



ROPA

Rights of Older Persons Australia

Towards a United Nations Convention on the Human Rights of Older Persons

A DISCUSSION PAPER

Rights of Older Persons Australia (ROPA)

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Rights of Older Persons Australia (ROPA) is a network of civil society organisations and individuals who are committed to advocating for the development of a new international treaty on the human rights of older persons and who call on the Australian government to support this goal and work actively to achieve it. ROPA's *Call for Action* is available at www.rightsofolderpersons.org.au.

Authorship of the discussion paper

This discussion paper was prepared by a working group of the Rights of Older Persons Australia (ROPA) network in consultation with the Interim Coordinating Group of ROPA.

The lead author and convener of the paper was Professor Catherine Renshaw of Western Sydney University, who drafted much of the paper and coordinated contributions from others and the editing process. ROPA is especially grateful to Professor Renshaw for her contribution.

The following members of the working group and Interim Coordinating Group made contributions to the paper: Susan Cochrane, Bill Mitchell, Sue McGrath, Linda Steele and Andrew Byrnes.

For inquiries about ROPA or the discussion paper, please consult our website www.rightsofolderpersons.org.au or contact us on info@ropa.com.au.



Executive summary

This discussion paper has been prepared by the Rights of Older Persons Australia (ROPA), a network of Australian civil society organisations and individuals committed to the improvement of the international and national frameworks for the protection of the human rights of older persons. The paper argues that a new international treaty on the human rights of older persons is urgently needed and calls on the Australian government to support this goal and participate actively in helping to bring it about.

The paper first provides an overview of the current situation in relation to the human rights of older persons and the international efforts that have been made to improve the situation of older persons around the world in recent decades. It notes that ageism and age discrimination are prevalent around the world and in Australia and that these have a significant impact on the extent to which older persons can enjoy their human rights. While older persons are a diverse cohort and experience different forms of discrimination and exclusion, in many cases ageism and age discrimination influence the nature of that discrimination. The paper notes the personal and social costs of ageism and age discrimination and emphasises that the COVID-19 pandemic has highlighted and exacerbated many of the structural patterns of ageism and age discrimination against older persons that already existed.

The paper notes that, while the current international human rights standards and mechanisms apply in theory to older persons, older persons are in practice relatively invisible in the existing treaties and the practice of the international human rights bodies. Studies by the United Nations and independent experts, as well as by advocates and scholars, have argued that this neglect of the rights of older persons is not just operational but results from fundamental flaws in existing instruments, including a failure to understand and address ageism, age discrimination and the social construction of ageing. The paper argues that a new comprehensive, focused and coherent treaty is the only way to make significant progress to address these shortfalls in protection.

The paper describes the efforts that have been made in the last decade within the United Nations to advance discussion on the question of a convention and argues that now is a critical time for action to be taken and the United Nations to commence the drafting of a convention. ROPA argues that Australia's standoffish approach and even opposition to the initiative thus far needs to be changed: Australia should support a new convention to complement existing thematic conventions relating to racial discrimination, discrimination against women, the rights of the child and the rights of persons with disabilities. All these conventions, which Australia has ratified, have had a significant impact in raising the level of human rights protection for those groups in Australia and across the world.

Many benefits would flow from the adoption, ratification and implementation of a new convention. These include: providing a clear statement that ageism and age discrimination are unacceptable and providing protection against the many forms of discrimination that older people face; changing people's lives by affirming and providing protection for their rights; facilitating personal and social development; guiding policymaking; providing standards for service delivery; clarifying the responsibilities of States and other actors in relation to the human rights of older persons; and improving State accountability for ensuring the protection of human rights by older persons.

ROPA calls on the Australian government:

- (a) (a) to express its support for and commit to working towards the adoption of a United Nations Convention on the Human Rights of Older Persons;
- (b) (b) to ensure the involvement of civil society organisations in the drafting, designing and negotiation of the instrument, particularly organisations that represent older persons and diverse communities of older persons; and
- (c) (c) to engage with the Human Rights Council, the and the Open-ended Working Group and other relevant bodies to urgently move forward the agenda for drafting and adoption of a new treaty on the human rights of older persons.
- (d) (d) to support the Australian Human Rights Commission's involvement in the discussion concerning a future convention on the rights of the older persons, both at the international and at the domestic level.

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1 Introduction

In 1982, the World Assembly on Ageing proclaimed the Vienna International Plan of Action, which called on countries across the world, individually and collectively, to ‘develop and apply at the international, regional and national levels policies designed to enhance the lives of the aging as individuals and to allow them to enjoy in mind and in body, fully and freely, their advancing years in peace, health and security’.¹

The Vienna Plan of Action affirmed that:

- (a) the fundamental and inalienable rights enshrined in the Universal Declaration of Human Rights apply fully and undiminishedly to the aging; and
- (b) quality of life is no less important than longevity, and that the aging should therefore, as far as possible, be enabled to enjoy in their own families and communities a life of fulfillment, health, security and contentment, appreciated as an integral part of society.²

Since 1982, there have been significant efforts by governments, United Nations bodies and civil society organisations to increase awareness of and sensitivity to ageing issues.³ There has also been unprecedented growth in the percentage of the world’s population aged 60 or older, which has highlighted the different challenges faced by older persons in societies across the world.⁴

Unfortunately, these efforts have not been enough to uphold the basic human rights of older persons and to guarantee their quality of life, let alone to promote full and effective participation by and opportunities for older persons in economic, social, cultural and political life. Across the world, older persons face entrenched ageism and age discrimination.⁵ As the COVID-19 pandemic shows, older persons are disproportionately vulnerable to violation of even the most fundamental rights, such as the right to life.⁶ Although the Universal Declaration of Human Rights states that we are all born equal and are all equally entitled to the same rights as everyone else, this does not apply as we grow older.

1 *Report of the World Assembly on Ageing, 26 July to 6 August 1982*, UN Doc A/CONF.113/31 (1982) Preamble.

2 Ibid.

3 See United Nations Human Rights Council, *The human rights of older persons*, UN Doc A/HRC/RES/24/20 (27 September 2013); United Nations Human Rights Council, *The human rights of older persons*, UN Doc A/HRC/RES/42/12 (4 October 2019); World Health Organization, *Global Report on Ageism* (18 March 2021) <<https://www.who.int/publications/i/item/9789240016866>>; World Health Organization, *World Report on ageing and health* (2015) <<https://apps.who.int/iris/handle/10665/186463>>; *Report of the World Assembly on Ageing, 26 July to 6 August 1982*, UN Doc A/CONF.113/31 (1982); *Report of the Second World Assembly on Ageing, 8-12 April 2002*, UN Doc A/CONF.197/9 (23 May 2002); United Nations Economic and Social Council, *Implementation of the International Plan of Action on Ageing*, E/RES/1993/22-AR (27 July 1993); United Nations General Assembly, *United Nations Principles for Older Persons*, GA Res 46/91 (16 December 1991); *Follow up report to the Second World Assembly on Ageing*, UN Doc A/66/173 (22 July 2011); *General recommendation No. 27 on older women and protection of their human rights*, CEDAW/C/GC/27 (16 December 2010); *Report of the United Nations High Commissioner for Human Rights*, E/2012/51 (21 April 2012); Office of the United Nations High Commissioner for Human Rights, *Analytical study on the promotion and protection of the rights of older persons in the context of climate change*, UN Doc A/HRC/47/46 (20 April 2021); United Nations Human Rights Council Independent Expert on the human rights of older persons, *Report on the impact of social exclusion on older persons*, UN Doc A/HRC/39/50 (11 July 2018).

4 United Nations Department of Economic and Social Affairs, *World Economic and Social Survey 2007: Development in an ageing world*, UN Doc E/2007/50/Rev.1 (2007).

5 *World Report on ageing and health* (2015) (n 3); *Global Report on Ageism* (2021) (n 3). See also Assel K. Izenkova et al, ‘Trends in ageing of the population and the life expectancy after retirement: A comparative country-based analysis’ (2015) 20(3) *Journal of Research in Medical Sciences* 250; Thomas Nicolaj Iversen, Lars Larsen and Per Erik Solem, ‘A conceptual analysis of Ageism’ (2009) 61(3) *Nordic Psychology* 4.

