



Law Council
OF AUSTRALIA

Draft Charter of Aged Care Rights

Department of Health

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Background	5
Legislative framework	6
Broader reforms.....	6
Feedback on the Single Charter	7
General response	7
A human rights approach	8
Specific rights contained in the Single Charter.....	9
Addressing the needs of vulnerable and disadvantaged aged care recipients	12
The role of access to justice in upholding rights	12
Effective complaints system.....	14
Recommendations	16
Appendix – Single Charter rights	17

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
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- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Access to Justice Committee, the Law Society Northern Territory, the Law Society of New South Wales, and the Queensland Law Society in making this submission.

Executive Summary

1. The Law Council welcomes the opportunity to respond to the Department of Health's (**the Department's**) consultation regarding the draft Charter of Aged Care Rights (**the Single Charter**). This submission addresses the Law Council's:
 - general support for a Single Charter as a means of overcoming complexity and confusion amongst both aged care recipients and providers;
 - suggestions to increase the Single Charter's clarity and accessibility to a wide audience of aged care recipients and service providers;
 - view that the Single Charter would be most effective if it were underpinned by a human rights rather than a 'consumer' approach;
 - support to include additional 'core' rights in the Single Charter, including: the right to full and effective use of an individual's personal, civil, legal and consumer rights; the right to live without discrimination; certain key freedoms; and the right of access to advocates.
 - view that many 'consumers' who will be covered by the Single Charter will be vulnerable or disadvantaged. The Department should appropriately contemplate and cater for the fact that not all consumers are equally able to understand and exercise their rights, and provide a service delivery framework for how this may be addressed. This framework would include:
 - increased access to specialist legal services regarding elder law issues; and
 - establishing a more effective complaints system for residents, families and support persons.

Background

2. The Single Charter is intended to provide the same rights to all recipients of Commonwealth-subsidised aged care regardless of the type of care and services they receive. According to the Department's *Draft Charter of Aged Care Rights: Consultation Paper 2018*¹ (**the Consultation Paper**) the Single Charter will replace the existing:
 - *Charter of care recipients' rights and responsibilities – residential care*;
 - *Charter of care recipients' rights and responsibilities – home care*; and
 - *Charter of care recipients' rights and responsibilities – (part 1, residential care setting; part 2, home care setting)*.²
3. Together, these are referred to as **the Existing Charters**. The Consultation Paper notes there is currently considerable duplication between the rights contained in the Existing Charters, as well as differences in terms of the rights afforded.³ This may confuse aged care recipients, particularly if they are unsure of the type of care they are receiving, and may also create regulatory complexity for providers.
4. The rights in the Single Charter are set out in the Appendix. As noted in its preamble, the rights described sit alongside other laws that inform the delivery and quality of aged care, including the *Aged Care Act 1997* (Cth) (**the Act**), the consumer outcomes

¹ Australian Government Department of Health, *Draft Charter of Aged Care Rights: Consultation Paper 2018*.

² *Ibid*, 3.

³ *Ibid*, 4.

in the new Aged Care Quality Standards, and rights under the Australian Consumer Law and anti-discrimination law. The Consultation Paper indicates that the Single Charter cannot be expected to articulate all rights of consumers, but instead should focus on the core rights of central importance to consumers.⁴

Legislative framework

5. While the move towards the Single Charter will require changes to aged care legislation, the Consultation Paper does not provide clarity on its legal status when implemented. The Law Council considers that it is important for aged care recipients, their relatives, friends and providers to be clear on these issues.
6. The Existing Charters are set out in Schedules 1-3 of the *User Rights Principles 2014* (Cth) (**the User Rights Principles**)⁵, which are made by the Minister under section 96-1 of the Act. Part 4.2 of the Act sets out the responsibilities of approved aged care providers to aged care recipients. Under these provisions, providers must not act inconsistently with the rights set out in the User Rights Principles.⁶ These include the rights set out in the Existing Charters.⁷
7. Under Part 4.4 of the Act, the Secretary may impose sanctions on an approved provider who has not complied, or is not complying, with one or more of its responsibilities under Parts 4.1-4.3 of the Act.⁸ This includes the responsibilities to comply with the Existing Charters. As noted in the Consultation Paper, creating a Single Charter will require legislative change,⁹ particularly to the User Rights Principles and their Schedules.

Broader reforms

8. The introduction of the Single Charter forms part of a broader set of Australian Government aged care reforms, including a Single Aged Care Quality Framework which, as well as the introduction of the Single Charter, contains:
 - a single set of quality standards for all aged care services (to be established in law later in 2018); (**the Draft Aged Care Quality Standards**);¹⁰
 - improved quality assessment arrangements for assessing provider performance against quality standards; and

⁴ Ibid, 6.

