

5 July 2023

Committee Secretary  
Parliamentary Joint Committee on Human Rights  
PO Box 6100  
Parliament House  
Canberra ACT 2600



Dear Committee

### **Inquiry into Australia's Human Rights Framework**

Thank you for the opportunity to provide feedback on the Inquiry into Australia's Human Rights Framework (the **Inquiry**). Aged and Disability Advocacy Australia (ADA) appreciates being consulted on this important issue.

### **About ADA Australia**

ADA is a not for profit, independent, community-based advocacy and education service with more than 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

ADA advocates and legal practitioners work with identified First Peoples advocates through the Aboriginal and Torres Strait Islander Disability Network Queensland (ATSIDNQ), a network established to support mob with disability and provide individual advocacy services for Aboriginal and Torres Strait Islander people with disability.

### ***Support for a federal Human Rights Act***

Australia's legislative framework for human rights protections is variable, offering inconsistent protection across State and territory jurisdictions. ADA supports the statement in the Australian Human Rights Commission's (the AHRC) position paper, *Free & Equal* (the **Position Paper**), which



describes the mix of Constitutional, common law, and existing State and Territory regimes as a 'patchwork' that is 'incomplete and piecemeal.'<sup>1</sup>

The 2010 Human Rights Framework has not overcome this and has not heralded in the required practical changes intended to promote and protect human rights. Discrimination laws have granted some recourse, and remain a critical part of a broader rights framework, however state and federal discrimination laws alone do not offer the rights-forward, frontloaded approach to the protection of human rights that is required.

The human rights instruments enacted in the Australian Capital Territory, Victoria and Queensland have had a significant positive impact on the protection of rights in those jurisdictions, but do not provide complete coverage. This is demonstrably the case for older persons who receive or may be eligible for aged care, a sector that is predominantly governed by federal legislation with monitoring and oversight regulation by federal bodies.

ADA strongly supports the introduction of a federal Human Rights Act. It is our view that a federal act is the necessary and appropriate instrument to scaffold the protection of all persons within Australian territory, and any persons subject to Australia's effective control in overseas territories. Critically, implementation of a federal act will afford every Australian a consistent legislative safeguard of rights, regardless of their location.

### ***Existing federal mechanisms***

As mentioned above, existing mechanisms in the federal context do not provide adequate protection.

The ratification of some international instruments, such as the Convention on the Rights of Persons with Disabilities (**CRPD**) have not been fully reflected in the domestic legal framework. This has resulted in significant gaps for persons with disability which have not been overcome by a variety of existing acts, including the *National Disability Insurance Scheme Act 2013* (and associated Rules) and the *Disability Discrimination Act 1992* (and associated Standards).

Similarly, for older persons the suite of existing State and Federal framework has not been effective in ensuring and promoting support for and adherence to rights – an outcome that was resolutely stated in the final report of the Royal Commission into Aged Care Quality and Safety (**Aged Care Royal Commission**). The report noted that the *Aged Care Act 1997*, various subordinate instruments comprising the Aged Care Principles including the *Quality of Care Principles 2014*, were insufficient and not fit for purpose in the protection of individual rights.

A practical outcome of this conclusion was noted in the Commission's reflection about the powers and approach of the regulating body responsible for monitoring, investigation and oversight. The report states:

*"The regulatory framework is overly concerned with processes, not focused enough on outcomes, and does not provide enough safeguards to protect older people...."*<sup>2</sup>

ADA supports the introduction of a replacement Aged Care Act as outlined in the recommendations of the Aged Care Royal Commission. However, should this be introduced, it will not vacate the need

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<sup>1</sup> AHRC, *Free & Equal: A Human Rights Act for Australia*, (2022)

[https://humanrights.gov.au/sites/default/files/free\\_equal\\_hra\\_2022\\_-\\_main\\_report\\_rgb\\_0\\_0.pdf](https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf).

<sup>2</sup> Aged Care Royal Commission, *A summary of the final report*, (2021) 76,

<https://www.royalcommission.gov.au/system/files/2021-03/final-report-executive-summary.pdf>.

for a federal Human Rights Act in the form described by the AHRC in the Position Paper. Rather, the two instruments would support the protection and upholding of rights as set out in the other, with the federal Human Rights Act providing the overarching and proactive framework to guide decision-making and the application of rights contained in other Acts.

### ***Role of the Australian Human Rights Commission***

ADA supports the expansion of the AHRC's role to include the specific functions in relation to a Human Rights Act, as set out in the Position Paper, including reporting and oversight functions, conducting systemic reviews and inquiries, additional intervention powers to intervene in court and tribunal proceedings, education programs, and training and compliance guidance.

Adequate and stable funding must be provided to the AHRC to ensure its ability to effectively carry out these critical responsibilities. In our observation, the Queensland Human Rights Commission has been able to significantly improve the complaints process for a complainant in light of increased resources to assist this key process.

### ***Effectiveness of existing human rights regimes***

As stated above, the Queensland *Human Rights Act 2019* (the **Queensland Act**) has had a significant and positive impact on the preservation of rights in Queensland. In our view, it has effected both practical and cultural changes within government and public entities in relation to decision-making, operations and policies that impact individuals.

This has been evident in a growing number of judicial decisions, including recently in a matter before the Queensland Mental Health Court.<sup>3</sup>

Further, and crucially, the Queensland Act provides a pathway to judicial enforcement of human rights, though that pathway is dependent on the 'piggy backing' mechanism. To this point, ADA strongly supports the model proposed by the AHRC with respect to a federal Human Rights Act including a direct cause of action for unlawfulness, and enforceable remedies.

As mentioned, the Queensland Act does not provide complete coverage for persons with disability or older persons. The introduction of a federal act would be beneficial for these cohorts: for example, for persons who are applying to become or are an existing participant of the NDIS, a Federal Human Rights Act would inform the decisions made by the National Disability Insurance Agency in relation to an application, and the Administrative Appeals Tribunal in adjudicating a decision of the agency. It would also enable an applicant to explore other resolution options, such as by way of complaint to the AHRC or in particular circumstances, via an application on grounds of unlawfulness to the Federal Court and Family Court.

ADA strongly encourages a proposed federal act to include a direct application to provision of aged care, including residential aged care facilities.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the Committee with its inquiry. Should you wish to discuss this submission, please do not hesitate to contact Vanessa Krulin, Solicitor and Senior Policy and Research Officer on [REDACTED].

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<sup>3</sup> *In the matter of ICO* [2023] QMHC 1.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Geoff Rowe', with a long horizontal stroke extending to the right.

**Geoff Rowe**  
Chief Executive Officer