

30 August 2023

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A new Aged Care Act: Foundations

Thank you for the opportunity to participate in this consultation process about the development of a new Aged Care Act. Relationships Australia made submissions to the Royal Commission, as well as to Parliamentary inquiries into the use of restrictive practices, in which we advocated for transformative changes to aged care services, centring human rights. We provide a range of services, funded by Commonwealth and State/Territory Governments, to support older people, including by preventing and responding to abuse and neglect of older people using diverse models such as case management, mediation, and counselling (individual and group). We are signatories to the EveryAGE Counts campaign against ageism, and a founding member of the Rights of Older Persons Australia¹ and of the Ending Loneliness Together campaign.²

This submission draws on our previous submissions to:

- the Royal Commission into Aged Care Quality and Safety (2019 and 2020)
- the Parliamentary Joint Committee on Human Rights concerning regulation of restrictive practices (2019)
- the Parliamentary Joint Committee on Human Rights concerning Australia's Human Rights Framework (2023)
- the House of Representatives Social Policy and Legal Affairs inquiry into the *Carer Recognition Act 2010* (Cth) (2023), and
- the Department of the Prime Minister and Cabinet, commenting on its draft strategy for the national care and support economy (2023).³

RECOMMENDATIONS

The Act should include a purpose provision

Recommendation 1 The new Aged Care Act ('the Act') should expressly state that the purpose of the Act is to centre the human rights of users of aged care services, including by progressing towards de-institutionalisation and the elimination of restrictive practices, regardless of the settings in which services are provided.

¹ See <https://www.everyagecounts.org.au/> and <https://www.rightsofolderson.org.au/>

² See <https://endingloneliness.com.au/>

³ Each of these submissions is available at <https://relationships.org.au/research/#advocacy>

Which rights should be protected by the Act?

Recommendation 2 The Act should specify the human rights engaged by the Act, and subordinate legislation made pursuant to the Act, and clearly enumerate the relevant international conventions.

Recommendation 3 The Statement of Rights must expressly apply:

- the Convention Against Torture and other Cruel, Degrading and Inhuman Treatment or Punishment, as well as the Optional Protocol to that Convention
- the United Nations Declaration on the Rights of Indigenous Persons, and
- the International Convention on the Elimination of all Forms of Racial Discrimination.

Recommendation 4 The Act must expressly recognise the human rights of older people to:

- make decisions about matters affecting them and, where required, to receive support to make and communicate those decisions
- live and participate in mainstream community life, including recreational, cultural, spiritual, educational, employment and political activities and to access health services, and
- take risks, in accordance with their wishes and preferences.

Recommendation 5 To bolster the Constitutional validity of the Act, and further strengthen it over the medium to long term in the interests of future generations of older people, the Government should prioritise the development of a new treaty to protect our rights as we age and to actively engage with the United Nations processes working to achieve that goal.⁴

Operationalising human rights under the Act

Recommendation 6 Consistent with Article 12 of the CRPD, aged care legislation (including the Act and subordinate instruments), policies, programmes and services should be developed using authentic co-design, with sufficient time and support for service users to be contacted, engaged, to reflect and to contribute.

Recommendation 7 To give effect to rights to participate in family, social, cultural and community life, and the right to health, the Act should prioritise universal access to services which promote social connection, through:

- individual, family and group counselling and psycho-social supports
- culturally safe and appropriate services⁵
- support to build service users' capacity, and capacity within families, for effective problem solving and communication to help older people to:
 - prepare for, manage and move beyond the transitions into residential care and transitions between levels of intensity of assistance, and
 - maintain connections to family, friends, neighbourhood and community.

⁴ See ROPA call to action at <https://www.rightsofolderpersons.org.au/>

⁵ See, for example, the testimony of Professor Flicker to the Royal Commission: 17 June 2019, pp 2024-2025.

Recommendation 8 To mitigate imbalances of power when users (or their representatives) wish to take action to assert users' human rights - the Act should require that:

- advocacy services, as well as legal advice and representation, are made available to support users and their representatives to engage with remedial processes, including complaints, conciliation, and matters involving alleged breaches of the statutory duty of care), and
- case management, counselling, mediation services and psycho-social supports are made available to support users and their representatives to engage with remedial processes, including complaints, conciliation, and matters involving alleged breaches of the statutory duty of care).

Recommendation 9 The Act should:

- embed supported decision-making, as envisaged in OPAN's position statement on supported decision-making⁶
- mandate that substitute decision-making occurs only to the extent permitted by the Act itself (*not* subordinate legislation), and in accordance with the best possible interpretation of the person's wishes and preferences
- be very clear about the relationship between nominees and representatives appointed pursuant to the Act and nominees, representatives and advocates appointed pursuant to other legislation (eg people exercising powers of attorney) or in respect of other systems (eg Centrelink nominees) (implementation would be facilitated by progressing Recommendation 10)
- mandate national structured workforce planning to ensure that staffing profiles correspond to need and risk⁷
- mandate a community visitor programmes,⁸ with a legislative mandate for those visitors to monitor and report on the use of restrictive practices
- impose on service providers obligations to offer professional training⁹
- require service providers to offer clinical supervision and psycho-social support to staff; optimally, providers should seek out 'suitably trained people with a lived experience of childhood institutionalisation... to conduct training and awareness raising,'¹⁰ and

⁶ See <https://media.accessiblecms.com.au/uploads/opan/2023/02/OPAN-Position-Statement-Supported-decision-making-must-be-embedded-across-aged-care.pdf>

⁷ See also Carnell-Paterson, 2016, p 75.

⁸ This should be accompanied by a report on findings of visitors, tabled in Parliament; for a precedent, see the volunteer-based Community Visitor programme run by the Office of the Public Advocate (Victoria): <https://www.publicadvocate.vic.gov.au/our-services/community-visitors>. In this regard, we note also the observations by the Queensland Office of the Public Guardian, identifying community visitors, with a legislated mandate, as essential to human rights compliant regulation of restrictive practices: see Office of the Public Guardian, Queensland, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 – Submission to the Parliamentary Joint Committee on Human Rights, 2019, pp 10, 13-14.

⁹ Including mandatory training in working with care leavers and trauma-informed practice.

¹⁰ See presentation of Professor Elizabeth Fernandez, Addressing the Complex Needs of Forgotten Australians in Aged Care, Relationships Australia NSW, 6 June 2019. Fernandez also observes that 'Training for social workers and health practitioners to understand the impact of exposure to maltreatment on psychosocial problems across the life course is crucial.

- require systematic national collection, publication and analysis of data about the use of all restrictive processes in aged care services, regardless of setting.

Recommendation 10 That the Commonwealth urgently progress harmonisation of laws relating to enduring instruments and establishment of a register.