6 United Nations Department of Economic and Social Affairs, *Covid-19 Pandemic and Older Persons* (Web Page), <<https://www.un.org/development/desa/ageing/covid19.html>>; Inter-American Commission on Human Rights, *Resolution No. 01/20: Pandemic and Human Rights in the Americas* (adopted 10 April 2020), <<http://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-20-en.pdf>>.

There is currently no international human rights treaty that applies specifically to older persons. The human rights guarantees provided in international conventions, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) apply to older persons in the same way that they apply to other people. There are also important non-binding international instruments, such as the United Nations Principles for Older Persons (1991)⁷ and the Madrid International Plan of Action on Ageing (2002),⁸ which provide useful frames of reference for the rights of older persons. Despite this, and because standards are scattered throughout different treaties and plans, there are gaps in protection and a lack of clarity about the nature of older people's rights and the actions needed to protect them. What is required are comprehensive, detailed, concrete standards that consolidate relevant provisions, define the spheres in which older persons are most at risk of having their rights violated and enable States, international bodies and civil society stakeholders to promote, realise and protect those rights.

In 1982, the United Nations convened the First World Assembly on Ageing, a 'forum to launch an international action programmed aimed at guaranteeing economic and social security to older persons as well as opportunities to contribute to national development'.⁹ In December 2011, the General Assembly established an open-ended working group open to all States Members of the United Nations, for the purpose of strengthening the protection of the human rights of older persons by considering the existing framework on the human rights of older persons, and identifying possible gaps and how best to address them.¹⁰ There is widespread agreement among older persons, their families, and civil society organisations in countries across the world, that adopting a United Nations Convention on the Human Rights of Older Persons is a priority.¹¹ Regional human rights bodies are already leading the way. In 2015, the Organization of American States approved the Inter-American Convention on Protecting the Human Rights of Older Persons.¹² In 2016 the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.¹³

7 *United Nations Principles for Older Persons*, GA Res 46/91 (16 December 1991).

8 United Nations Department of Economic and Social Affairs, *Second World Assembly on Ageing, Madrid, Spain 8 – 12 April 2002: Political Declaration and Madrid International Plan of Action on Ageing* (Web Page) <<https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf>>.

9 The *Vienna International Plan of Action on Ageing* was the result of the World Assembly, and was 'the first international instrument on ageing, providing a basis for the formulation of policies and programmes on ageing. It was endorsed by the United Nations General Assembly in 1982 (in resolution 37/51)'. United Nations, 'First World Assembly on Ageing, 26 July-6 August 1982, Vienna' (Web Page), <<https://www.un.org/en/conferences/ageing/vienna1982>>.

10 United Nations General Assembly, *Follow-up to the Second World Assembly on Ageing*, UN Doc A/RES/65/182 (4 February 2011) [28]. See also United Nations General Assembly, *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, UN Doc A/RES/67/139 (13 February 2013).

11 See, eg, Sandra Huenchuan and Luis Rodríguez-Piñero, *Ageing and the protection of human rights: current situation and outlook* (Economic Commission for Latin America and the Caribbean, March 2011); United Nations Department of Economic and Social Affairs, "Recommendation 3", *Report of the Expert Group Meeting Rights of Older Persons* (Report, 5-7 May 2009), <<https://www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf>>; see also Economic Commission for Latin America and the Caribbean, *Brasilia Declaration*, LC/G.2359 (16 September 2008); Economic Commission for Latin America and the Caribbean, *Second Follow-up meeting of the Brasilia Declaration: Towards a Convention on the Rights of Older Persons* (Summary report, 21-22 May 2009), <<http://globalag.igc.org/agingwatch/events/regionals/eclac/argentine-meeting.pdf>>; Pan American Health Organization, 'Towards a Universal/Regional Convention for the Human Rights and Fundamental Liberties of Older Persons' (Report, 5-6 October 2009), <<http://globalag.igc.org/agingwatch/events/regionals/eclac/panamericanpresentation.pdf>>; Susanne Paul, *Global Action on Aging, Report on Third Follow up to the Brasilia Declaration of 2007 calling for a UN Convention or a Special Rapporteur on the Rights of Older Persons* (Report, 5 October 2009), <<http://globalag.igc.org/agingwatch/events/regionals/eclac/chilereport.htm>>; Diego Rodríguez-Pinzón and Claudia Martín, 'The international human rights status of elderly persons' (2003) 18 *American University International Law Review* 915-1008; Kwong-Leung Tang and Jik-Joen Lee, 'Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People' (2006) 36(7) *British Journal of Social Work* 1135-1150; Russell E Morgan Jr and Sam David, 'Human rights: a new language for aging advocacy' (2002) 42(4) *Gerontologist* 436.

12 *Inter-American Convention on Protecting the Human Rights of Older Persons* (entered into force 11 January 2017).

13 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa* (adopted 31 January 2016).

We call on the Australian government to take a leadership role in the international movement to develop a Convention on the Human Rights of Older Persons. In Australia and abroad, demographic change has resulted in the unprecedented growth in the population of older people. Without strong human rights guarantees that are secured and fulfilled across all stages of life, our ageing population will continue to suffer from discrimination, ageism, neglect and abuse. Australia, like other countries, will benefit from an explicit legal framework to ensure that older people's rights are realised in our increasingly ageing societies. Australia is well-positioned to play a leading role in supporting a Convention on the Human Rights of Older Persons.

1.1 Recommendations

- The Australian government should commit to working towards the adoption of a United Nations Convention on the Rights of Older Persons.
- The Australian government should commit to involving civil society organisations in the drafting, designing and negotiation of the instrument, particularly organisations that represent older persons and diverse communities of older persons.
- The Australian government should engage with the Human Rights Council, the Commission for Social Development and the Open-ended Working Group to urgently move forward the agenda for drafting and adoption of a United Nations Convention on the Human Rights of Older Persons.
- The Australian government should support the Australian Human Rights Commission's involvement in the discussion concerning a future convention on the rights of the older persons, both at the international and at the domestic level.

2 Older Persons, ageism and discrimination

2.1 Defining ‘older persons’

There is no universally accepted definition of ‘older person’. The concepts of ‘old age’ and ‘elder’ status have varied over time, within and among cultures. The United Nations generally defines ‘older person’ as a person who is over 60 years of age.¹⁴ In Australia, until recently, the accepted touchstone for ‘old age’ was the age of eligibility for the Age Pension (historically 65 for males and 60 for women).¹⁵ For some time, the shorter life span of Indigenous people in Australia¹⁶ has meant that the age of 50 is nominated as the age of eligibility for access to government services such as aged care.¹⁷ The point at which someone is considered to have reached older age is now shifting upwards across OECD member countries to reflect health, life expectancy and public fiscal policy changes.

This paper adopts the view that ‘old’ is a relative concept. The definition, meaning and impact of ‘old’ is socially constructed and dependent on context.¹⁸ The cultural values and practices of the communities to which older persons belong are the key determinant of how ‘older age’ is defined.¹⁹ Different members of society will answer the question of ‘who is old’ in diverse ways. What is important is the understanding that on a practical level, different categories operate to give meaning, to include or exclude, to enable or facilitate access to human rights and to allocate resources to older people. Also critical is the understanding that older persons are not a homogeneous group. There is a great diversity amongst older persons, given each person’s unique life experiences and intersecting identities (such as gender, ethnicity, indigeneity, disability, rurality and residence, sexual orientation and socio-economic status).

