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EAAA
Elder Abuse Action Australia

Submission to the Inquiry into Australia's Human Rights Framework

Introduction

Elder Abuse Action Australia (EAAA) welcomes the opportunity to put forward our support for the introduction of a federal Human Rights Act for Australia in the form of this submission. Ageing is an inevitability of living, and yet we know from repeated studies from Australia and around the world that older people are increasingly stereotyped to an extent that it leads to infringements of their human rights, particularly in relation to self-determination and dignity[1].

The protectionist approach that is often taken both politically and socially towards older people in Australia is usually seen as benevolent, however it is ultimately infantilising, and the resulting removal or reduction of the person's autonomy and independence can in turn cause social, economic, psychological, and physical harms[2].

The human rights legislation that currently exists in the ACT, Victoria, and Queensland does allow for some level of protectionism, however it also installs mechanisms to ensure proportionality whenever rights are limited. Without a federal Act there is no way to ensure that the protectionist policies and attitudes that so frequently impact older people are subject to proportionality testing and that any limitations of human rights are commensurate with the reasons for said limitations.

EAAA acknowledges the work performed by the Australian Human Rights Commission since its establishment in 1986, inclusive of taking legal action in relation to discrimination as defined by the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth). The lack of federal human rights legislation, however, limits the Commission's ability to act in relation to breaches of human rights that fall outside the remit of these acts, restricting it to conciliation methodologies alone to resolve complaints or address violations.

In layman's terms this means that human rights protected by international treaties remain legally unprotected outside of the existing jurisdictional legislation in the ACT, Victoria, and Queensland despite Australia's signatory status to these treaties. The current approach in Australia is piecemeal both in terms of what rights are legally protected and the jurisdictional nature of those protections thus undermining the right of every person to be treated equally under the law and free from discrimination.

Amnesty International identifies Australia as the only liberal democracy in the world with no national human rights protection mechanism[3], this is something that EAAA is eager to see

addressed with the following five key recommendations to be embedded within any federal Human Rights Act.

Recommendations:

1. A federal Human Rights Act must clearly define the rights which are protected, the pathways to address violations of these rights, and those people who are entitled to such protection.
2. A federal Human Rights Act must include the core tenets of the international human rights treaties to which Australia is a signatory, with particular reference to Article 25.1 of the Universal Declaration of Human Rights[4].
3. A federal Human Rights Act must have 'public authorities' specifically defined and advised of their responsibilities in protecting human rights.
4. A federal Human Rights Act must allow for all new legislation to be examined by the Attorney General's Department for inconsistencies with, or breaches of, the Act.
5. As a part of the implementation program for a federal Human Rights Act, the Australian Human Rights Commission must be provided with adequate resources to investigate, resolve, and educate relevant parties in relation to the Act.

Recommendation One

***A federal Human Rights Act must clearly define the rights which are protected, the pathways to address violations of these rights, and those people who are entitled to such protection*.**

The existing Human Rights Acts in place in the ACT, Victoria, and Queensland all clearly define the protected rights, however these rights are inconsistent across the three jurisdictions[5,6,7]. In order for any federal legislation to successfully overcome the problem of the country's fragmented approach to human rights violations it would be incumbent for definitions to include all rights protected under existing jurisdictional legislation. It is also noteworthy that whilst each jurisdiction protects specific rights not included in the legislation of others, all of the rights protected by the three jurisdictions are covered by one or more international treaties that have been ratified by Australia.

The sum total of 24 human rights protected across the ACT *Human Rights Act 2004*[8], the Victorian *Charter of Human Rights and Responsibilities Act 2006*[9], and the Queensland *Human Rights Act 2019*[10], are not exhaustive of the human rights commitments made by Australia through the ratification of international treaties. There is no protection, for example, of the rights to adequate standard of living as protected by the Universal Declaration of Human rights[11]. This is something which will be further addressed in recommendation two of this submission, but the specific inconstancies are worth noting in relation to definition of the rights protected within any proposed federal Human Rights Act.

The ACT is the only jurisdiction whose current human rights legislation protects work-related rights[12]. These rights are also protected in Article 23 of the Universal Declaration of Human Rights[13], signed by Australia in 1948, and in Article 6 of the International Covenant on Economic, Social and Cultural Rights[14], ratified by Australia in 1975.

The ACT and Queensland both define and protect the right to education within their legislation[15,16] where Victoria does not[17], this right is also protected by Article 26 of the Universal Declaration of Human Rights[18], Article 13 of the International Covenant on Economic, Social and Cultural Rights[19], and Article 28 of the Convention on the Rights of a Child[20], ratified by Australia in 1990.