Recommendation 11 The Act must provide meaningful and accessible remedies for breaches of *all* rights (including, for the avoidance of doubt, decision-making rights), not only those resulting in physical harm or quantifiable loss/damage (or risks of these); a right that cannot be vindicated through a remedy is of questionable value.¹¹

Rights and principles

Recommendation 12 The Act should make clear the intended function and purposes of the various concepts which it is using to establish norms and prescribe conduct, and the relationships between these concepts.

Recommendation 13 To enhance clarity, transparency and accessibility of the legislation and the broader policy context in which it sits, Government should refer to other relevant initiatives in developing provisions to fulfil the intended function of the proposed Statement of Principles.

Recommendation 14 Any Statement of Principles accompanying the Statement of Rights should include the National Supported Decision-Making Principles as proposed by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, as adapted by OPAN's Position Statement.¹²

High quality service provision

Recommendation 15 The Act should establish specific, measurable, nuanced and informative metrics to demonstrate high quality care, developed through authentic co-design with service users.

Accountability

Recommendation 16 The Act must provide for a statutory review after three years of operation, with subsequent statutory reviews every five years thereafter, requiring a report of the review to be completed within six months of the anniversary of the Act's commencement and tabled within 15 sitting days of completion. The terms of reference for statutory reviews must include consideration of how the Act could be improved to better articulate and uphold users' human rights.

Recommendation 17 The Act must impose on the System Governor an obligation to publish clear, timely and reliable comparative information about service providers.

¹¹ This is consistent with Recommendation 2 in our submission to the inquiry of the Parliamentary Joint Committee on Human Rights into Australia's Human Rights Framework.

¹² See p 7 of the Statement.

Recommendation 18 The Act should clearly define the respective functions, powers and responsibilities of, and the relationships between:

- the Secretary, in their role as Secretary of the Department
- the System Governor (the Secretary of the Department, exercising specific powers and functions under the new Act)
- the Department
- the Commission
- the Complaints Commissioner
- the Aged Care Quality and Safety Advisory Council, and
- the Inspector-General of Aged Care.

Recommendation 19 The Act should require that any administrative arrangements between the Secretary as System Governor, the Department, the Commission, and the Aged Care Quality and Safety Advisory Council, that define lines of responsibility must be in writing and publicly available on a date no later than the date on which they come into effect.

Regulatory considerations raised by the Foundations Consultation Paper

Recommendation 20 The Act should expressly support a regulatory culture that makes considered use of sanctions and enforcement measures.

Recommendation 21 To promote robust independence, the Act should make clear that all regulatory officers and bodies are to be funded from the Federal Budget, and not wholly/partly by industry.

Recommendation 22 The Act should create a mandatory reporting scheme where abuse is suspected to be perpetrated by staff employed by aged care providers, or by individuals and other entities receiving a fee for providing a service to an older person.

Recommendation 23 That the Act define the duty of care broadly, so that it clearly applies to all breaches of all human rights, regardless of the kind or degree of harm, and expressly include breach of the right to make decisions.

Recommendation 24 That the Government take measures to ensure that service users can access advocacy and therapeutic support services, as well as legal advice and representation, to use the proposed complaints and compensation pathways.

Recommendation 25 To promote a culture which upholds the human rights of services users, and affords accountability, the Act should provide that, in certain circumstances, remedies can be sought personally against directors and officeholders of entities, as well as statutory officeholders, including the System Governor and the Complaints Commissioner.

THE WORK OF RELATIONSHIPS AUSTRALIA

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 choices, cultural background or economic circumstances.

Relationships Australia provides a range of services, including counselling, dispute resolution, services for victims and perpetrators of domestic and family violence and abuse and neglect of older people, children's services, 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. Through our programs, we work with people to enhance relationships within families, whether or not the family is together, with friends and colleagues, and across 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. Relationships Australia is committed to:

- ensuring that social and financial disadvantage are not barriers to accessing services
- 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
- collaborating with other 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 a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling help services, and public housing) is often needed by people engaging with our services, and
- contributing our practice insights and skills to better inform research, policy development, and service provision.

FRAMING PRINCIPLES OF THIS SUBMISSION

Principle 1 - Commitment to human rights

Relationships Australia contextualises its services, research and advocacy within imperatives to strengthen connections between people, scaffolded by a robust commitment to human rights. Relationships Australia recognises the indivisibility and universality of human rights and the inherent and equal freedom and dignity of all. In our recent submission about Australia's Human Rights Framework, we recommended that the Government should support and commit to working towards the adoption of a United Nations Convention on the Human Rights of Older Persons and ensure that:

- aged care legislation is embedded in human, as distinct from consumer, rights, and
- human rights form the basis for regulatory policy relating to aged care.

We warmly welcome the Government's commitment to a new Act which adopts a rights-based approach. However, an international convention on the rights of older persons would ensure that the rights conferred by the Act have a firm Constitutional basis – so that all of the human rights (not just those under the CRPD and the International Covenant on Economic, Social and Cultural Rights) of all aged care service users (not only those with a disability) are robustly protected.

Principle 2 – Commitment to inclusive and universally accessible services

Our clients (and our staff) face escalating hardship and precarity, rent and mortgage stress, and financial barriers to accessing other goods and services that are necessary to flourish. These include basic health care (including dental and mental health care and preventive health measures), physical, social and

cultural activities, educational and employment opportunities, and good quality fresh food. Since the onset of the Covid-19 pandemic, many people have experienced these kinds of difficulties for the first time. But there are many others for whom the pandemic merely exacerbated longstanding structural inequalities, barriers and scarcities. For them, the situation is exponentially worse.

In this context, Relationships Australia is committed to universal accessibility of services, which mandates inclusive and culturally safe services. Our clients (and staff) experience stigma, marginalisation and exclusion arising from diverse circumstances and positionalities, including:

- 'postcode injustice' in accessing health, justice and other social services, as well as social, cultural, economic and political opportunities
- poverty
- status as users of care and support
- disability and longstanding health restrictions (including poor mental health)
- being an adult informal carer for a child or other adult
- being a young person caring for a child or an adult
- intimate partner violence, abuse or neglect as an older person, and/or child maltreatment
- family separation
- housing insecurity and instability
- employment precarity, unemployment and under-employment
- misuse of alcohol and other drugs, or experience of gambling harms
- having come from culturally and linguistically diverse backgrounds (including people who have chosen to migrate and people who have sought refuge)
- digital exclusion
- effects of complex grief and trauma, intergenerational trauma, intersecting disadvantage and polyvictimisation
- being survivors of institutional abuse
- experiencing homelessness or housing precarity, and
- identification as members of the LGBTIQ+ communities.