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- 14 United Nations Department of Economic and Social Affairs, *World Population Ageing 2019: Highlights*, UN Doc ST/ESA/SER.A/430 (2019).
- 15 The age eligibility for the pension has been progressively rising in a phased way to reach 67 for both women and men in 2023. See Australian Government, ‘Who can get age pension?’ (Web Page), <<https://www.servicesaustralia.gov.au/who-can-get-age-pension?context=22526>>.
- 16 Australian Institute of Health and Welfare, *Life Expectancy and mortality of Aboriginal and Torres Strait Islander People* (Report, 5 May 2011) <<https://www.aihw.gov.au/getmedia/5e6b79b6-dbcd-45c6-a4d2-e5b5ce278ebc/12328.pdf.aspx?inline=true>>; Department of the Prime Minister and Cabinet (Australia), *Closing the Gap Report 2020* (Report, 12 February 2020), <<https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>>.
- 17 However, this differential recognition was not extended to early access to the Age Pension, which is now the subject of a long overdue legal challenge. See Elias Visontay, ‘Case to lower pension age for Indigenous Australians goes to full federal court’ *The Guardian* (online, 1 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/01/federal-court-to-consider-lowering-pension-age-for-indigenous-australians-due-to-gap-in-life-expectancy>>; ‘Legal challenge launched to secure fair access to the Age Pension for Aboriginal and Torres Strait Islander people’, *Human Rights Law Centre* (27 September 2021, online), <<https://www.hrlc.org.au/news/2021/9/26/legal-challenge-launched-to-secure-fair-access-to-the-age-pension-for-aboriginal-and-torres-strait-islander-people>>.
- 18 There are two overarching ways of defining older persons: (1) chronological age-based definitions and (2) what can be broadly described as multidimensional views of ageing. Chronological age-based definitions differ depending on the context (for example, the workplace, residential aged care settings, the tax and transfer system, within families) and on factors such as increasing longevity, an ageing population and expectations of social and economic participation held by members of society, governments and older people themselves. They are not based on fixed, objective biological or chronological determinants of when a person enters ‘older age’. See United Nations Human Rights Council Independent Expert on the human rights of older persons, *Report on ageism and age discrimination*, UN Doc A/HRC/48/53 (5 August 2021) [31]-[37]. For example, when determining eligibility for a State pension, discounts or other privileges such as capacity to drive, different qualifications and criteria for age are used. See Australian Government, ‘Qualification for Age’ (Web Page, 20 September 2022), <<https://guides.dss.gov.au/social-security-guide/3/4/1/10>>. See also Lotte P. Brinkhof et al, ‘The Subjective Experience of Ageism: The Perceived Ageism Questionnaire (PAQ)’ (2022) 19(14) *International Journal of Environmental Research and Public Health* 8792.
- 19 Gerard Quinn and Israel Doron, ‘Against Ageism and Towards Active Social Citizenship for Older Persons: The Current Use and Future Potential of the European Social Charter’ (Report, Council of Europe, 27 September 2021). In its Resolution 50/141, the General Assembly decided that the term ‘older persons’ should be substituted for the term ‘the elderly’, in conformity with the United Nations Principles for Older Persons. See *International Year of Older Persons: towards a society for all age*, UN Doc A/RES/50/141 (adopted 21 December 1995) [14].
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Importantly, the adoption of a treaty focused on the rights of older persons does not intend to create a separate category of human rights for older people. Rather, the convention would recognise that as people age, they may require different protection and promotion of their rights either due to systematic ageism, or due to their increasing needs for assistance to exercise their rights.

2.2 Ageism and its impact on human rights

Regardless of how ‘older age’ is defined, being classified as an ‘older person’ or as having reached ‘older age’ often leads to systematic disadvantage. Discriminatory treatment is often based on ageist stereotypes and paternalistic or adverse assumptions about loss of capacity, and inability to adapt and to learn new skills, or even interest in doing so. These ageist attitudes exacerbate exclusion of individuals and groups from social and economic activities such as remunerated work once they reach ‘older age’.²⁰

Ageism is variously defined as: stereotyping, discrimination and mistreatment based solely upon age;²¹ or as the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) towards others or oneself based on age.²² While chronological age and life stage contribute to social and personal meaning-making and status across the life course, a particular hallmark of this in later life is the setting apart and setting aside of older persons as of lower intrinsic value to the economy, society, communities and families than other ages. A literal form of this setting apart and setting aside is exemplified by residential facilities for older people which are located and designed in ways that separate older people from the communities, activities and social rituals that have been the bedrock of their lives ‘before’. To a greater or lesser extent, in older age we become stigmatised as dependent burdens, rather than contributors, in intergenerational competition with younger people for power and resources. It is important to note that many older people are no longer working in the paid labour market and demand greater resources when it comes to health and welfare services, leading them to be considered as an economic burden in many respects. In the context of an ageing society and crises such as climate change, natural disasters and global pandemics, this narrative increasingly appears in public discourse as a zero-sum conflict between younger and older.

The social meaning and lived experience of age also interacts in complex ways with other categorisations and identities such as economic class, social capital, race, gender, ethnicity, indigeneity, location, sexuality, ability/disability and much more. More than at any other life stage these multiple identities become blurred in the public and private imagination and are overlaid and swamped by a series of rigid and largely negative stereotypes and social norms around older age. This blurring of difference is especially strange given that complexities have accumulated and interacted in rich and layered ways in individual life stories over decades. Suffice to say that diversity and complexity abound in older life.²³

20 Gerard Quinn and Israel Doron, ‘Against Ageism and Towards Active Social Citizenship for Older Persons: The Current Use and Future Potential of the European Social Charter’ (Report, Council of Europe, 27 September 2021).

21 The term was first coined in 1969 by the American gerontologist Robert Butler. W. Andrew Achenbaum, ‘A History of Ageism Since 1969’ (2015) 39(3) *Generations Journal* 10-16. See also John B. Williamson and Tay K. McNamara, *Ageism: Past, Present, and Future* (Taylor and Francis, 2019); Sheri R. Levy and Jamie L. McDonald, ‘Progress on Understanding Ageism’ (2016) 72(1) *Journal of Social Issues* 5-25; Liat Ayalon and Clemens Tesch-Römer (eds), *Contemporary Perspectives on Ageism* (Springer Link, 2018).

22 World Health Organization, ‘Ageing: Ageism’ (Web Page, 18 March 2021), <<https://www.who.int/news-room/questions-and-answers/item/ageing-ageism>>.

23 See generally Friederike Enßle and Isle Helbrecht, ‘Understanding diversity in later life through images of old age’ (2021) 41(10) *Ageing & Society* 2396-415; Christine Weber et al, ‘Same Old, Same Old? Age Differences in the Diversity of Daily Life’ (2019) 35(3) *Psychology and Aging* 434-48; Daniel Holman and Alan Walker, ‘Understanding unequal ageing: towards a synthesis of intersectionality and life course analyses’ (2021) 18 *European Journal of Ageing* 239-55; RTOREO, ‘The nuances of ageism: How intersectionality can impact the experience of aging’ (Report, 2021), <<https://rtoero.ca/wp-content/uploads/2022/01/Nuances-of-ageism-whitepaper-RTOERO-2021.pdf>>; Elina Meliou and Oliver Mallett, ‘Negotiating Gendered Ageing: Intersectional Reflexivity and Experiences of Incongruity of Self-Employed Older Women’ (2022) 36(1) *British Sociological Association* 101-18; Ontario Human Rights Commission, ‘Age & intersectionality’ (Web Page) <<https://www.ohrc.on.ca/en/time-action-advancing-human-rights-older-ontarians/age-intersectionality>>; Christine Stephens, ‘From success to capability for healthy ageing: shifting the lens to include all older people’ (2017) 27(4) *Critical Public Health* 490-498. See also Gerard Quinn and Israel Doron, ‘Against Ageism and Towards Active Social Citizenship for Older Persons: The Current Use and Future Potential of the European Social Charter’ (Report, Council of Europe, 27 September 2021).