Both Victoria's and Queensland's legislation protects property rights as human rights[21,22], something which is also protected by Article 17 of the Universal Declaration of Human Rights[23] and by Article 7 of the International Covenant on Economic, Social and Cultural Rights[24]. Queensland is the only state which protects the right to health services under its human rights legislation[25] as protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights[26], whilst the ACT is the only state which defines the right to compensation in the event of wrongful conviction as a human right[27], something which is protected in Article 9 of the International Covenant on Civil and Political Rights[28], ratified by Australia in 1980.

While it is important to note that some of the above rights are protected under alternative legislation, for example the right to education is protected in Victoria within the *Education and Training Reform Act 2006*[29], it is essential that all rights which fall into the domains of human rights be specifically and clearly defined in any federal Human Rights Act to ensure that all human rights violations can be addressed with appropriate recourse which must also be defined within the bill, and to reduce the fragmentation of the existing legislation.

The concept of equality before the law is a core tenet of democracy and of human rights themselves[30], however there is some debate about whether this concept is effectively embedded within the Australian judicial system[31,32]. In order to ensure equality before the law as a feature of a federal Human Rights Act it is incumbent upon legislators to ensure that this Act specifically protects not only Australian citizens, but all peoples either on Australian soil or under effective control of Australian institutions or organisations overseas.

This is of particular significance given the most recent figures from 2021-2022 Annual Report of the Commonwealth National Preventative Mechanism under the Optional Protocol to the Convention Against Torture indicated that there were still more than 1300 people in immigration detention[33].

EAAA would further draw the committee's attention to the consistent findings of the United Nations High Commissioner for Refugees that older people were at particular risk for abuse and human rights violations during displacement[34].

Recommendation Two

A federal Human Rights Act must include the core tenets of the international human rights treaties to which Australia is a signatory, with particular reference to Article 25.1 of the Universal Declaration of Human Rights.

International treaties relating to human rights and ratified by Australia include the aforementioned Universal Declaration of Human Rights[35], The International Covenant on Economic, Social and Cultural Rights[36], The International Covenant on Civil and Political Rights[37], and the Convention on the Rights of the Child[38]; as well as other treaties including International Convention on the Elimination of All Forms of Racial Discrimination[39], ratified in 1975; The Convention on the Elimination of All Forms of Discrimination Against Women[40], ratified in 1983; The Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment[41], ratified in 1989; and the Convention on the Rights of Persons with a Disability[42], ratified in 2007. The ratification of these treaties however does not have any impact on Australia's domestic law, rather it is a commitment to uphold these treaties and embed them within domestic law. This is made clear in Article 27 of the Vienna Convention on the Law of Treaties, acceded to by Australia in 1974, which states:

> *"A party may not invoke the provisions of internal law as a justification for its failure to perform a treaty."*[43]

Acknowledging that existing federal discrimination acts do protect some of the rights protected by international treaties, EAAA nonetheless believes that this commitment within the Vienna Convention, and the commitment of Australia to the other aforementioned treaties, must translate into the rights protected within them being specifically included within a federal Human Rights Act. EAAA would like to draw the committee's particular attention to Article 25.1 of the Universal Declaration of Human Rights which states:

> *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*[44]

The significance of this article to EAAA within this submission is due to two factors: the disproportionate number of older Australians affected by an inadequate standard of living, and the correlation between socioeconomic disadvantage and the likelihood of experiencing elder abuse.

The disproportionate number of older Australians impacted by a lack of adequate standard of living is illustrated by data from the Australian Bureau of Statistics' 2018 Survey of

Disability Aging and Carers (SDAC). The data produced shows that the median gross personal income of persons aged 65 years and older was $454 per week, in comparison to those aged 15-64 who took home a median gross income of $961 per week, with two-thirds of those aged 65 and over living in a low-income household reliant on less than $756 per week[45]. These figures are reinforced by 2021 Census data which, whilst less specific indicates that of the 2.3million people aged 65 and over surveyed, almost 1.3million (1,287,971) specified an income of less than $500 a week[46]. The 2022 Poverty in Australia Snapshot found that in dollar figures the poverty line translates to $489 per week for a single adult[47], $35 dollars higher than the gross median income of those over 65 in 2018.