None of these circumstances, experiences and positionalities exists at the level of an individual or family. They become barriers to full enjoyment of human rights and full participation in economic, cultural, political, and social life through the operation of broader systemic and structural factors including:

- legal, political and bureaucratic frameworks
- beliefs and expectations that are reflected in decision-making structures (such as legislatures, courts and tribunals, and regulators)
- policy settings that inform programme administration, and
- biases or prejudices that persist across society and that are reflected in arts, culture, media and entertainment.

Our commitment to accessibility also underpins our advocacy for systems and processes that lift from the shoulders of those least equipped to bear them the burdens of fragmented, siloed, complex and duplicative laws, policies, programmes, and administering entities. Accordingly, Relationships Australia welcomes the proposals to permit verbal applications, a single application process, one common set of

transparent eligibility requirements, and streamlined evidentiary requirements (Consultation Paper, p 48).

Principle 3 – An expanded understanding of diverse ways of being and knowing

Our commitment to human rights necessarily includes a commitment to respecting epistemologies beyond conventional Western ways of being, thinking and doing. Of acute importance is a commitment to respecting epistemologies and experiences of Aboriginal and Torres Strait Islander people as foundational to policy and programme development, as well as service delivery. Centring the epistemologies and experiences of Aboriginal and Torres Strait Islander people is a necessary (although not sufficient) step in achieving the targets in the National Agreement on Closing the Gap, as well as preventing entry into poverty, ameliorating its effects, and hastening transitions out of poverty. We welcome Government's attention to the imperative of connection of First Nations peoples to Culture and Country.

Relationships Australia is committed to valuing lived experience, including through incorporating the expertise from lived experience at all stages of policy, legislation and service design, implementation and evaluation.

Principle 4 – An expanded understanding of valued and valuable work

Our society should re-frame how caring roles – paid and unpaid – are recognised and valued in our social, economic and political infrastructure. As noted above, Relationships Australia recently made a range of recommendations responding to a draft Strategy for the care and support economy and a Parliamentary inquiry into the *Carer Recognition Act 2010* (Cth). The recommendations made in these submissions seek to elevate the value, and uphold the human rights, of all carers. Recommendations in this submission are consistent with, and build upon, recommendations made in these earlier submissions.

Principle 5 - Commitment to promoting social connection and addressing loneliness as a serious public health risk

Policy, regulatory and service interventions that strengthen connections and reduce isolation are the most promising and feasible avenues for reducing the risk of abuse and exploitation of people who face structural and systemic barriers to their full participation in society. For example:

Social support has emerged as one of the strongest protective factors identified in elder abuse studies... Social support in response to social isolation and poor quality relationships has also been identified as a promising focus of intervention because, unlike some other risk factors (eg disability, cognitive impairment), there is greater potential to improve the negative effects of social isolation.¹³

¹³ See Dean, CFA 51, 20, Box 7, citing the United States of America population study described in Acierno et al, (2017); citing also Hamby et al (2016); Pillemer et al (2016).

Loneliness is a complex social problem and a public health concern. It stems from dissatisfaction with our relationships, a lack of positive and respectful relationships, or both of these, and is often caused by experiences of exclusion due to structural and systemic social realities that form obstacles to participation in social, economic, cultural and political life. As a public health concern (Heinrich & Gullone, 2006; Holt-Lunstad et al, 2015; Mance, 2018; AIHW, 2019), loneliness has been linked to physical health risks such as being equivalent to smoking 15 cigarettes a day and an increased risk of heart disease (Valtorta, 2016). Loneliness is a precursor to poorer mental health outcomes, including increased suicidality (Calati et al, 2019; McClelland et al, 2020; Mushtaq, 2014).

Relationships Australia is a foundation member of the Ending Loneliness Together network¹⁴ and has, since 2013, been the custodian of Neighbours Every Day,¹⁵ the primary purpose of which is to equip and empower individuals to build sustainable, respectful relationships with those around them. It is an evidence-based campaign aimed at reducing loneliness by raising awareness and, importantly, providing tools to combat social isolation.

Isolation from the social scaffolding that has defined their identities for decades can be catastrophic for people moving into residential care, or who remain in place but need help to maintain family and broader social connections.¹⁶

Accordingly, the Act should explicitly recognise the public health importance of promoting connection and reducing loneliness, including by prioritising universal access to services which promote social connection for co-morbidities of loneliness, including low cost high impact interventions to facilitate social connection. The campaign Ending Loneliness Together has released a guide that explains how community organisations can use validated scales to measure loneliness, and we would be pleased to facilitate the engagement of the Department, and providers, to operationalise this guidance to benefit service users. Further, Relationships Australia South Australia provides free individual and group therapy services to people living in residential aged care facilities. This has been funded since 2018 under the Commonwealth Mental Health in Residential Aged Care initiative. These services have delivered an overall improvement in mental health outcomes and quality of life, as well as improved mental health literacy of staff, families and other people involved in residents' lives. Working collaboratively is key to maximising residents' psychological wellbeing a person-centred framework. We would welcome an opportunity to engage with the Department about expanding these services to provide geographic equity to users across Australia.

¹⁴ The campaign Ending Loneliness Together has released a guide that explains how community organisations can use validated scales to measure loneliness: https://endingloneliness.com.au/wp-content/uploads/2021/08/AGuideto-Measuring-Loneliness-for-Community-Organisations_Ending-Loneliness-Together.pdf

¹⁵ Neighbours Every Day is an evidence-based campaign, evaluated by the Australian National University, aimed at reducing loneliness by raising awareness and, importantly, providing tools to combat social isolation. With adequate resourcing, we are confident that Neighbours Every Day could be scaled to reach a greater number of people, in all communities and at all stages of the life course. See <https://neighbourseveryday.org/>

¹⁶ See, eg, Fernandez, Lee & McNamara, 2018. See also CoTA media release 3 July 2023 about the revised aged care visitor code: <https://cota.org.au/news-items/revised-aged-care-visitor-code-strikes-right-balance/>

Principle 6 – Intergenerational stewardship and equity

Relationships Australia agreed with the observation, set out in the Royal Commission’s Background Paper 1, *Navigating the Maze*, of ‘...a prevailing narrative that the ageing of the population is seen as a problem to be fixed and that older people are a burden facing the nation.’¹⁷ This perspective is regrettably a common one, reflected even in government publications such as previous intergenerational reports have set the tone for reporting and commentary which convey a regrettably official imprimatur on ageism.¹⁸ There is, we consider, a bi-directional relationship between ageism and ‘othering’ of older people with segregation of older people in the existence of an ‘aged care system’ in which people are cast as passive ‘care recipients’ in residential aged care facilities. It is also our view that abuse and neglect of older people, regardless of setting, has ageism at its root.

