



**REALISING THE RIGHTS OF OLDER
PERSONS:
LEGAL AND POLICY ISSUES FOR SOUTH
AUSTRALIA**

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Why adopt a human rights based approach?

- Human rights focus on respect and dignity for all human beings, without discrimination.
- Increased levels of risk and vulnerability with an ageing population, with consequent potential for exploitation and abuse to occur.
- Safeguarding vulnerable older persons without adopting a paternalistic approach to protection; advanced age (of itself) should not automatically equate with vulnerability or incapacity.
- The absence of a binding international convention on the rights of older persons, or a national or South Australian Charter of Rights, is no excuse for inaction on human rights!
 - Australia, as a nation, is bound under international law, to respect and protect the human rights set out in each of the major human rights conventions.
 - The Australian States have more extensive powers than the Commonwealth to develop innovative laws and policies in the area of adult protection.

Internationally -

- UN Principles for Older Persons 1991
- Madrid International Plan of Action on Ageing 2002
- General International Human Rights Conventions:
 - ICCPR, ICESCR, CAT, CERD, CEDAW, CRPD
 - Article 2 of the ICCPR has been interpreted to prohibit discrimination on the basis of 'age' – *Schmitz-de-Jong v Netherlands* (1991 decision of the UN Human Rights Committee)

Within Australia -

- Anti-discrimination & equal opportunity legislation including the *Age Discrimination Act 2004* (Cth)
- Victorian *Charter of Human Rights and Responsibilities 2006*
- ACT *Human Rights Act 2004*

Federal Legislative Power

- Aged Care: invalid and old-age pensions (section 51(xxiii Constitution), other benefits and allowances (section xxiiiA Constitution)
- Treaty-Making and Treaty Implementation (sections 61 and 51(xxix) Constitution)

Federal Legislation -

- *Aged Care Act 1997* (Cth)
 - User Rights Principles 1997:
 - Schedule 1 - Charter of Residents' Rights and Responsibilities
 - Schedule 2 - Charter of Rights and Responsibilities for Community care

Federal Limitations

- Absence of political support for a national human rights charter.
- Limitations within the *Aged Care Act 1997* –
 - Linked to the federal power over pensions & government benefits;
 - Does not extend to older persons not in receipt of a government benefit.
- Federal law would need to rely on the external affairs power to extend safeguards to persons not accessing federal support, and only binding human rights conventions could enliven that power (thus not the UN Principles for Older Persons).
- In the absence of a Convention on the Rights of Older Persons, arguably only State and Territory criminal laws could cover all types of elder abuse, and only State legislatures have the constitutional capacity to introduce some form of comprehensive adult protection legislation.

Human Rights Charters

- *ACT Human Rights Act 2004*
- *Victorian Charter of Rights and Responsibilities 2006*

Adult Protection Legislation

- *Scotland's Adult Support and Protection Act 2007*
- *British Columbia's Adult Guardianship Act 1996 (amended in 2000)*

Whole of Government Adult Protection Policy

- *New South Wales' Interagency Protocol for Responding to Abuse of Older People 2007*

Relevant Legislation

- *Mental Health Act 2009*
- *Guardianship and Administration Act 1993*
- *Criminal Law Consolidation Act 1935*
- *Intervention Orders (Prevention of Abuse) Act 2009*
- *Aged and Infirm Persons' Property Act 1940*

- *Administrative Decisions (Effect of International Instruments) Act 1995* (the 'anti-Teoh legislation')

12 Rights and Freedoms & 12 Guiding Principles

7 categories of Rights:

- Dignity and Self-Determination
- Liberty and Security of the Person
- Equality and Non-Discrimination
- Minimum Standards of Living and Care
- Privacy and Family
- Social Participation
- Freedom of Thought, Conscience, Religion and Expression

Dignity and Self-Determination

1. Older persons have the right to be treated with dignity and humanity and to be free to exercise personal self-determination.¹
2. Older persons have the right to freedom of movement and to choose their preferred place of residence. These rights shall only be restricted in accordance with law, where such restriction is necessary to protect public health, public order or morals, and the rights and freedoms of others.²

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1. Articles 1 & 10, ICCPR; Article 1, ICESCR; Principles 3, 14, 15, UN Principles for Older Persons.
 2. Article 12, ICCPR; Principle 6, UN Principles for Older Persons.

3. Older persons have the right to be free from torture or other forms of cruel, inhuman or degrading treatment.¹
4. Older persons have the right to liberty and security of the person and to be free from exploitation and physical, social, psychological and sexual abuse. No person shall be deprived of their liberty except in accordance with procedures established by law.²

1. Article 7, ICCPR; CAT; Principle 17, UN Principles for Older Persons.

2. Article 9, ICCPR; Article 12, ICESCR; Principle 17, UN Principles for Older Persons.

5. Older persons have the right to exercise their rights free from all forms of discrimination, whether on the basis of age, sex, colour, sexual orientation, religion, political opinion, educational qualification, national origin or ethnicity.¹
6. Older have the right to recognition as a person before the law and to be treated equally before the law.²

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1. Article 2, ICCPR; Article 2, ICESCR; Principle 18, UN Principles for Older Persons.
 2. Articles 16 & 26, ICCPR; Principle 12, UN Principles for Older Persons.