2.3 Recognition of ageism as a global problem

In 2021 the World Health Organization (WHO) released the first *Global Report on Ageism*.²⁴ The report established that: (1) globally, one in two people are ageist against older people;²⁵ (2) ageism pervades many institutions and sectors of society, including health and social care, the workplace and other commercial settings, arts and the media, and the legal system; and (3) health-care rationing on the basis of age is widespread.²⁶ Also in 2021, the United Nations Independent Expert on the Enjoyment of All Human Rights by Older Persons released the *Report on ageism and age discrimination*,²⁷ bringing together recent international thinking, research, analysis and conceptualisation on ageism and human rights. The report shows that there is deep-rooted discrimination against older persons across the world. Its effects are devastating: isolation, abandonment, neglect, a higher incidence of earlier death, poorer physical and mental health, and slower recovery from disability.²⁸ The report details the forms that ageism can take, including physical, financial, psychological, social and sexual violence.²⁹ The settings for abuse include within families and in homes, the workplace, care institutions, public spaces, the media, cyberspace and emergency settings.³⁰ A wide range of actors may be perpetrators, including family members, caregivers, neighbours, legal guardians, health professionals, government workers and financial representatives.³¹

The COVID-19 pandemic amplified the widespread practice of discrimination against older persons, exacerbating discrimination that was already suffered on the basis of gender, race, ethnicity, indigeneity, locality, disability or other grounds.³² One of the clearest lessons of the pandemic is that existing international laws and procedures do not provide adequate protection against violations of human rights in old age or on the grounds of old age. There is consensus among a broad coalition of actors that efforts to develop international standards to guide actions to promote and ensure the enjoyment of human rights in older age are necessary and must be accelerated.³³

24 *Global Report on Ageism* (2021) (n 3).

25 Ibid 37.

26 Ibid 22.

27 United Nations Human Rights Council Independent Expert on the human rights of older persons, *Report on ageism and age discrimination*, UN Doc A/HRC/48/53 (5 August 2021)

28 Ibid [14], [59].

29 Ibid [62].

30 Ibid.

31 Ibid.

32 See generally Federica Spaccatini, Ilaria Giovannelli and Maria Giuseppina Pacilli, “‘You are stealing our present’: Younger people’s ageism towards older people predicts attitude towards age-based COVID-19 restriction measures” (2021) *Journal of Social Issues* <2022DOI: 10.1111/josi.12537>; Laura E. Bernstein, Alexandria R. Ebert and Julie Hicks Patrick, ‘Ageism before and during the COVID-19 pandemic’ (2022) *Translational Issues in Psychological Science* <<https://doi.org/10.1037/tps0000323>>; Gordon L. Flett and Marnin J. Heisel, ‘Aging and feeling valued versus expendable during the COVID pandemic and beyond: A review and commentary of why mattering is fundamental to the health and well-being of older adults’ (2020) 19(6) *International Journal of Mental Health and Addiction* 2443-2469; M Edström, ‘Visibility patterns of gendered ageism in the media buzz: A study of the representation of gender and age over three decades’ (2018) 18(1) *Feminist Media Studies* 77–93; Tessa Morgan et al, ‘COVID and the portrayal of older people in New Zealand news media’ (2021) 51(1) *Journal of the Royal Society of New Zealand* S127-S142; Joanne Brooke and Debra Jackson, ‘Older people and COVID-19: Isolation, risk and ageism’ (2020) 29 *Journal of Clinical Nursing Research, Theory and Practice* 2044-2046; United Nations Media Center, ‘Pandemic exposes ageism and age discrimination in society, says UN expert’ (Press Release, 30 September 2021) <<https://www.ohchr.org/en/press-releases/2021/09/pandemic-exposes-ageism-and-age-discrimination-society-says-un-expert>>; United Nations Media Center, ‘COVID-19: Violence and neglect increases for older persons during lockdown, says UN expert’ (Press Release, 14 June 2021) <<https://www.ohchr.org/en/press-releases/2021/06/covid-19-violence-and-neglect-increases-older-persons-during-lockdown-says>>.

33 Groups include: ‘The Global Alliance for the Rights of Older People’ (Web Page) <<https://rightsofolderpeople.org/>>; ‘INPEA’ (Web Page) <www.inpea.net>; ‘HelpAge International’ (Web Page) <www.helpage.org>; ‘Age UK’ (Web Page) <www.helpage.org>; ‘Global Action on Aging (‘GAA’)' (Web Page) <globalaging.org>. See also Geraldine Van Bueren QC, ‘The case for a convention on the rights of older persons’ (Web Page) <<https://www.ageinternational.org.uk/policy-research/expert-voices/the-case-for-a-convention-on-the-rights-of-older-persons/>>.

2.4 Ageism and age discrimination in Australia

In Australia, the evidence of ageism directed at older people and its impact on their status as rights holders is extensive and growing.³⁴ The research establishes that ageism is deeply implicated in the marginalisation of older people from general human rights inclusion and protection, and that human rights guarantees are often denied to older people, as older people.³⁵

Recent reports and inquiries demonstrate that the absence of a human rights approach in system design and service delivery is undermining the basic rights of older Australians, and causing pain, suffering and fear.³⁶ If Australia is serious about being an inclusive society which flourishes because all individuals are accorded their human rights, a profound change to underlying social attitudes and policy settings is required.

Older persons in Australia suffer from violations to their fundamental human rights such as the right to life, the right to privacy and the right to family life, as well as the right to freedom from cruel, inhuman or degrading treatment. The Royal Commission into Aged Care Quality and Safety reported that deliberate acts of harm and forms of abuse occur in residential aged care, including physical and sexual abuse.³⁷ Physical and sexual violence in residential aged care sometimes occurs at the hands of staff members, and there are situations in which residential aged care providers do not protect residents from abuse by other residents. The Royal Commission report states: 'This is a disgrace and should be a source of national shame. Older people receiving aged care should be safe and free from abuse at all times.'³⁸

Abuse of older persons also occurs in the community. The National Elder Abuse Prevalence Study reports that 14.8% of older persons living in the community suffer some form of neglect or abuse – psychological, sexual, financial or physical.³⁹ The most common form of abuse is psychological and most commonly, perpetrators are adult children. Most victims do not seek help. The socio-demographic characteristics associated with elder abuse include financial strain, housing stress and individual-level characteristics such as social isolation, mental illness, poor physical health and disability. The study reports that elder abuse largely remains a hidden problem, and that increasing recognition and awareness of elder abuse behaviours is essential.⁴⁰

In the employment context, a 2021 study by the Australian Human Rights Commission reported that over a quarter of respondents experienced age discrimination in the previous two years and almost a third were aware of other people experiencing age discrimination in the workplace.⁴¹ Research by EveryAGE Counts establishes that the key settings where ageist attitudes prevail are the workplace,

34 Australian Human Rights Commission, *What's age got to do with it? A snapshot of ageism across the Australian lifespan* (Report, 2021) ('*AHRC Report 2021*').

35 See Van Bueren (n 33).

36 See *Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) ('*Royal Commission Report 2021*'). See also Michael S North and Susan T Fiske, 'Act Your (Old) Age: Prescriptive, Ageist Biases Over Succession, Consumption, and Identity' (2013) 1(1) *International Perspectives Psychology Research Practice Consultation* 72.

37 *Royal Commission Report 2021* (n 36); Royal Commission into Aged Care Quality and Safety, 'Interim Report' (31 October 2019) <<https://agedcare.royalcommission.gov.au/publications/interim-report>>; Royal Commission into Aged Care Quality and Safety, 'Aged Care in Australia: A Shocking Tale of Neglect' (Media Release, 31 October 2019) <<https://agedcare.royalcommission.gov.au/news-and-media/royal-commission-aged-care-quality-and-safety-interim-report-released>> ('[The] Interim Report has found the aged care system fails to meet the needs of its older, vulnerable, citizens. It does not deliver uniformly safe and quality care, is unkind and uncaring towards older people and, in too many instances, it neglects them').

38 *Royal Commission Report 2021* (n 36) 68.

39 Australian Law Reform Commission, *Elder Abuse – A National Legal Response: Final Report* (Report, 2017) ('*ALRC Report 2017*') 204. See also Briony Dow and Biana Brijnath, 'Elder abuse: context, concepts and challenges' in *Australia's welfare 2019 data insights* (Australian Institute of Health and Welfare, 2019) 143-159.