Stewardship for future generations should not be viewed through a reductionist fiscal lens. Relationships Australia takes seriously obligations of stewardship and fairness for future generations, which transcend the national balance sheet and require us to invest in social infrastructure (tangible and intangible). Future generations will benefit from a society that upholds the human rights of all, regardless of their age or perceived utility to the economy, that values and respects its unpaid carers and its care and support economy; many of them will be part of that economy, as providers as well as users. The recommendations in this submission are intended to guarantee the human rights of future older people living in Australia. What comfort is a positive balance sheet if future generations still find themselves tied to chairs and drugged into inertia as they age?

Recognising this, Relationships Australia is actively involved in campaigns against ageism such as EveryAGE Counts and Rights of Older Persons Australia, so that the scourge and shame of ageism come to be matters of historic curiosity, no longer a battle to be fought.

COMMENTS ON CONSULTATION PAPER NO. 1 – A NEW AGED CARE ACT: THE FOUNDATIONS

Overarching comments

Relationships Australia is concerned that arrangements for the provision of services to older people have been disconnected from the service users’ human rights. The Carnell-Paterson Review observed 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.¹⁹

Relationships Australia therefore welcomes proposals that the Act should move away from the focus, in the current legislation, on providers and towards person-centred care that upholds users’ rights, and that it will include a clear statement of rights. We note the proposed reliance of the external affairs

¹⁷ Background Paper 1, *Navigating the Maze*, 3. See also Qu et al, 2021; ALRC Report 131; Hirst, et al.

¹⁸ See, eg, Martin, 2023.

¹⁹ Carnell-Paterson, 2016, p 111.

power to provide the Constitutional basis of the Act, which is intended to more effectively engage human rights of users.

We are concerned, however, that the Consultation Paper indicates continued reliance on market-based mechanisms, including by conflating human rights with consumer rights. There were early messages of caution in implementing free market principles in the aged care sector; the 1993 Gregory Review ‘...cautioned that market-based proposals (such as removing acquittal requirements for providers) could jeopardise the ability of the funding system to ensure proper levels of quality care.’²⁰ This caution has been amply vindicated, as the Royal Commission showed.

Reforms to Commonwealth aged care legislation, policy and programs since 1997 have been consciously ‘market-focused’, aimed at positioning aged care increasingly as a service sold and purchased in a free and competitive market, rather than as an essential social service.²¹ In its inquiry into elder abuse, the Australian Law Reform Commission expressed its concern about the applicability of market principles in aged care.²²

When flaws in the aged care system have attracted attention, the assumption by governments seems to have been that problems arise from sub-optimal implementation of free market principles, rather than with such principles themselves, and how they could operate in a small and geographically dispersed market characterised by dramatic asymmetries of knowledge and power. Such assumptions, for example, seem to have underpinned the Productivity Commission’s recommendations in 2011,²³ the 2016 Roadmap, and observations made in the Tune Review in 2017. The 2016 Roadmap, for example, suggested that the problem with regulatory arrangements was that they were unduly onerous for market participants. However, the Royal Commission found that these ‘onerous’ requirements ‘often fail’ to detect ‘poor practices’ and, when they do, ‘...remedial action is frequently ineffective. The regulatory regime appears to do little to encourage better practice beyond a minimum standard.’²⁴

Further perverse incentives are created when human services operate as businesses that are required to prioritise generating profits for owners/shareholders by minimising expenditure and costs over users’ human rights. This has been apparent in relation to health services, child care services, and corrective services, as well as aged care services.

Market principles have demonstrably failed users of our aged care system, and ongoing reliance upon them would doom the new Act to perpetuating the neglect and abuse of users (and also poor treatment

²⁰ Royal Commission into Aged Care Quality and Safety, Interim Report - Neglect, 70, citing R Gregory, Review of the Structure of Nursing Home Funding Arrangement: Stage 1, Department of Human Services and Health, 1993, pp 21, 32, 79.

²¹ See, for example, the 2016 Aged Care Roadmap (https://www.health.gov.au/sites/default/files/aged-carerodmap_0.pdf, viewed 27 June 2020). See Department of Health. 2017-18 Report on the Operation of the Aged Care Act 1997. Canberra: Australian Government (2018), Australian Institute of Health and Welfare. GEN fact sheet 2017-18: Government spending on aged care. Canberra: AIHW (2019).

²² ALRC Report 131, Elder Abuse – A National Legal Response, 2017, pp 106-107.

²³ See Productivity Commission, Caring for Older Australians, Inquiry Report 2011.

²⁴ Royal Commission into Aged Care Quality and Safety, Interim Report - Neglect, About the Interim Report, 8.

of workers in Australian aged care), because of marked disparities of power between users (and potential users) and providers. These arise from multiple factors, including:

- the urgency which often attends decisions to seek aged care services, and
- lack of real choice in providers, arising partly from unmodifiable circumstances such as geography (which affects urban, as well as rural, regional and remote areas; it can be profoundly disruptive and distressing to enter into urban residential aged care on the other side of the city from where your spouse remains).

We are also concerned that bio-medical values, baked into the system from its 'nursing home' origins, will continue to undermine human rights. Such values pathologise ageing and older people, and privilege bio-medical perspectives over the wishes and preferences of individual users. The uneasy coupling of bio-medical, 'hospital-like' models and free market principles has not served older people well. Bio-medical models have proven disastrously reductionist and dismissive of users' moral and legal personhood. The language of 'consumer empowerment' has rendered invisible the persistent asymmetries of knowledge and power between users, providers and government and, in doing so, further entrenched disparities. It seems improbable that the advantages offered by marketisation, such as competition which enables consumers to purchase what they need and value, at a price that is both affordable and reflects their values, can ever be achieved in the Australian aged care environment.

Unless the new Act expressly rejects market and biomedical models, and explicitly centres of human (not merely consumer) rights, future generations of service users will not benefit from vital transformations necessary to uphold their human rights. This would be a grievous failure of stewardship.

Purpose of the Act

Relationships Australia advocates for inclusion in the Act of a clause providing that the purposes of the Act include to uphold the human rights of users, and to move towards de-institutionalisation.

Statement of Rights

Relationships Australia welcomes the proposed inclusion of a Statement of Rights. The rights, choices and dignity of older people must drive transformation of how our country regards older people. A pervasive commitment to acknowledging and valuing the intrinsic worth of all, regardless of cognitive capacity, physical ability and economic contribution, is the best guarantee of a free and compassionate society for current and future generations. At the core of abuse and neglect, such as was revealed by the Royal Commission and by the report into the nature and prevalence of elder abuse (Qu et al, 2021), is a sense that those who are abused or neglected have not the same intrinsic value or worth as others.

