jackson & Hafemeister, 2016; Johannesen & LoGiudice, 2013; Kaspiew *et al*, 2016; Pillemer *et al*, 2016; von Heydrich *et al*, 2012. Holt-Lunstad, J, Smith, T B, Baker, M, Harris, T, & Stephenson, D (2015). Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review, *Perspectives on Psychological Science*, 10(2), 227 –237. Lim, M (2018), 'Is loneliness Australia's next public health epidemic?' *InPsych* 2018; 40(4). Retrieved from <https://www.psychology.org.au/for-members/publications/inpsych/2018/August-Issue-4/Is-loneliness-Australia-next-public-health-epide>.

⁴ Relationships Australia notes the disparity between the regulation of restrictive practices in the National Disability Insurance Scheme and the largely *laissez-faire* approach in the aged care system; this disparity has been commented on by other stakeholders: see, for example, the submission of the Office of the Public Guardian, Queensland, to the Parliamentary Joint Committee on Human Rights, 2019, and the statements to that inquiry from Older Persons Advocacy Network and the Australian College of Nurse Practitioners.

⁵ See, for example, the testimony of Professor J Ibrahim to the Royal Commission, 16 May 2019, at p 1786.

(correctly, to date) that it will not rebound upon them through public denunciation or, indeed, through any other remedy, reckoning, or calling to account.

This is at least partly attributable to insidious and ubiquitous ageism, which disvalues, others and segregates the older people of our community. Further, we consider that it is not drawing too long a bow to suggest that ageism has licensed the continued failure, over many years, to implement recommendations for reform emerging from a succession of reviews and inquiries prompted by intermittent exposure of scandalous mistreatment of vulnerable older people.⁶

The human rights of older people in Australia are rendered more precarious by the longstanding refusal of Australia Governments, across party political lines, to support an international covenant on the rights of older people. Australia's opposition does not appear to have a principled basis. Suggestions have been made that older people's rights receive adequate protection through:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of Persons with Disabilities, and
- the *Age Discrimination Act 2004* (Cth).

It is no longer plausible to contend that the rights of older people in Australia receive protection and vindication from these current domestic and international arrangements.

They did not stop the egregious and deplorable human rights violations exposed thus far at the Royal Commission.

A positive human rights framework could be a powerful counter to ageism and could foster an age-inclusive culture. In particular, such a framework would facilitate:

- the exposure of ageism in all facets of community life
- the rebuttal of assumptions and biases associated with ageism

⁶ For an overview of major reviews and inquiries into the Australian aged care system, see Background Paper 8, *A History of Aged Care Reviews*, published by the Royal Commission, October 2019. See also the testimony of Professor R Paterson to the Royal Commission, in which he expressed disappointment about the lack of implementation of recommendations made in the Carnell-Paterson Report.

- the prevention, detection and effective responses to abuse of older people, regardless of whether they live in the community or in care facilities, and
- embedding in society an explicit culture of respect for the dignity and innate value of all members of our community – including older people.

Relationships Australia notes that the Commission has published materials setting out the benefits that a Human Rights Act could have in protecting the rights of older people.⁷ We consider that a positive human rights framework would also promote and incentivise:

- positive public constructions of older people that embody them as whole persons with full agency in their lives
- deliberately making and holding space in public life – as a matter of right, not generosity or tokenism - for the voices, images and actions of older people – understanding that ‘ageing concerns’ are not a niche issue, but universal, and
- strengths-based frameworks for service responses and interventions.

Current initiatives that would be reinforced by a positive human rights framework

1. National Plan

Relationships Australia has welcomed the *National Plan to Respond to the Abuse of Older Australians*, and is pleased to participate in ongoing work by Australian governments to develop a communications strategy to call out and remedy ageism.

2. Data about the prevalence of abuse of older people

Of critical importance to responding effectively to abuse in RACF is data that:

- measures the prevalence of abuse in these settings
- identifies protective and risk factors, and
- enables rigorous evaluation of policy and service responses.

Relationships Australia has welcomed the Commonwealth Government’s commissioning of the Australian Institute of Family Studies to investigate the prevalence of abuse of older persons in the community. However, as is clear from the Interim Report of the Royal Commission, there is an equally pressing need to conduct a companion study into prevalence of abuse of older persons in RACF. To provide the most robust and useful evidence base, such a study must to

⁷ At https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_older.pdf

include people with cognitive impairment.⁸ Relationships Australia acknowledges that designing and implementing this study will be complex, but is a prerequisite of effectively upholding the rights of older people to be free of abuse, regardless of their living arrangements.

3. Supporting the autonomy of older people

Relationships Australia considers that a positive human rights framework would support implementation of the recommendations made by the ALRC in Report 124, *Equality, Capacity and Disability in Commonwealth Laws*; in particular, recommendations relating to:

- the National Decision-Making Principles, and
- moving away from reliance on substitute decision-making, and towards supported decision-making, in Commonwealth laws.