40 *ALRC Report 2017* (n 39) 78. See also Lixia Qu et al, 'National Elder Abuse Prevalence Study: Final Report' (Australian Institute of Family Studies, 2021). The AIFS study was confined to people living in the community, and people with sufficient cognitive capacity to engage in consultation. The limitations on the study suggest that the figure of 14.8% significantly understates the prevalence of abuse and neglect: the study excluded people living with cognitive impairment and people living in residential aged care facilities, prisons and other institutional settings. The parameters of the study also did not accommodate specific examination of the situations of culturally and linguistically diverse older people, and older people experiencing compounded marginalisation through intersecting disadvantage, such as homelessness or membership of LGBTIQ+ communities.

41 *AHRC Report 2021* (n 34) 35-44.

provision of healthcare, aged care and family and local community settings.⁴² In relation to the provision of healthcare, the Final Report of the Royal Commission into Aged Care Quality and Safety found that people receiving aged care, particularly those in residential aged care, do not consistently receive the health care they need and that in many cases, care is substandard.⁴³ Substandard care can occur in both routine areas like provision of adequate food, medication management, dental and skin care, as well as in complex care, such as the management of chronic conditions, dementia or palliation.⁴⁴ Notably, the Commission found that those who run the aged care system do not seem to know about the nature and extent of substandard care and have made limited attempts to find out.⁴⁵

2.5 The COVID-19 global pandemic

In 2020, the United Nations reported that the COVID-19 pandemic was causing untold fear and suffering for older people across the world.⁴⁶ The statistics were shocking. Over 95 per cent of fatalities due to COVID-19 in Europe were of people 60 years or older.⁴⁷ In the United States, 80% of deaths were among adults 65 and over. In China, approximately 80% of deaths occurred among adults aged 60 years or older. Fatality rates for those over 80 years of age was five times the global average.⁴⁸

The broader effects of the pandemic were equally shocking. Across the world, older persons were denied healthcare for conditions unrelated to COVID-19, were neglected and abused in institutions and care facilities, suffered hunger and poverty, loneliness and isolation, and endured the trauma of stigma and discrimination.⁴⁹ Older persons living in precarious conditions – such as refugee camps, informal settlements and prisons – were particularly at risk, due to overcrowded conditions, limited access to health services, water and sanitation facilities, as well as potential challenges accessing humanitarian support and assistance.⁵⁰ Older persons, often women, were among the caregivers responding to the pandemic, increasing their risk of exposure to the virus. Older persons were subjected to hate speech targeting older persons in public discourse and on social media as expressions of intergenerational resentment.⁵¹ Ageism, discrimination and stigma were at the core of the suffering of older persons brought about by COVID-19.

The final recommendation of the United Nations report into COVID-19 and its effect on older persons was that stronger legal frameworks are required at both national and international levels to protect the human rights of older persons, including by accelerating the efforts of the General Assembly's working group to develop proposals for an international legal instrument to promote and protect the rights and dignity of older persons.⁵²

42 EveryAGE Counts, 'The drivers of ageism: Foundational research to inform a national advocacy campaign tackling ageism and its impacts in Australia' (Full Report, 2017) 9. See also EveryAGE Counts, 'Ageism Report 2021' (Full Report, 2021); Leah Nemirow, 'We can do better: Addressing ageism against older adults in healthcare' (2022) 35(2) *Healthcare Management Forum* 118-122.

43 *Royal Commission Report 2021* (n 36) 7-13.

44 *Ibid* 69-73.

45 *Ibid* 72.

46 United Nations Sustainable Development Group, 'Policy Brief: The Impact of COVID-19 on older persons' (Report, 2020) <<https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>>.

47 *Ibid* 5.

48 *Ibid*.

49 *Ibid* 2-4, 9.

50 *Ibid* 7.

51 *Ibid* 9.

52 *Ibid* 14. See also Inter-American Commission on Human Rights, *Resolution No. 01/20: Pandemic and Human Rights in the Americas* (10 April 2020) <<http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>>.

3 A Convention on the Human Rights of Older Persons

3.1 Gaps in the current framework

Even though international human rights law applies to people of all ages, specific reference to older people is rare. As a result, older people's rights are insufficiently protected by human rights monitoring mechanisms, governments, the human rights community and civil society. The research indicates that the ageing population is particularly vulnerable to discrimination and human rights violations.⁵³ It is clear that the current human rights instruments and legal frameworks do not provide adequate protection for older people, either in law and in practice.

Reports published in 2021 and 2022 by the Office of the High Commissioner for Human Rights (OHCHR) conclude that the current international human rights framework does not provide adequate protection of the human rights of older persons.⁵⁴ The reasons for this are not just operational but reflect fundamental conceptual flaws that can only be remedied by the adoption of a comprehensive and coherent thematic treaty on the human rights of older persons. International human rights law recognises that specific groups require their own legal framework of rights protection. The rights of women, for example, are protected by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵⁵ The rights of children are protected by the Convention on the Rights of the Child (CROC).⁵⁶ The rights of people with disabilities are protected by the Convention on the Rights of Persons with Disabilities (CRPD).⁵⁷ These instruments have improved the lives of millions of people by providing an internationally agreed set of standards against which to measure domestic laws and policies, and for holding hold government to account in protecting and fulfilling the rights of specific groups.⁵⁸

Research establishes that there is an array of areas in which specific implications of human rights, experienced from the perspectives of older persons, have not yet been articulated and, therefore not upheld, with profound negative effects on how older people experience day to day living. These include rights in relation to an adequate standard of living (particularly in relation to housing), legal capacity, employment, education, quality of care, health care, autonomy, long term care, palliative care, emergencies, as well as rights to be free of violence, abuse, neglect and exploitation and to receive assistance if they experience these, the impact of technological developments, digital deficits

53 EveryAGE Counts, 'Ageism Report 2021' (Full Report, 2021); *Royal Commission Report 2021* (n 36); See also Lixia Qu et al, 'National Elder Abuse Prevalence Study: Final Report' (Australian Institute of Family Studies, 2021); Adam Dean, 'Elder abuse: Keys issues and emerging evidence' (Australian Institute of Family Studies, 2019) <https://aifs.gov.au/sites/default/files/publication-documents/51_elder_abuse_0_0.pdf>.

54 Claudia Mahler, Independent Expert on the enjoyment of all human rights by older persons (OHCHR), *Older persons and the right to adequate housing – Note by the Secretary-General*, UN Doc A/77/239 (19 July 2022); Office of the High Commissioner for Human Rights ('OHCHR'), *Update to the 2012 Analytical Outcome Study prepared by the Office of the High Commissioner for Human Rights on the normative standards in international human rights law in relation to older persons* (Working paper, 23 March 2021) ('*The Update* (2021)').

55 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

56 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC').

57 *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, Annex I (24 January 2007), 2515 UNTS 3 ('CRPD').

58 See, eg, Human Rights Watch, '25th Anniversary of the Convention on the Rights of the Child' (Report, 2014) <<https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child>>.

and access to information technology.⁵⁹ The existing framework is silent on ageism and its implications for the rights of older persons⁶⁰ and provides only ‘fragmented and inconsistent coverage of the human rights of older persons in law and practice.’⁶¹

The Office of the High Commissioner of Human Rights observes that:

Existing treaties were not formulated on the basis of an adequate diagnosis or in-depth understanding of the nature of the ageing process and its social meanings or of how ageism structures so many aspects of social relations and leads to discriminatory laws, policies and practices. A principal finding of this Update is that the absence of such a diagnosis goes a long way towards explaining the inadequate response of the existing international human rights framework to human rights violations against older persons or on the basis of older age.⁶²

The OHCHR’s 2021 Updated Study concludes:

The silences, neglect and relative invisibility of human rights issues of central concern to older persons are so widespread and systemic in the international human rights system that it is clear that fundamental change is required. Simply exhorting existing mechanisms to do more and to include the perspectives of older persons in the execution of their mandates is not enough; a new dedicated normative instrument is needed to comprehensively remedy those deficiencies.⁶³

A convention would demonstrate that the failure to ensure effective protection of older persons’ human rights is unacceptable and would stipulate the positive obligations on states to realise equality and the enjoyment of rights by older people.⁶⁴ There is evidence about the impacts of existing group-specific or issue-specific treaties that suggests a Convention on the Human Rights of Older Persons could empower older persons to claim their rights, and to participate in international and national affairs on an equal basis with others whose rights are enshrined in specific treaties.⁶⁵ Historically, older persons have been relatively invisible in the work of UN human rights treaty bodies.⁶⁶