Relationships Australia has joined the Rights of Older People Alliance because Australia's reliance on a 'patchwork' of international conventions, such as those listed in the Consultation Paper, is another instance of 'othering' and obscuring the intrinsic worth and value of older people. For example, reliance on the Convention on the Rights of Disabled Persons to provide a Constitutional basis for human rights-centred age care services inaccurately pathologises ageing and older people, allowing ongoing medicalisation of their treatment, such as through continued tolerance for the use of restrictive practices. We are also concerned that reliance on the CRPD and the ICESCR, via the external affairs

power, may encourage and enable successful challenges to the Constitutional basis of the rights of service users who do not have a disability. This is untenable, and should be a catalyst for urgent Commonwealth action in supporting development of a Convention on the Rights of Older People.

Treatment of restrictive practices

The Act must unambiguously declare the elimination of restrictive practices to be a key objective. The use of restrictive practices as behavioural controls is abhorrent, and flagrantly violates our international obligations. Specifically, diagnosis of dementia or other cognitive impairment does not in any way diminish the entitlement of a person to enjoy all the human rights that attend on personhood. This was recognised nearly 30 years ago in the Burdekin Report:

...dementia, like other mental illnesses, can be managed successfully without compromising protection of human rights.²⁵

The absence of therapeutic benefit for those subjected to restrictive practices has been plainly demonstrated, including in evidence to the Royal Commission, as has the use of restrictive practices to benefit persons other than the individual subjected to them. It is important to recognise, too, that the rights violations and harms inflicted by the use of restrictive practices are in no way ameliorated by any lack of malice that prompts their use. Benevolent intent does not cure infringement of bodily integrity, which is why medical treatment is, with limited exceptions, subject to a precondition of consent.²⁶

Yet, since the delivery of its Final Report, the Commonwealth has seen fit only to tinker with regulations by confecting dubious ‘authorisation’ arrangements, so that ‘decision-makers’ with neither therapeutic expertise or even an intimate knowledge of the older person are called upon to ‘authorise’ the use of restrictive practices to ease the burden on intolerably over-burdened staff, protect third parties (including staff, other residents and other third parties), and remove liability risk from providers. Current arrangements do not regulate restrictive practices. Instead, they go to great lengths to fabricate excuses to normalise their continued use.

Further, the use of the term ‘informed consent’ in connection with restrictive practices is Orwellian. In no way do the interim arrangements under the *Quality of Care Amendment (Restrictive Practices) Principles 2022* (in place until December 2024) support anything that can properly be described as consent. Compounding this egregious situation is ongoing reliance on the well-documented hodge-podge of state and territory guardianship and substitute decision-maker arrangements.²⁷ The protections of older people in respect of restrictive practices is markedly inferior to that of people with disability²⁸ which, given the prominence of the CRPD in the Consultation Paper, is – to say the

²⁵ Carnell-Paterson, 2016, p 111, citing AHRC, 1993.

²⁶ *Rogers v Whitaker* (1992) 175 CLR 479. See also Williams, Chesterman & Laufer, 2014, at 647.

²⁷ We agree with the comments made by the Law Council of Australia in its submission at <https://lawcouncil.au/resources/submissions/a-new-model-for-regulating-aged-care-consultation-paper-no-2>.

²⁸ Office of the Public Guardian, Queensland, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 – Submission to the Parliamentary Joint Committee on Human Rights, 2019, 3*. See also recommendation 2 of that submission, at 4, 13. We note that this disparity has been remarked upon by other participants in this discussion:

least – incongruous. It is (or should be) self-evidently invidious that the protection of fundamental rights is weaker simply if one has attained an (arbitrarily determined) age. It is a further example of structural ageism and it is state-sanctioned elder abuse.

We hold particular concerns about the use of restrictive practices against older people who are survivors of violence and trauma. Many of our clients have suffered previous trauma and abuse, including in institutional settings. This includes people who are Forgotten Australians, Child Migrants, members of the Stolen Generations, people affected by forced adoption, and survivors of institutional child sexual abuse – and who, too often, belong to a combination of these groups. Relationships Australia clients who have had these experiences have told us of plans to kill themselves rather than enter institutional aged care, or anything that resembles the institutions where they were preyed upon. As a provider of services to members of these groups (although not a provider of RACF, homecare or past out of home care), Relationships Australia is deeply mindful that, for people who have experienced perpetually compounding, life-long suffering as a result of institutional abuse, the prospect of being re-institutionalised is terrifying. Daily life in even the best service is saturated, down to the tiniest detail, with triggers for re-traumatisation. At the worst, for example, where physical premises in which people were once abused have actually been re-purposed as aged care facilities, the menace is self-evident, grotesque and intolerable. A key priority for system reform must be to ensure that there is no replication in later life of the oppressive policies, practices and environments that engendered trauma earlier in life.²⁹

Rather than waiting until 2024 (how many people will be subjected human rights violations and suffer potentially life-shortening harm before then?), the Government should urgently act to implement reforms to reduce, with a view to eliminating, the use of restrictive practices in aged care services. In this regard, we commend to the Government's urgent attention the proposals made by the Queensland Public Advocate, which centre on an authorisation process, undertaken by an appointed 'senior practitioner' and 'authorised program officers,' as well as Recommendations 4-10 and 4-11 of ALRC Report 131, with which the Queensland proposals are consistent.

Relationships Australia acknowledges that a human rights based approach to restrictive practices would have a substantial impact on the cost of providing aged care. Yet if Australia takes seriously its human rights obligations to our older community members, then this is what is required. We further emphasise that restrictive practices can only be eradicated if caregivers are properly supported within a safe work environment. We have canvassed these considerations in more detail in our submissions to the inquiry about the Carer Recognition Act and the draft National Strategy for the care and support economy.

Decision-making rights

Relationships Australia welcomes the prominence given to decision-making rights in the Consultation Paper. To most effectively implement these rights, Relationships Australia considers that the

see, for example, the statement to the inquiry from Older Persons Advocacy Network, the response from the Australian College of Nurse Practitioners.

²⁹ See O'Neil, 2019.

Government should consider the recommendations made in ALRC Report 124 and, in particular, recommendations relating to the National Decision-Making Principles and replacing substitute decision-making with supported decision-making. Supported decision-making is not ‘best practice’ or an aspiration; it is simply what is required to protect human rights, as has been recognised in the CRPD. As outlined in OPAN’s 2022 Position Statement, it should be displaced only in the most exceptional of circumstances, and substitute decision-making permitted only under primary legislation and to ensure decision-making in accordance with the best possible interpretation of the person’s wishes and preferences. There is no place in a new Aged Care Act for a ‘best interests’ test.

We have elsewhere advocated for greater prioritisation by the Commonwealth, State and Territory Governments of harmonising laws relating to enduring powers of attorney and establishing a register of instruments, with accompanying educational materials for donees and donors of these powers, and the broader community. Implementation of these recommendations would support further simplification and accessibility of the supported decision-making mechanisms under the Act, offering a valuable safeguard and support for older people by upholding their decision-making rights and making clear – where they are unable to make a decision, even with support – their wishes and preferences. Third parties dealing with donors would also benefit from greater simplicity and transparency.