In this regard, Relationships Australia commends the work being done under the auspices of the Standing Committee of Attorneys-General to simplify inter-jurisdictional operability of enduring instruments. This is vital in encouraging people to make timely arrangements to communicate their views, beliefs, values and preferences, and in giving them confidence that these arrangements will be respected.⁹

A positive human rights framework would support the rights of people engaging with the Commonwealth family law system

Supporting the rights of children and young people

Recent years have seen mounting research and commentary favouring the participation of children and young people in family law disputes affecting them, and noting the increasingly-articulated desire of children and young people to have a voice in decision-making that affects them. The ALRC commented that

... tension between protection and participation is sometimes framed as a contest between competing principles or rights.....The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and

⁸ Dementia and cognitive impairment contribute to dependency, which is recognised as a risk factor for the perpetration of abuse of older people, yet people affected by dementia or other cognitive impairment have seldom been included in research to date: see Bedson and Chesterman, *Are national elder abuse prevalence studies inclusive of the experiences of people with cognitive impairment? Findings and recommendations for future research*, Office of the Public Advocate (for the Australian Guardianship and Administration Council), 2017. Bedson and Chesterman note that people with dementia and other forms of cognitive impairment tend to be actively excluded from samples in prevalence studies (at 17), with only a few exceptions in existing literature (cf p 21; see also Bedson, Chesterman and Woods, 2018). While Bedson and Chesterman note that 'evidence supporting a relationship between dementia and elder abuse is mixed,' (at 8), this is a particular weakness in the evidence base which Relationships Australia considers, given predictions of increasing rates of dementia in the community, must be addressed urgently. See also Bedson, Chesterman and Woods, 'The Prevalence of Elder Abuse among Adult Guardianship Clients', [2018] *MqLawJl* 3; Bedson and Chesterman 2017 noted that 52% of people in Australian RACF have dementia (at 5).

⁹ See, for example, AGAC's recent publication, *You Decide Who Decides*, October 2019.

their right to participation (art 12). Instead, they are complementary...[at para 7.18 of Report 135]

A report by the Australian Institute of Family Studies, on the needs and experiences of young people, noted that internationally consistent research

...establishes the importance for children and young people having an opportunity for their views to be heard and considered in decision-making affecting them. In particular, research has highlighted the importance of facilitating these opportunities to be heard, both in relation to matters relevant to deciding the post-separation care and regarding the more general effects of their parents' separation.¹⁰

Carson *et al* observed that

Hearing the voices of children and young people has been identified as particularly critical in these circumstances, not only because this participation is central to meeting obligations pursuant to the UNCRC but also because it is important from an evidentiary perspective and is consistent with the expressed views of the relevant children and young people in cases characterised by family violence or conflict.¹¹

Relationships Australia considers that it is now well-established that:

- children and young people should be facilitated in expressing their views, where they wish to do so, in family court proceedings and family dispute resolution
- children and young people should be afforded access to developmentally appropriate information about, for example:
 - when and how they could have their say about post-separation arrangements
 - to what extent their views would have influence
 - whether they would be represented
 - how could they get help to communicate their preferred living arrangements to their parents
 - timeframes and nature of legal proceedings, the identity and role of decision-makers
 - steps associated with negotiating parenting arrangements
 - how to get mental health support, access support groups, helplines and legal advice, and
 - the potential outcomes and options for their living arrangements, and
- there is scope to enhance how that participation is facilitated.

¹⁰ Carson *et al*, 2018, at p 6.

¹¹ At pp 34-35.

In its final report on the inquiry into the family law system, the ALRC recommended that

The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice (Recommendation 50).

Relationships Australia supports this recommendation, as it would provide a valuable forum for children and young people to identify systemic issues and engage with policy makers and service providers. This is clearly significant in terms of giving effect to the Convention on the Rights of the Child. That Convention, however, goes further to call on signatories to afford opportunities for the participation of children and young people in matters that affect them as individuals. The establishment of an Advisory Board would not be an adequate proxy.

A positive human rights framework could be an invaluable catalyst for the establishment of mechanisms to facilitate the participation of individual children and young people.

Supported decision-making and the family law system

As noted previously in this submission, Relationships Australia considers that a positive human rights framework would support implementation of the recommendations made in the ALRC's report, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124).

In some instances, supported decision making is not possible. In this context, Relationships Australia concurs with the ALRC's suggestion that the role and duties of litigation representatives be re-conceptualised.¹² A positive human rights framework would usefully inform such re-conceptualisation, as well as providing much-needed impetus to remedy long-recognised difficulties encountered in arranging, in a timely manner, the appointment of suitable litigation guardians.¹³ These difficulties significantly curtail access to justice for cohorts experiencing particular vulnerability. Relationships Australia is aware of cases being delayed for considerable periods of time because willing guardians cannot be found.

¹² Cf recommendations 47 and 48, Report 135.

¹³ See Relationships Australia National submission to DP86, at p 106; see also submissions from Caxton Legal Centre, submission 51, paragraphs 15-19; Law Council of Australia, submission 43, paragraph 80, in response to ALRC Issues Paper 48.

Concluding remarks

Thank you again for the opportunity to participate in this vital national conversation. Should you require any clarification of any aspect of this submission, or information on the services that Relationships Australia provides, please contact me or Dr Susan Cochrane, National Policy Manager, Relationships Australia. We look forward to future opportunities to engage in the conversation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nick Tebbey', written in a cursive style.

Nick Tebbey
National Executive Officer