3.2 Standard-setting and reporting

The existence of a treaty and associated international reporting provides an occasion for governments to reflect on their record in light of relevant Convention’s standards and the relevant human rights treaty body’s recommendations, including by detailing the measures they claim to have taken in response to, or consistent with, the Convention’s requirements and the treaty committee’s recommendations.⁶⁷ A diversity of outcomes flows from treaty body reviews including review of existing domestic laws and policies, withdrawal or modification of reservations, and parliamentary, institutional, judicial

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- 59 See, eg, Alexander Seifert, Sheila R. Cotton and Bo Xie, ‘A Double Burden of Exclusion? Digital and Social Exclusion of Older Adults in Times of COVID-19’ (2021) 76(3) *The Journals of Gerontology: Series B* 99-103; Centre for Ageing Better, ‘COVID-19 and the digital divide’ (Report, July 2021) <<https://ageing-better.org.uk/sites/default/files/2021-07/COVID-19-and-the-digital-divide.pdf>>; Farooq Mubarak and Reima Suomi, ‘Elderly Forgotten? Digital Exclusion in the Information Age and the Rising Grey Digital Divide’ (2022) 59 *Inquiry: The Journal of Health Care Organization, Provision and Financing*; Age UK, ‘Digital inclusion and older people – how have things changed in a Covid-19 world’ (Briefing Paper, 2021) <<https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/digital-inclusion-in-the-pandemic-fiscal-march-2021.pdf>>.
- 60 *The Update* (2021) (n 54) [17], [42], [94], [108]. See also United Nations Human Rights Council, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, UN Doc A/HRC/49/70 (28 January 2022) (‘A/HRC/49/70’) [25]-[28],[45].
- 61 *The Update* (2021) (n 54) [2],[53].
- 62 *Ibid* [23]. See also A/HRC/49/70 (n 60) [14], [22].
- 63 *The Update* (2021) (n 54) [8].
- 64 Annie Herro and Andrew Byrnes, ‘Framing contests over the human rights of older persons’ (2020) 38 *Australian Yearbook of International Law* 254.
- 65 *Ibid*.
- 66 *Ibid*, 282. United Nations Office of the High Commissioner for Human Rights (OHCHR), *Normative standards in international human rights law in relation to older persons* (Analytical Outcome Paper, August 2012) <<https://social.un.org/ageing-working-group/thirdsession.shtml>>; Herro and Byrnes 2020, above n 64, 282.
- 67 Andrew Byrnes and Marsha Freeman, ‘The Impact of the CEDAW Convention: Paths to Equality’ (UNSW Law Research Paper No. 2012-7, 20 February 2012) <<http://dx.doi.org/10.2139/ssrn.2011655>>; Tang and Lee (n 11).

or non-government references to and reliance on norms.⁶⁸ Similarly, the introduction of a new treaty should of itself cause a review of thematic or relevant laws.⁶⁹ The critical importance of specialist treaties is to ensure states have overlapping obligations and multiple accountabilities on specific issues, noting, for example, that sex discrimination cuts across all issues.⁷⁰

A normative framework creates a rights claim, not based on discretion, charity or political expediency but rather, based on entitlement identifying the state as a duty-bearer and imposing an obligation to act.⁷¹ Australia's experience following the ratification of CEDAW and CRPD provides strong evidence of the legal and policy advances that can follow the development and implementation of international human rights treaties.⁷² Since 1980, CEDAW has been central to the political and social campaign to address discrimination against women and to pursue the goals of gender equality. It has provided a framework for advocacy and scrutiny of policy and law, and the impetus for ensuring appropriate legislative guarantees and protection of equality and non-discrimination on the ground of sex.⁷³ The CRPD represented 'a strong affirmation at the international level of the rights of persons with disabilities and underlines the change in thinking that has taken place from charity-based models to a rights-based framework grounded in a social model of disability'.⁷⁴ In effect, CRPD moved the world from non-binding international standards on disability to formally binding legal obligations.⁷⁵

3.3 Experience from other human rights treaties

Recent reports of the Office of the High Commissioner for Human Rights establish that:

Experience with other specialized treaties at the United Nations and the regional level shows that these treaties add substantially and in unique ways to the realization of the rights that they guarantee. A new normative framework on the human rights of older persons would put the spotlight on the specificity of older persons for the enjoyment of their rights and in addressing violations. A treaty's impact lies not only in its direct implementation and application at the domestic level, but also in its shaping of policy frameworks, and of indicators to measure progress. They also provide a rallying point for stakeholders and advocacy and facilitate cross-fertilization with existing frameworks and help other mechanisms to become more aware of and sensitive to the intersectionality of rights and violations.⁷⁶

The OHCHR's 2022 Report concludes:

To deliver on the promise to ensure that all persons, including all older persons, fully enjoy their human rights and fundamental freedoms, it is necessary to move expeditiously toward developing and adopting a coherent, comprehensive and integrated human rights framework that reflects an up-to-date and nuanced understanding of the social construction of ageing, the nature and extent of ageism and the experiences of diverse groups of older persons.⁷⁷

68 Byrnes and Freeman (n 67) 4-5.

69 Ibid, 12; OHCHR, *Interparliamentary Union from Exclusion to Equality Realizing the rights of persons with disabilities* (Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and Its Optional Protocol, 2007) <<https://www.ohchr.org/sites/default/files/Documents/Publications/training14en.pdf>>.

70 Byrnes and Freeman (n 67) 51.

71 Andrew Byrnes, 'Human Rights Unbound: An Unrepentant Call for a More Complete Application of Human Rights in Relation to Older persons—And Beyond' (2020) 39(2) *Australasian Journal of Ageing* 91–98, 96.

72 Andrew Byrnes, 'The Disability Discrimination Ordinance, the UN Convention on the Rights of Persons with Disabilities, and Beyond: Achievements and Challenges after Ten Years of Hong Kong Anti-Discrimination Legislation' (UNSW Law Research Paper No. 2008-13, 25 March 2008) <<http://dx.doi.org/10.2139/ssrn.1392061>>.

73 Andrew Byrnes, 'The implementation of the CEDAW in Australia: Success, trials, tribulations and continuing struggle' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) 323.

74 Byrnes (n 72) 5. See also Herro and Byrnes (n 64) 263.

75 Byrnes (n 72) 5.

76 A/HRC/49/70 (n 60) [58]; *The Update* (2021) (n 54) [204], [206].

77 A/HRC/49/70 (n 60) [59].

3.4 Content of a convention

In relation to the content of a new convention, for several decades, scholars have assessed and analysed older persons' specific human rights needs.⁷⁸ Among the needs identified are:

- equality and non-discrimination (discrimination on the basis of age);
- protection from neglect, violence and abuse (ageism);
- autonomy and independence;
- accessibility, infrastructure and habitat (transport, housing and access);
- right to health and access to health services;
- access to justice;
- social protection and social security (including social protection floors);
- economic security;
- right to work and access to the labour market;
- education, training, life-long learning and capacity building;
- participation in the public life and in decision making processes;
- social inclusion;
- contribution of older persons to sustainable development;
- palliative care.⁷⁹

These are among the norms and principles that should guide the development of a Convention on the Human Rights of Older Persons. A human rights framework that denounces ageism will support and encourage policies and practices that avoid such unintended costs and enable older Australians to reap the benefits of intergenerational participation.