Studies show many detrimental effects of living below the poverty line, including poorer health outcomes, a higher likelihood of homelessness, and poor access to food and security[48]. Poverty is also detrimental to personal safety[49,50], and an analysis of lower socioeconomic status more broadly as a part of the National Elder Abuse Prevalence Study 2021 by the Australian Institute of Family Studies found that those at the lowest end of the socioeconomic scale were the most likely to experience elder abuse (17.4%) and those at the highest end the least likely to experience such abuse (12.2%)[51]. Australia once took pride in being 'The Lucky Country', with low levels of socioeconomic inequality, but current research shows this is no longer the case[52]. If we aspire to be the lucky country for all Australians, we must enshrine the right to an adequate standard of living within a federal Human Rights Act.

Recommendation Three

A federal Human Rights Act must have 'public authorities' specifically defined and advised of their responsibilities in protecting human rights.

The current legislation in place in the ACT, Victoria, and Queensland all outline the obligations and responsibilities of 'public authorities' in relation to upholding and ensuring human rights[53,54,55]. They also define a public authority but do so loosely and without any direct reference to public guardians, state trustees, or prisons. Due to the high number of human rights abuses that take place within these settings and the vulnerability of those under the wardship of prisons, public guardians, or state trustees, EAAA strongly urges the committee to include these organisations as specific examples of what is meant by the term 'public authority', and to expand upon the obligations of public authorities beyond what is considered in the jurisdictional legislation. This is of particular relevance given that the aforementioned public authorities are all managed by states and territories rather than by the Commonwealth. Individuals who are under the authority of such external wardships or administrators are necessarily limited in their freedoms and liberties including their freedom to leave the jurisdiction and seek another. A lack of freedom of movement within Australia should not mean that an individual is afforded a different level of human rights than if they lived on the other side of a state or territory border.

EAAA also draws the committee's attention to *PJB v Melbourne Health and Another* (2011) VSC 327[56], which will be drawn upon further in this recommendation, as this case provides a strong illustration of the importance of clarity in the definition of the term 'public authority'. The lack of clarity within the Victorian *Charter of Human Rights and Responsibilities 2006*[57] saw inconsistent opinions arise about the responsibilities of the Victorian Civil and Administrative Tribunal (VCAT) in relation to the Charter. This arose when the Victorian Attorney General Rob Hull submitted that VCAT was not in fact a public authority and was therefore not bound by the obligations of public authorities under the Charter[58]. Justice Bell however, determined that as VCAT was acting in an administrative capacity in overseeing the *Guardianship and Administration Act 1986* (VIC)[59], that for the purposes of *PJB v Melbourne Health* VCAT must be considered a public authority and thus subject to the obligations outlined in section 4 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC)[60]. The need for judicial clarification on this issue can be addressed and eliminated by a more detailed definition of the term 'public authority' in federal legislation.

The issue of wardship in the form of either incarceration or state guardianship directly affects almost one hundred thousand Australians, with statistics showing an increasing impact on older Australians. In 2022 the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with a Disability heard that more than 50,000 Australians were currently under state guardianship[61], whilst data from the Australian Bureau of Statistics shows that between 1994 and 2021 the number of Australians over the age of 65 in prison grew from just 116 to 1,291[62].

The relevance of this stretches well beyond simply the increasing number of older inmates in Australian prisons, with research suggesting that prison systems often fail to meet the specific needs of older or disabled inmates with a 'thoughtlessness' that equates to abuse in the form of neglect[63,64]. In many cases this thoughtlessness or neglect is due to prisons simply not having the infrastructure or systems in place to deal with the complex needs of these inmates particularly in relation to medical diagnosis and treatment[65]. Systemic failure however should not relieve any organisation, including a prison, of their obligation to provide basic dignity and care for those under their wardship, and with the increasing number of older Australians in prison this problem will likely exacerbate unless direct action is taken to hold prisons accountable for their failure to protect the rights and dignity of all individuals in their care.

The importance of providing clarity around the obligations of prisons and state trustees is further illustrated by an examination of findings of human rights violations by these public authorities in those jurisdictions which currently have human rights legislation in place. The two case studies below provide a small sample to demonstrate the importance of a federal Human Rights Act providing precise expectations of public authorities and the need for all prisons and state trustees/guardians in all jurisdictions to be held accountable under consistent legislation for breaches of the human rights of those in their care.