7. Older persons have the right to life, to adequate food, clothing and shelter and to enjoy the highest attainable standards of physical and mental health.¹

1. Article 6, ICCPR; Articles 11 & 12, ICESCR; Principles 1, 10-13, UN Principles for Older Persons.

8. Older persons have the right to be free from arbitrary or unlawful interferences with his/her privacy, family, home or correspondence.¹
9. Older persons have the right to a family life and to have their family unit respected by others, including government agencies and officials.²

1. Article 17, ICCPR; Principles 5, 10, 17, UN Principles for Older Persons.

2. Article 23, ICCPR; Article 10, ICESCR; Principles 10, 5, UN Principles for Older Persons.

10. Older persons have the right to freely associate with others and to participate fully in the social and cultural life of their community.¹

1. Article 25, ICCPR; Article 15, ICESCR; Principles 7, 8, & 9, UN Principles for Older Persons.

Freedom of Thought, Conscience, Religion and Expression

11. Older persons have the right to exercise freedom of thought, conscience and religion.¹
12. Older persons have the right to freedom of opinion and expression and to seek, receive and impart information and ideas. Adult persons have the right to seek, and be provided with, personal information about him/herself held by government agencies of officials.²

1. Article 18, ICCPR.

2. Article 19, ICCPR; Principles 4, 15, 16, UN Principles for Older Persons. This right is also supported by Freedom of Information legislation throughout Australia.

Guiding Principles for Implementation of the Charter

1. A person's capacity to make decisions affecting themselves is to be presumed unless that person is formally assessed as having mental incapacity.
2. A person has the right to make decisions about their own life, the way in which they live and the people they choose to live and associate with, provided that such decisions are voluntary, are not contrary to law and do not infringe the rights of others.
3. A person has the right to seek, receive and impart information which can assist in their capacity to exercise their rights and freedoms. This includes the right to an interpreter and assisted communication methods.
4. A person has the right to maintain relations with family and friends, and interferences with those relationships should be in a manner which is least restrictive of the adult person's rights and only for the purpose of safeguarding the physical safety and wellbeing of the adult person.

Guiding Principles for Implementation of the Charter

5. A person has the right to accept or reject assistance, treatment or intervention.
6. A person has the right to access the basic necessities of life including food, water, shelter, heating/cooling, clothing, hygiene and safety. However, a person has the right to live in conditions that others may perceive as unhealthy or substandard, provided that the person is competent to make decisions for themselves and the health and safety of others is not adversely threatened or affected.
7. The abuse of adults, particularly vulnerable adults, is not merely an individual or personal problem, but a social issue that requires a whole-of government and community response.
8. Adults are entitled to seek and receive appropriate support and intervention by relevant service providers and members of the community, but the provision of support should be appropriate to the adult person's particular needs and respectful of the person's individual rights.

Guiding Principles for Implementation of the Charter

9. Even where a person lacks capacity to make decisions for him/herself every effort should be made to ensure that their views are taken into account and that communication with the adult is conducted in a manner which is appropriate to their skills and abilities.
10. Competent adults have the right to provide their own instructions (advance directives) and make decisions about managing their affairs. Such directives shall be taken from the adult person, rather than a person who purports to be acting for the adult.
11. Adults should be assisted to tell their own story to whatever extent possible, rather than allowing others who purport to act for the adult to take control of that process.
12. All interactions with adults should be conducted in a non-discriminatory manner and with due sensitivity given to the race, gender, religion, cultural or ethnic background, sexual orientation or ability of the adult person.

The Legal Effects of a Charter

- Scheduled to a new *Adult Protection Act* or included as part of a whole of government policy;
- No new cause of action. Thus, the result would not be a ‘lawyer’s picnic’.
- The rights would constitute relevant considerations for government agencies that must be taken into account when decisions are made, actions taken or services provided to older persons.
 - The failure to take account of the Charter would become a possible ground of review in the Supreme Court, where a government agency decision or action is subject to judicial review under administrative law.
- The Charter could also be included in service agreements with private agencies, extending its reach to all service providers.
- MOUs could be developed with local governments and community organisations to promote the Charter’s dissemination as part of a broader education and awareness campaign.

Conclusion

- International human rights norms are more effectively realised where they are *adapted* to local settings as opposed to their simple *adoption* in either domestic law or policy.
- South Australia would lead the nation in protecting the rights of vulnerable older persons if a new framework for adult protection (whether in law or policy) combined a human rights based approach with a system for coordinated interagency responses in cases of actual or suspected abuse.
- Even without an international convention, the Australian States have the legislative power to adapt existing treaties and principles to which Australia is either bound or supportive of in developing a comprehensive framework for adult protection. For the Commonwealth to implement such a scheme at the national level, an international convention on the rights of older persons would be required to enliven specific constitutional powers, and the ultimate success of such a scheme would depend on the support and collaboration of the States and Territories.