3.5 How a convention would improve the lives of Australians and our society more generally

Many arguments have been advanced which demonstrate how a convention would improve the lives of Australians and our society more broadly.⁸⁰ The central issues include addressing age discrimination and ageism in a broader context of unprecedented demographic change (ageing population), climate change,⁸¹ global health issues, economic insecurity and natural disasters.⁸² Bearing in mind these factors only serve to exacerbate the severity of the human rights violations already taking place, a convention would:

As the world experiences rapid population ageing, the pressures that result in age discrimination are likely to intensify; so does the imperative to address such discrimination. A convention would:

- provide a definitive, universal position that age discrimination is morally and legally unacceptable;

78 Paul De Hert and Eugenio Mantovani, 'Specific Human Rights for Older Persons? The Inevitable Colouring of Human Rights Law' (2011) 4 *European Human Rights Law Review* 398–418; Israel Doron and Itai Apter, 'The Debate around the Need for an International Convention on the Rights of Older Persons' (2010) 50(5) *The Gerontologist* 586–593; Israel Doron and Itai Apter, 'International Rights of Older Persons: What Difference Would a New Convention Make to Lives of Older People?' (2010) 11(2) *Marquette Elder's Advisor* 367–385; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) *Human Rights Law Review* 37–66; Diego Rodríguez-Pinzón and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003) 18(4) *American University International Law Review* 915–1008; Tang and Lee (n 11); William John Mitchell, 'Making the case for a convention on the human rights of older persons' (2021) 27(3) *Australian Journal of Human Rights* 532–553.

79 Van Bueren (n 33).

80 The Global Alliance for the Rights of Older People, 'Why we need a convention', (Web Page) <<https://rightsofolderpeople.org/portfolio-items/why-do-we-need-a-convention-for-older-people/>>.

81 See Human Rights Council, *Analytical study on the promotion and protection of the rights of older persons in the context of climate change*, UN Doc A/HRC/47/46 (20 April 2021).

82 The Global Alliance for the Rights of Older People, 'Strengthening Older People's Rights: Towards a UN Convention' (Report, 2013) <<https://rightsofolderpeople.org/wp-content/uploads/2013/12/Strengthening-Rights-English-Low-Res.pdf>>.

- draw attention to the multiple, cumulative and intersectional forms of discrimination that older people experience because they are older people; and advance equality and non-discrimination for older persons including as they age and become older.
- provide clarity for rights holders and duty bearers on their respective rights and responsibilities.
- draw attention to, deepen understanding of, and provide redress for the complex, multiple forms of discrimination that older people experience.
- oblige ratifying states to adopt non-discriminatory laws and provide legally binding protection with accompanying accountability mechanisms.
- provide the basis for advocacy, public awareness and education on the rights of older people.
- strengthen societies' responses to the challenges of demographic change and improve intergenerational solidarity.
- guarantee protection against specific human rights abuses associated with, or commonly coalescing around, ageing, becoming old or older, including situational issues such as during disasters and pandemics, in institutional settings, and within gender and other relevant dimensions.

Change people's lives

Protecting older people's rights will help older people to lead dignified, secure lives, as equal members of society. Exercising these rights enables older people to be treated with respect on an equal basis with younger people. A convention would:

- acknowledge and elevate the generational, spiritual, religious, community, indigenous, ethnic and cultural norms, including expectations of 'eldership', and similarly, expectations of traditional support structures and relationships such as filial piety.
- help people live lives of dignity throughout the life course.
- provide a framework to guide policy responses to demographic ageing based on rights, equity and social justice.
- change the view of older people from being seen as recipients of charity and people in need of protection to individuals with knowledge, power, experience and full agency in their lives.
- protect, value and preserve the social identity of older persons.
- improve relationships between different generations through increased respect for older people, and make societies more cohesive.
- encourage a paradigm shift from older people being considered passive recipients of welfare, to older people as rights holders with responsibilities.

Facilitate and complement development

Respecting people's rights throughout the entire course of their lives will promote greater respect, dignity, autonomy and material security, all of which are crucial to general well-being. Increased protection of rights facilitates conditions which enable older people to participate in and contribute to their own development, as well as that of those around them. In doing so, respecting and protecting all people's rights, regardless of age, results in more inclusive, equitable and sustainable societies.

Enable more effective advocacy

A convention would:

- put age discrimination and older people's rights more centrally onto governments', donors' and NGOs' agendas. Ageism (including interpersonal, institutional, and self-directed levels) and age-based discrimination, harassment, vilification and systemic inequality are endemic and cause harm, disadvantage and injustice.
- provide a powerful advocacy and education tool for older people and those who represent them.

Provide standards for service delivery

The private and voluntary sectors are increasingly recognising the impact they have on the ability of people to realise their human rights. Many health and financial services are provided by businesses and NGOs. Although a convention would only be legally binding on ratifying States, the private and voluntary sectors also need standards for the provision of services that respect older people's rights. A convention would provide authoritative guidance for the setting of such standards.

Clarify responsibilities

A convention would:

provide the necessary, legally binding protection of older people's rights under international law.

- provide clarity on what older people's rights are and the minimum standards and actions necessary to protect them.
- make visible the responsibilities of States and other actors towards older people.
- complement and raise the profile of the Madrid Plan of Action and the UN Principles for Older Persons.
- strengthen the implementation of existing international law by making the rights of older people more explicit.

Improve accountability

A convention would:

- provide a reporting and accountability mechanism for States' actions towards older people.
- provide a system of redress for the violation of the rights of older people.
- encourage ongoing dialogue among UN Member States, civil society organisations, NGOs, the private sector and older people, through the monitoring of its implementation.

Guide policy-making

A convention would:

- provide a framework to guide policy decision-making.
- encourage the collection of age-disaggregated data to inform policy decisions.
- promote age-sensitive programmes.
- help governments allocate resources more fairly.
- encourage greater development aid for programmes benefiting older people.
- lead to the training of healthcare personnel, employees, the judiciary and others involved in older people's issues.
- guide the private sector in how it can protect older people's rights.

4 The Path to a United Nations Convention on the Human Rights of Older Persons

4.1 Momentum towards a Convention

The earliest proposal for a United Nations instrument on the human rights of older persons dates back to 1948.⁸³ In the past decade, momentum towards a new treaty or convention was generated by sustained diplomatic efforts of Latin American States, led by Argentina, which continues to lead on this issue along with other States.⁸⁴ Various UN bodies have examined the adequacy of the current international human rights framework for protecting the human rights of older persons and the desirability of adopting a new convention that focuses specifically on the human rights of older persons.

4.2 The UN General Assembly's Open-ended Working Group on Ageing

In 2011, the UN General Assembly established the Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, which meets annually in New York and in which States, civil society organisations, national human rights institutions and other stakeholders have participated.⁸⁵

The General Assembly established the OEWSGA by its resolution 65/182 (2010), which was adopted by consensus (that is, without a vote).⁸⁶ The resolution asked the OEWSGA to identify the deficiencies in the existing international human rights system in order to strengthen the protection of the human rights of older persons, in particular by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.⁸⁷

In 2012, in resolution 67/139⁸⁸ (adopted by majority vote)⁸⁹ the General Assembly further requested the OEWSGA to submit to it at the earliest possible date, *a proposal containing, inter alia, the main elements that should be included in an international legal instrument to promote and protect the rights*

83 The 'Declaration of the Rights of Older Persons' was presented by Argentina in 1948. See UN General Assembly, *Declaration of old age rights*, A/RES/213 (4 December 1948).

84 Age Platform Europe, 'United Nations: How the debate on a new convention on the rights of older persons is progressing' (Web Page, 16 January 2017) <<https://www.age-platform.eu/special-briefing/united-nations-how-debate-new-convention-rights-old-er-persons-progressing>>.

85 United Nations General Assembly, *Follow-up to the Second World Assembly on Ageing*, A/RES/65/182 (4 February 2011).

86 Ibid [28].

87 Ibid.

88 United Nations General Assembly, *Resolution adopted by the General Assembly on 20 December 2012*, A/RES/67/139 (13 February 2013) ('A/RES/67/139').