Owen-D'Arcy v Chief Executive, Queensland Corrective Services (2021) QSC 273:[66]

This case relates to an offender who had been convicted of multiple violent crimes and was serving a life sentence as a result. Having been deemed a threat to the general prison population and having been convicted of the attempted murder of a corrective services officer, Michael Owen-D'Arcy was issued with a Maximum Security Order (MSO) and a No Association Decision in 2013. MSOs are limited to six-months in duration, however in Mr Owen-D'Arcy's case new orders had been issued every six months, alongside further No Association Decisions from January 2013 until the case was heard in October 2020. The result of this was that Mr Owen-Darcy spent more than seven years in isolation in a 3.8 by 2.2 metre cell, and that when he was permitted solitary exercise, he was required to wear handcuffs, leg-irons, and a body belt at all times. Lawyers for Mr Owen-D'Arcy argued that his human rights had been breached as these continuous orders essentially deprived him of meaningful human contact and dignity for several years without any provisions or explanations to the prisoner of how he could overcome this situation. The courts found for Mr Owen-D'Arcy, and that Queensland Corrective Services had failed to seek alternative options, or any methods through which Mr Owen-D'Arcy could be removed from the No Association Decision at any time in the future, and furthermore had failed to consider the impact this isolation had on his human rights and wellbeing. With the proportion of older people imprisoned in Australia rising exponentially[67], and the established link between social isolation and a risk of elder abuse[68], it is inherent that we ensure prison and protective services are aware of their human rights obligations and held accountable for any violations.

Each of the three human rights acts in Australia protects the dignity of those who are incarcerated, such as Mr Owen-D'Arcy, and whilst proportionality must apply there is no mechanism in place to remove human rights entirely based on the nature of an individual's crimes. The Queensland *Human Rights Act 2019* specifically states under section 30 that all persons deprived of liberty must be treated with humanity. This case illustrates the importance of a federal act in that were Mr Owen-D'Arcy's case to have been brought prior to introduction of Queensland's *Human Rights Act 2019*, the only finding he could have hoped for was a judicial review, as opposed what he achieved which was a determination of a human rights violation and a precedent for further consideration of consecutive no association decisions.

PJB v Melbourne Health and Another (2011) VSC 327 (Patrick's Case):[69]

Patrick was a 58-year-old man who had been an involuntary mental health patient at a hospital operated by Melbourne Health for ten years. Patrick was stable whilst taking his compulsory medication and sought to return to the home he owned and live in the community, something which Melbourne Health claimed was unrealistic based on Patrick's history of ceasing medication compliance when released into the community on several previous occasions.

Melbourne Health was seeking to relocate Patrick to an assisted living facility, something which he opposed, they believed that this relocation would be more successful if Patrick did not own his own home and was thus restricted in his options for living arrangements. Melbourne Health took Patrick's case to the Victorian Civil and Administrative Tribunal (VCAT) under the *Guardian and Administration Act 1986* (VIC) resulting in State Trustees Ltd being appointed as an unlimited and exclusive administrator of Patrick's estate.

The complexities in this case relate to the balance between when a right may be limited, and the right to equality under the law, both of which are found within the Victorian Charter. *The Guardianship and Administration Act 1986* is designed to apply only to individuals who are deemed unable to manage their own affairs, as a result it is discriminatory by its very nature against someone such as Patrick with a mental illness. The Victorian Charter however does allow for rights to be limited should the purpose of the limitation be reasonably considered to outweigh the limitation itself, in the case of the Guardianship Act to protect the individual from mismanaging their affairs to their own detriment. In Patrick's case the rights that were accused of being infringed were his right to freedom of movement (section 12), his right to privacy and home (section 13), and his right to property (section 20), the latter of which is notably not protected by the *Human Rights Act 2004* (ACT)[70].

All of those who gave evidence during the VCAT Guardianship hearing testified that Patrick was incapable of living independently in the community, however a consultant psychiatrist shared their belief that Patrick was capable of managing his own finances, by evidence that he was currently doing so. Patrick had also advised that whilst he opposed a guardianship order, should one be required he would preference his brother being named as administrator. This was opposed by Melbourne Health largely on the grounds that Patrick's brother had previously advised that he would not sell Patrick's home, and the tribunal found that this went against the purpose of the order and therefore appointed the state trustees. As determined by the appeals judge, this decision alone indicates that the purpose of the order was not to protect Patrick as he was unable to make sound decisions for himself but to sell his home and deprive him of property as there is no indication that Patrick's brother was unable to make rational decisions about Patrick and his estate. Additionally, the evidence was that Patrick was making sound financial decisions as he was making the required repayments on his home, and he was not letting it fall into disrepair. The result was that a finding that the limitations the guardianship order put on Patrick's human rights were disproportionate to his needs.

The relevance of this case is multifaceted, including the aforementioned importance of defining public authorities, which as previously discussed was disputed in this case, but also the likelihood of a different outcome for Patrick should he have resided outside of Victoria or Queensland.