Statement of Principles

The proposed Statement of Principles raises issues about accessibility of the legislation.

Relationships Australia is concerned that the use of both a statement of rights and a statement of principles will perpetuate the use of confusing and unnecessarily complex legislative arrangements in respect of aged care by (inadvertently) creating scope for duplication, gaps and overlaps in application. We have observed the consequences of a similar approach in Part VII of the *Family Law Act 1975* (Cth), in which the cumulative proliferation of statements of purpose, objects, principles and considerations has caused harm and distress to families and substantial expenditure of public resources by fostering voluminous litigation. The Government should consider how to most clearly distinguish between the normative provisions of a statement of rights and the guidance which it intends to provide through a statement of principles.

Relationships Australia notes that there is an array of national initiatives that should influence the framing and implementation of any principles legislated in the Act. Many of these are listed at p 20 of the First Action Plan 2023-2027 under the National Plan to End Violence Against Women and Children 2022-2032; also relevant (although curiously omitted) is the National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023, which is currently being reviewed.

Finally, and also based in our experience with the Family Law Act, Relationships Australia cautions the Government against too literally following the terms of Recommendation 3 of the Royal Commission’s Final Report, by identifying multiple ‘paramount’ considerations. The Government is currently in the process of undoing a similar and highly confusing situation in Part VII, and should be wary of re-creating these issues in a new piece of legislation.

Service delivery principles

Our experience with assisting individuals and families to cope, in times of trauma, with fragmented legislation, policies and programmes shows that:

- legislation, policy and funding arrangements must be person-centred and predicated on integration and seamlessness of the user experience
- geographic inequities are pervasive, and sometimes result from arbitrary and artificial administrative (including funding) divisions
- services must be universally accessible, emphasising prevention, early intervention, reablement and restorative services, and
- service integration and collaboration must happen at an organisational level, invisible to users.

The Royal Commission acknowledged the complexities arising from ‘the interface between health, aged care and disability services in urban, regional and rural areas.’³⁰ In its first Background Paper, the Royal Commission noted that ‘...the system is complex and fragmented, and reform has been difficult to implement’.³¹

People approaching the aged care ‘system’ have been confronted with a disorienting kaleidoscope of scattered, ever-shifting pieces where the burden is on them to identify and navigate a coherent array of services to meet their needs, or the needs of their loved ones. In some instances, unmanaged fragmentation has had catastrophic consequences, as evidenced by the events at Oakden.³² We therefore welcome the Government’s commitment to simplify access to aged care services.

Definition and measurement of high quality care

Relationships Australia supports the inclusion of a definition of high quality care. That definition should be driven by authentic co-design to ensure it is person-centred, meaningful to service users and supports continuous improvement, rather than by binary outcomes that promote mechanistic, tick-a-box compliance.³³ The Act and subordinate legislation should specify metrics that are valued by service users, clear timeframes, and tangible consequences for failing to achieve metrics. These consequences must be genuine, proportionate and regulators must be confident in applying them.

Whistleblower protections

Relationships Australia supports proposals to protect whistleblowers. We are very conscious that fears of retribution and reprisal are strong deterrents from raising concerns and making complaints. We

³⁰ Royal Commission, 18 January 2019, 2. Similar problems had been identified by the Productivity Commission nearly a decade earlier; see also Carnell-Paterson, 2017, vii.

³¹ Royal Commission Background Paper 1, Navigating the Maze, 1.

³² In addition to inquiries initiated by the Government of South Australia, Carnell-Paterson also described how fragmentation of oversight and accountability facilitated shamefully long-tolerated failures. Professor Flicker also drew attention to the effect of funding fragmentation in limiting the possibility of achieving economies of scale in service delivery: see testimony, 17 June 2019, 2032.

³³ See Transcript of testimony of Professor R Paterson; p 4592. See also Carnell-Paterson, 2016, p 62.

would welcome more detail about how the proposed protections will attract greater confidence than existing provisions.

Regulatory considerations raised by the Foundations Consultation Paper

We acknowledge that the Government has previously received submissions on proposals concerning regulation. However, the foundations of the new Act must be both informed by, and guide, development of an effective, efficient regulatory framework that affords primacy to users' human rights. Relationships Australia considers that the following observation by the Australian National Audit Office remains salient:

The ultimate test of the regulatory framework is its ability to respond to issues in a timely and appropriately calibrated manner. Past incidents in the sector serve as a reminder of the potential impact of non-compliance on frail and elderly residents, and the importance of adopting a proactive and flexible approach to the administration of the framework, including the timely reporting and assessment of information collected by the Department and Agency staff.³⁴

In 2011, the Productivity Commission identified best practice principles for regulation of aged care services, which included:

- separating policy advice from regulation³⁵
- role clarity among regulators, and
- responsive regulation to encourage and enforce compliance.³⁶

In his testimony to the Royal Commission, Professor Paterson expressed the view that 'there has been a total lack of curiosity. I think there has been a mechanistic approach to the [complaints] role'.³⁷ Moreover, even the best-intentioned and most highly skilled regulators and providers are constrained by funding envelopes that force them to rely on measures and processes that do not take much time or expense to manage.

Relationships Australia notes the recommendations in the 2023 Tune Review, that dis-establishment of the Aged Care Quality and Safety Commission would be an unnecessary diversion of resources, given its current programme of changes to respond to the findings of the Royal Commission.³⁸ We nevertheless remain concerned that 'light touch', reactive and incurious regulatory culture will continue to pervade the Commission in the absence of radical transformation. There will need to be genuine accountability not just for providers, but also for officeholders within the regulatory framework established by the new Act. The need for robust, independent and proactive culture, including among agencies and officeholders bearing responsibility for providing accountability, has recently been emphasised by the Robodebt Royal Commission. Over the course of evidence given to that Royal Commission, it became

³⁴ ANAO, 2010-11; see also Carnell-Paterson, 2016, at p 62.

³⁵ As also noted by Carnell-Paterson, 2016, pp 56ff. See also Productivity Commission, 2011, vol 2, 15.2.

³⁶ See Productivity Commission, vol 2, Chapter 15. Carnell-Paterson, 2016, pp 66ff. See also the testimony of Professor R Paterson to the Royal Commission: pp 4584-4585.

³⁷ Transcript of testimony, at p 4592. See also Carnell-Paterson, 2016, p 62.

³⁸ See especially recommendations 6.1, 6.2 and 6.3.

clear that a number of government mechanisms intended to ensure good governance and accountability failed, with grievous consequences for those subjected to the Robodebt processes. We are concerned about the proliferation of officeholders and entities that will have a range of regulatory and accountability roles under the new Act.