89 The vote was 54 in favour, 6 against, with 118 abstentions. Australia abstained. See United Nations, 'General Assembly Strongly Condemns Widespread, Systematic Human Rights Violations in Syria, as It Adopts 56 Resolutions Recommended by Third Committee' (Media Release, 20 December 2012) <<https://press.un.org/en/2012/ga11331.doc.htm>>.

and dignity of older persons, which are not currently addressed sufficiently by existing mechanisms and therefore require further international protection.⁹⁰

4.3 Progress in the OEWGA

As of mid-2022, the OEWGA had held 12 substantive working sessions of four days each.⁹¹ These sessions have examined in detail the ways in which older persons are denied their human rights and have accumulated a substantial body of evidence to demonstrate that human rights violations are widespread and have been exacerbated by the COVID-19 pandemic. However, progress towards drafting of a new treaty has been minimal, with a significant number of States either still unconvinced of the need for a new instrument, sitting on the fence until others move positively, and in some cases actively opposing any progress. There have been some positive developments at the 12th session of the OEWGA in 2022 as described below.

4.4 The United Nations Human Rights Council

The UN Human Rights Council is the principal UN body with responsibility for human rights. It meets in Geneva and reports to the General Assembly. In 2013, the Human Rights Council established a new ‘thematic special procedure’, the Independent Expert on the enjoyment of all human rights by older persons (currently Dr Claudia Mahler).⁹² The Independent Expert prepares regular thematic reports for the Human Rights Council and the UN General Assembly,⁹³ and also conducts country visits at the request of individual States and prepares reports on those visits.⁹⁴ The Independent Expert is the only UN human rights mechanism that focuses specifically and comprehensively on the human rights of older persons; the mandate holder is a volunteer and receives some, though limited support from the under-resourced UN secretariat for her work. Some aspects of the human rights of older persons are raised in other mechanisms (including the Universal Periodic Review and by some of the UN human rights treaty bodies) but often in a fragmented manner that is not comprehensive or sustained.⁹⁵

4.5 Recent positive developments 2021-2022

There have been a number of recent developments that give cause for optimism that there is now an opportunity to break the logjam and move forward.

OEWGA: At the 2023 (12th) session of the OEWGA, Argentina and other States proposed the establishment of an informal cross-regional core group of States to work on developing a draft decision for adoption by the OEWGA at its 2023 (13th) session to establish a working group of the OEWGA that would develop possible elements of a new instrument.⁹⁶ That process is underway; however, one of

90 A/RES/67/139 (n 88) [2]. The UNGA has subsequently reiterated the resolution 65/182 mandate, but the 67/139 mandate is also still current. See United Nations Human Rights Council, *Report of the Human Rights Council on its twenty-first session, A/HRC/21/2* (26 August 2013) 60-61.

91 See United Nations Department of Economic and Social Affairs, ‘Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons’ (Web Page) <<https://social.un.org/ageing-working-group/twelfthsession.shtml>>.

92 OHCHR, ‘Independent Expert on the enjoyment of all human rights by older persons’ (Web Page) <<https://www.ohchr.org/en/special-procedures/ie-older-persons>>.

93 See, eg, United Nations Human Rights Council Independent Expert on the human rights of older persons, *Older persons deprived of liberty – Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/HRC/51/27* (Thematic Report, 13 September 2022).

94 See, eg, United Nations Human Rights Council Independent Expert on the human rights of older persons, *Visit to Finland – Report of the Independent Expert on the enjoyment of all human rights by older persons, A/HRC/51/27/Add.1* (Country Report, 24 August 2022).

95 See United Nations OHCHR, ‘About the mandate – Independent Expert on the enjoyment of all human rights by older persons’ (Web Page) <<https://www.ohchr.org/en/special-procedures/ie-older-persons/about-mandate>>.

96 United Nations General Assembly, *Report of the Open-ended Working Group on Ageing on its twelfth session, A/AC.278/2022* (16 May 2022) 14.

the challenges has been to ensure that civil society and National Human Rights Institutions (NHRIs)⁹⁷ participate in that process in a meaningful way.

Human Rights Council: In October 2021, the Human Rights Council adopted resolution 48/3,⁹⁸ its first resolution that substantively addresses the human rights of older persons in any depth.

That resolution requested the Office of the High Commissioner for Human Rights:

- (a) to prepare a report on normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons' and to submit the report to the Council's 49th session (February-March 2022);⁹⁹ and
- (b) to convene a multi-stakeholder meeting, fully accessible to persons with disabilities, with the participation of the Independent Expert on the enjoyment of all human rights by older persons, human rights experts and expert representatives of Member States, the treaty bodies and the special procedures, regional mechanisms, the United Nations system, academia, national human rights institutions and civil society, including with the meaningful and effective participation of older persons and of persons of different ages, *to discuss the report, and to prepare a summary with conclusions of the meeting that includes recommendations on addressing possible gaps and the dispersiveness of international human rights law with regard to older persons* (italics added).¹⁰⁰

This summary is to be presented to a future session of the Council, most likely in early 2023.

The OHCHR submitted the report requested to the Council in early 2022.¹⁰¹ This report built on and summarised findings that were presented in the study prepared by OHCHR in 2021 at the request of a number of States at the OEWGA and is available on the OEWGA website.¹⁰² The multi-stakeholder meeting to discuss the 2022 report took place on 29 and 30 August 2022 in Geneva in hybrid format. A summary of its outcome will be provided to the Human Rights Council at one of its sessions in 2023 (likely to be the 52nd Session), which will then decide on any further action it considers appropriate.¹⁰³

The recent developments described above, though apparently somewhat arcane, are indications that there is a desire on the part of some States to move this process forward. Not only should civil society encourage that process and participate in it, but we must also persuade the Australian government to join the processes in the OEWGA and the UN Human Rights Council in an active and supportive way.

97 United Nations OHCHR, 'UN Human Rights and NHRISs' (Web Page) <<https://www.ohchr.org/en/countries/nhri>>.

98 United Nations Human Rights Council, *Human rights of older persons*, A/HRC/RES/48/3 (14 October 2021) ('A/HRC/RES/48/3').

99 Ibid [13].

100 Ibid [14].

101 A/HRC/49/70 (n 60).

102 United Nations Department of Economic and Social Affairs, 'Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons' (Web Page) <<https://social.un.org/ageing-working-group/twelfthsession.shtml>>.

103 A/HRC/RES/48/3 (n 98) [14].

5 Conclusion

Until relatively recently, governments and societies have not, as a matter of practical need, been called upon to recognise and uphold the rights of older persons as a significant proportion of the population. This has changed as a result of demographic ageing (as a neutral fact rather than, as suggested below, a ‘problem’) and as a result of cultural and social changes (eg, changes relating to family formation and composition, segregation of older people from the wider communities in which they have lived).¹⁰⁴ It is also the case that there was an assumption in many societies that to the extent that older relatives needed care and support as they aged, this would generally be provided by the person’s family. Increased urbanisation, changing family structures, increased workforce participation by women (who performed much of the unpaid care work and still do) and the significantly larger numbers of people living to an age where they do require such support were not in the minds of those who formulated the canonical rights to privacy and home, to health, and to social security (which focuses largely on economic security and income transfers).¹⁰⁵

COVID-19 demonstrated that we have much further to go in achieving equal rights for persons of all ages. Attitudinal shifts are required in social, political and legal responses to aging. The scholarship and research show the gaps that exist in the current international architecture that protects rights, and why older persons are a group whose unique characteristics require separate recognition and protection. It is now time for countries such as Australia to support and lead the development of an international convention to uphold and fulfil the rights of older persons.

We call upon the Australian government to:

- commit to working towards the adoption of a United Nations Convention on the Rights of Older Persons.
- commit to involving civil society organisations in the drafting and negotiation of the instrument, particularly organisations that represent older persons.
- engage with the Human Rights Council, the Commission for Social Development, and the Open-ended Working Group to urgently move forward the agenda for drafting and adoption of a United Nations Convention on the Rights of Older Persons
- support the Australian Human Rights Commission’s involvement in the discussion concerning a future convention on the rights of the older persons, both at the international and at the domestic level.

¹⁰⁴ AHRC/49/70 (n 60) [23]. See also *The Update* (2021), above n 52, [104]: ‘While demographic ageing may indeed not have been a pressing issue when the ICESCR was adopted, the more important point is not the fact of the ‘problem’ of ageing populations, but rather social responses to the process of ageing and older persons’.

¹⁰⁵ *The Update* (2021), above n 52, [138].