Nothing within this recommendation should be taken as a stance to limit the human rights obligations of private guardianship arrangements.

Recommendation Four

A federal Human Rights Act must allow for all new legislation to be examined by the Attorney General's Department for inconsistencies with, or breaches of, the Act.

The rights that are outlined in the existing ACT, Victoria, and Queensland legislation, as well as the rights outlined in the International Treaties to which Australia is a signatory are at the core of Australia's expressed values of democracy and equality[71]. It is therefore essential to ensure that the rights protected in any future federal Human Rights Act be upheld within other pieces of legislation. As the government department responsible for the maintenance of Australia's law and justice framework, EAAA recommends that the Attorney-General's department is tasked within a federal Human Rights Act to undertake an analysis of all new federal legislation to ensure that it does not undermine or contravene protected human rights.

Recommendation Five

As a part of the implementation program for a federal Human Rights Act, the Australian Human Rights Commission must be provided with adequate resources to investigate, resolve, and educate relevant parties in relation to the Act.

Whilst EAAA is strongly in favour of the introduction of a federal Human Rights Act we also acknowledge the burden that new or altered obligations can have on organisations and public authorities. It is on this basis that EAAA recommends that in conjunction with the introduction of such legislation a provision or materials to assist a public or private authority with self-examination and implementation of any new measures be provided by the Commonwealth.

As Australia's National Human Rights Institution and with the responsibility for monitoring and scrutinising Australia's adherence to human rights obligations[72], EAAA recognises the Australian Human Rights Commission as the expert authority in this area. We therefore recommend that in this capacity as the national subject matter expert, the Commission be provided with the additional resources required to allow it to take on additional tasks in relation to education of, and assistance provided to organisations on their obligations under any federal Human Rights Act.

Conclusion

The implementation of a federal Human Rights Act for Australia is vital to ensure equality under the law is truly achieved and that the most vulnerable in our communities in particular

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are protected against human rights violations. The case studies analysed in recommendation three of this submission provide clear examples of the rights of those under wardship in Australia being breached in ways that cannot be easily addressed under existing federal legislation. If we look solely at Patrick's case, we see a judgement in reference to a breach of his property rights[73], which are not protected by the existing human rights legislation in the ACT[74].

The introduction of a federal Human Rights Act in Australia will allow for the protections of people that the country has long since intended, bringing us into line with all other liberal democracies around the world[75], and fulfilling the intentions Australia had when it codesigned the Universal Declaration of Human Rights in 1948 and established the Australian Human Rights Commission in 1986.

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Acknowledgement of Country

Elder Abuse Action Australia acknowledges the Traditional Custodians of Country across Australia, the lands on which we live and work. We pay our respects to their elders both past and present and acknowledge the continued connection of Aboriginal and Torres Strait Islander People to land, sea, community, and culture.

About Elder Abuse Action Australia

Elder Abuse Action Australia (EAAA) is a specialist organisation founded in 2018 to create real and meaningful change to eliminate elder abuse. Our work positively impacts the lives of older Australians, their families, communities and broader society. Since its inception, EAAA has established itself as the leading authority on elder abuse in Australia and has delivered Compass.info, a national website that raises awareness of elder abuse and connects people to services and information tackling the abuse of older people, and the very successful National Elder Abuse Conference *Walk the Talk* in February 2022 in Hobart Tasmania.

What we do

Elder Abuse Action Australia—EAAA—was established to confront the often-hidden problem of discrimination, neglect, and mistreatment of older Australians.
As the national voice for action, EAAA campaigns for a society that respects and values older Australians and is free from elder abuse. We use the tools of advocacy, policy development, research, and capacity building to raise community awareness of elder abuse and improve the lives of older people.

Why we do it

Older people are among the most vulnerable of all Australians. As people age, they rely on family, friends and carers for additional support. But for many, the experience of ageing is soured by discrimination, ageism, exclusion and abuse.

Older people have the same rights as everyone else. They have the right to be treated fairly, feel safe in their home, and live with dignity and self-determination.

EAAA
Elder Abuse Action Australia

The abuse of older Australians affects individuals and society as a whole. It can limit the participation of the elderly in their communities and deny those communities the benefits of having older people fully contribute.

EAAA exists to give voice to those older Australians whose safety, rights, dignity and autonomy are diminished by the people or institutions they deal with.

For enquiries about this submission please contact:
Vicki Nash - Policy Manager
Vicki.nash@eaaa.org.au
Phone: 0411 107 040