Relationships Australia supports the application of relational regulation, in which proactive regulators demonstrate curiosity, offer high challenge/high support to providers, and – critically, given the regulatory failings identified in a parade of reviews and inquiries – do not allow providers to ‘mark their own homework’. We agree with the view attributed by the Law Council of Australia to the New South Wales Bar that

...injury, deaths and harm to the wellbeing of older persons will persist without substantial reform involving an independent regulator, as recommended by the Final Report.³⁹

Human-rights centred quality and safety measures

Relationships Australia urges that the future identification and development of measures for quality and safety centre peer-led user co-design. It should be users who identify what are valued and valuable outcomes, and this should form the basis of regulation and compliance activities. A notable example of this *not* occurring was evident in the disorganised development of the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*.

In our submission to the Joint Parliamentary Committee on Human Rights, we observed that ‘stakeholder consultation described in the Explanatory Statement seem[ed] dominated by clinicians, providers and regulators’. The absence of user voices in designing regulation, and inadequate notions of efficiency in the context of human services, led to regulation that measures transactions and outputs, at the expense of the human rights of older people. It is deeply concerning that even the most recent changes to those Principles appear more about providing convenience for providers by enabling swift identification of someone who can ‘consent’ than with upholding users’ human rights, and minimising the occurrence of degrading, harmful breaches of those rights.

The 2016 Roadmap predicted that the industry would soon be in a position to engage with ‘co-regulation and earned autonomy’, and envisaged that the only necessary government protections would be consumer law.⁴⁰ In light of Oakden, Earle Haven and the Royal Commission findings, Relationships Australia strongly welcomes the Government’s proposed retention of regulatory responsibilities, which should be aimed at:

- addressing asymmetries of knowledge and power that preclude consumer law providing effective protection, deterrence and sanction – in this context, the Government should stand as the ‘ultimate consumer’, with the financial and legislative power to hold sub-standard providers to account through an array of mechanisms (including robust licensing and accreditation arrangements), as well as data collection and policy development

³⁹ Law Council of Australia, submission on A new model for regulating Aged Care – Consultation Paper No. 2, 100723, paragraph 119.

⁴⁰ Aged Care Roadmap, 2016, p 13.

- provide clear lines of accountability, and
- preventing, identifying and responding to abuse and neglect that occurs within aged care service provision (regardless of setting); while Australia has not yet collected data on the nature and prevalence of abuse and neglect occurring in institutional settings, a meta-analysis of European data observed that ‘...research has shown that elder abuse occurs in every country with nursing and residential facilities and anecdotal evidence suggests that abuse may be very prevalent.’⁴¹

Relationships Australia considers that it is vital to conceptualise accreditation, regulation and compliance as activities emanating from a tripartite relationship between service users, accrediting agencies/regulators and providers – with users having primacy. In the past, discussions about policy and administration of accreditation and compliance have been conceptualised within a dyad comprising only (or, at best, dominated by) government and providers. This is incompatible with a human rights based, person-centred system.

Complaint and conciliation mechanisms

Relationships Australia welcomes the flexibility of complaint pathways envisaged by the Consultation Paper. We also agree that, in many instances, an early and informal resolution is the most suitable, enabling prompt intervention and remediation and minimising disruption and distress. However, we do have questions and concerns about the proposals relating to complaint mechanisms. The Consultation Paper indicates that

The intention is that an older person, who considers their rights have been breached by a registered provider or an aged care worker when seeking access to or accessing aged care services, will also be able to make or escalate a complaint to the Commission under a revised complaints process, led by the Complaints Commissioner. The Commission will then be able to pursue early intervention, conciliation or restorative outcomes (for example, an apology or an agreement to provide compensation).⁴²

It is unclear, for example:

- whether the older person would need to take up their complaint with the provider at the first instance, before they can have recourse to the Complaints Commissioner
- if this is the case, then what structures and processes does the Government intend having in place to ensure that older people feel comfortable pursuing remediation pathways, given the serious imbalance of power? As noted elsewhere in this and in other submissions made by Relationships Australia, the imbalance of power, and the real and valid fear of it being abused in response to a complaint, acts as a very hard barrier to making complaints
- what support will be in place for older people who wish to have someone with them when they make the complaint? Will there be protections in place, beyond the whistleblower protections? Will the processes be trauma-informed?
- what will conciliation involve and what supports and protections will be available?

⁴¹ Yon et al, 2018, pp 59, 61.

⁴² At p 18.

- does the reference to ‘restorative outcomes’ mean that restorative practices will be used (there may be some confusion between restorative justice and restorative practice)? If so, what training and preparation will providers, workers and supporters of older people receive to ensure that practices are genuinely restorative?
- will older people have ready access to therapeutic support and advocacy services, as well as legal advice⁴³ to support their engagement with complaint, conciliation and restorative practice, noting that older people currently experience significant barriers in accessing legal advice and representation? This will be particularly important if apologies, legally-binding agreements or compensation are being considered (for example, in the absence of legal advice, a user may be coerced into signing a non-disclosure agreement even in instances of serious misconduct);
- on what basis is the Government excluding a finding of fault or blame in the proposed complaints process?⁴⁴ Where the complaint is about conduct that amounts to violence, abuse or neglect, how does that align with other Government policies such as the National Plan to End Violence Against Women and Children, with its strong emphasis on accountability? Why should perpetrators of abuse against users of aged care services not be held accountable? Further, a finding of fault or blame does not exclude opportunities for continuous improvement; indeed, it may be a powerful catalyst for change.
- will there be a process to deal with frivolous or vexatious complaints? Who will administer it and on what criteria will decisions be made? Will there be a forum to review decisions that a complaint is frivolous or vexatious?
- what sanctions will the Complaints Commissioner be able to apply? Will these be legally binding? If a user or their representative is not satisfied with the outcome of the Commissioner’s intervention, what remedies are then available?
- we welcome the proposal that the complaints framework will be supported by procedural fairness, but it is unclear how this will work.

Relationships Australia offers services that provide older people with the psychological space, safety and supports to initiate challenging conversations about abuse and neglect, intergenerational violence, life transitions, and advance planning. Our services are trauma-informed and DFV aware, and can apply restorative practice principles. These are scaffolded by individual, family and group counselling and mediation services where required. We would be pleased to discuss with Government assistance we could provide, in collaboration with other services (such as advocacy and legal advice services) to support a robust, fair and responsive complaints process.

A new duty of care and compensation

In our submission to the Parliamentary inquiry into Australia’s Human Rights Framework, we recommend that a national Human Rights Act should impose duties to protect and promote human rights and provide meaningful, effective, accessible and proportionate remedies for breaches of human

⁴³ It is important for people to have a choice of services to engage.

⁴⁴ See Consultation Paper No. 2, A new model for regulating Aged Care, p 59:
<https://www.health.gov.au/sites/default/files/2023-04/a-new-model-for-regulating-aged-care-consultation-paper-2-details-of-the-proposed-new-model.pdf> [accessed 22 August 2023]

rights, including a standalone cause of action that can be invoked (including against the Crown) in respect of alleged breaches of human rights, proof of which can afford access to a range of remedies, including damages and restitution, as well as injunctive and declaratory relief (Recommendation 2).

Many of the concerns identified in the preceding section about complaints mechanisms apply in respect of the proposed duty of care and the proposed compensation pathway, including:

- a failure to address the imbalance of power and resourcing between users and providers, and
- the barriers to access to justice experienced by all older people, and in exacerbated forms for older people experiencing compounding barriers relating to (for example), language difficulties, disabilities, mental illness, poverty and housing precarity.

Relationships Australia does not consider that the proposal would afford primacy to upholding users' human rights, but instead would only provide a rarely-used remedy on a far narrower basis. In particular, the Paper appears to require a service user to prove 'serious' failures giving rise to (ie causing) risk to, or actual, serious illness, injury or death.⁴⁵ Given the threshold of 'seriousness', what standard of proof will be required? We are concerned that causation and harm may both prove to be very high hurdles for plaintiffs to clear. Defendants may well seek to contest liability by claiming that any harm alleged has been caused by pre-existing conditions. Further, the remedy is framed around medicalised concepts of harm, and seems unconcerned with upholding or vindicating breaches of human rights that should be at the centre of the new Act, such as the right to make one's own choices. Breach of that right gives rise to a range of harms, but this duty will afford no remedy for it. Finally, we are concerned that the scope given to defendants to contest liability (eg claiming the breach was not serious, disputing causation, disputing harm) will allow proceedings to be so protracted as to effectively deny a remedy.

By way of example, in the Four Corners report which catalysed the Royal Commission, a worker was shown striking at a woman as the worker walked past. It was unclear whether the woman suffered 'serious' harm. It was reported that the worker was subsequently charged with an offence. Yet it seems from the Consultation Paper that the woman may well have no remedy, despite the criminality of the act, its demeaning and degrading character, and the emotional and psychological toll on the woman. In common law, even if no injury had been caused, the tort of battery would be available, which recognises the violation of the dignity interest and the interest in bodily integrity that are infringed in such circumstances⁴⁶ and which does not require proof of causation.⁴⁷

⁴⁵ Consultation Paper, p 30.

⁴⁶ See *Department of Health and Community Services (NT) v JWB and SMB ('Re Marion')* (1992) 175 CLR 218.

⁴⁷ *Wilson v Pringle* [1987] 1 QB 237, 249 (Croom-Johnson LJ). For descriptions of the history of the interest in bodily integrity, see *Secretary, Department of Health and Community Services (NT) v JWB and SMB ('Re Marion')* (1992) 175 CLR 218, 233 (joint judgment), 266 (Brennan J), 310, 312 (McHugh J). See also *Slater v Baker & Stapleton* (1767) 95 ER 860.

De-institutionalisation

Relationships Australia agrees with the observation that

...even if there were no quality of care problems in nursing homes, conventional nursing homes arguably fail the quality test because of the severe strictures on life in these settings. Put simply, the total disenfranchisement associated with living in a nursing home is too high a price to pay for even high-quality technical care.⁴⁸

The human needs for, and rights to, social inclusion and public participation do not stop at the doors of a residential aged care facility and are not diminished by impairment of cognitive or physical capacity. The benefits to older people of services and supports to maintain relationships have been well-recognised in the literature over the past decade. Accordingly, Relationships Australia considers that aged care reforms should prioritise investment in service responses that mitigate against stigma, segregation, loneliness and social isolation, and that actively promote ongoing user-centred participation in outside (as well as on-site) activities and public life. It is well-understood that segregation, stigma and isolation each poses significant risks to physical and mental health and that healthy family and broader social relationships are protective factors against abuse and neglect.⁴⁹

De-institutionalisation is an important part of the necessary response. A Convention on the Rights of Older People would support this, as it has for children and people with disability, under the Convention on the Rights of the Child and the CRPD respectively.

In the meantime, over-burdened staff members may not have the time, or the skills, to wrap around the residents. There is a gap of psycho-social need that is not yet adequately recognised, researched or met. However, place-based individual and group work can offer a cost-effective therapeutic response, while building skills and capacity to thrive, and maintaining their sense of belonging to their old communities and connections. Beneficial service responses include:

- access to individual, family and group counselling (such as the RASA service provided under the Mental Health in Residential Aged Care initiative and the Let's Talk programme provided by Relationships Australia New South Wales)
- culturally safe and appropriate services⁵⁰ (such as services provided by ACCOs, and including on-Country care)
- support to build the service user's capacity, and capacity within the family, for effective problem solving and communication to help older people to:
 - prepare for, manage and move beyond the transitions into residential care and transitions between levels of intensity of assistance (including Eldercaring Coordination currently being piloted by Relationships Australia South Australia and case management and mediation services provided by our federation in Queensland, Canberra and Region,

⁴⁸ Kane, 2001.

⁴⁹ See, eg, Heinrich & Gullon, 2006; Dean, 2019; Pillemer et al, 2016.

⁵⁰ See, for example, the testimony of Professor Flicker to the Royal Commission: 17 June 2019, pp 2024-2025.

- maintain connections to family, neighbourhood and community, including through programmes such as Neighbours Every Day and Ending Loneliness Together.

Conclusion

This submission was informed by observations, findings and recommendations in reports of a plethora of inquiries, reviews and other policy and programmes documents over the past 13 years. There is a depressing commonality of themes, findings and recommendations. Despite the energy, commitment and talent expended, the structural transformation for which they and – more importantly, users – have called have not found favour with governments.

We suspect that this has a lot to do with the ageism that is baked into our society – in our casual conversations, in media, culture and the arts, among policy-makers and thought leaders. It was over ten years ago that then-Commissioner Broderick predicted that ‘...the temptation to brand people in this large and expanding group as a costly problem will likely escalate.’⁵¹ This has occurred, and has been particularly pronounced in public discourse about the COVID-19 pandemic, as noted by the most recent Age Discrimination Commissioner, the Hon Dr Kay Patterson AO.⁵² It is past time for our country to address ageism at home and in the international community. The new Act could be a powerful counter to these influences.

Relationships Australia looks forward to engaging further with the development of the new Aged Care Act, and with the development of frameworks for providing rights-based and person-centred aged care services in the home. Thank you again for the opportunity to participate in this consultation. If we can provide further assistance, please do not hesitate to contact me at 02 6162 9300 / ntebbey@relationships.org.au or, alternatively, to contact Dr Susan F Cochrane, our National Policy Manager, at scochrane@relationships.org.au.

Kind regards



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⁵¹ Broderick, 2010.

⁵² See, eg, Patterson, 2020, 2021.

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