⁵ Schedule 1 – Charter of Care recipients’ rights and responsibilities – residential care; Schedule 2 – Charter of care recipients’ rights and responsibilities – home care; Schedule 3 – Charter of care recipients’ rights and responsibilities – short-term restorative care. Schedule 3 includes both Part 1 – Short-term restorative care provided in a residential care setting, and Part 2 – Short-term restorative care provided in a home care setting; User Rights Principles.

⁶ For example, under s 56(1)(m) of the Act, the approved providers of residential care must not act in a way which is inconsistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles.

⁷ For example, clause 9 of the User Rights Principles states that the rights and responsibilities of a care recipient who is being provided, or is to be provided with, residential care include the rights and responsibilities set out in the ‘Charter of Care Recipients’ Rights and Responsibilities – Residential Care’ set out in Schedule 1.

⁸ The Act, s 65-1.

⁹ Consultation Paper, 6.

¹⁰ The draft Aged Care Quality Standards are contained in Schedule 2 of the Department of Health, *Exposure draft of the Aged Care Legislation Amendment (Single Quality Framework) Principles 2018*, <https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/07_2018/aged_care_legislation_amendment_single_quality_framework_principles_2018.pdf>.

- publication of improved information about quality to help consumers choose aged care and services.
9. Further, subject to parliamentary processes, from 1 January 2019, the functions of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioners will transfer to the Aged Care Quality and Safety Commission.¹¹ In addition, the Australian Government recently announced its decision to ask the Governor General of the Commonwealth of Australia to establish a Royal Commission into the aged care sector.¹² The Law Council has provided a [submission](#) to the Department regarding the Royal Commission's Terms of Reference, which have now been [settled](#).

Feedback on the Single Charter

General response

10. The Law Council is generally supportive of the premise of establishing a Single Charter that explicitly sets out a core number of rights for persons in aged care, and is linked to obligations upon aged care providers to ensure that they are not infringed. It agrees that a Single Charter will reduce existing duplication and likely confusion amongst both aged care recipients and providers.
11. The Law Council also supports the plain English approach which has been adopted for the Single Charter. As noted in the Consultation Paper, it will be important to ensure that this is translated into multiple languages so that it is accessible to a wide audience. The Law Council considers that accessibility would also be increased by:
- providing the Single Charter in user-friendly formats (such as large print, audio-accessible, and braille); and
 - listing the Single Charter's rights in a numeric rather than alphabetical order, as (1)-(12) is an easier sequence to follow and recall than (a)-(l).
12. As noted in the Single Charter's preamble, the rights described sit alongside other laws that inform the delivery and quality of aged care, including the Act, the consumer outcomes in the new Aged Care Quality Standards, and rights under the Australian Consumer Law and anti-discrimination law. The Law Council considers that it would be useful for the preamble to clarify that the rights sit alongside other 'Commonwealth and state and territory laws'. It notes, for example, that rights under anti-discrimination legislation exists at the state and territory as well as the federal level.
13. The Consultation Paper notes that the Single Charter will be accompanied by supporting fact sheets.¹³ As discussed above, it is important that these fact sheets explain the Single Charter's legal status to aged care recipients and providers, including the potential ramifications of breaches of its rights. They should also explain how to make complaints and how to access legal assistance to exercise their rights.
14. While supporting the more succinct approach adopted to the Single Charter, the Law Council considers that it would be most effective if it were underpinned by a human rights approach. It also supports the inclusion of additional rights, as outlined below.

¹¹ Under the recently introduced *Aged Care Quality and Safety Commission Bill 2018* (Cth).

¹² Prime Minister, Minister for Health, Minister for Senior Australians and Aged Care, 'Royal Commission into Aged Care Quality and Safety' (media release), 16 September 2018, <<https://www.pm.gov.au/media/royal-commission-aged-care-quality-and-safety>>.

¹³ Consultation Paper, 6.

A human rights approach

15. The Law Council considers that a human rights-based approach should be adopted in determining which core rights should be afforded to aged care recipients under the Single Charter. This involves consideration of relevant human rights standards, including the Universal Declaration of Human Rights,¹⁴ the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights protect the rights of older persons equally with other persons.¹⁵ The Convention on the Rights of Persons with Disabilities¹⁶ (**CRPD**) is also clearly relevant. There are also specific international instruments that bear upon the rights of older persons, such as the United Nations Principles for Older Persons¹⁷ (**the UN Principles**), the Vienna International Plan of Action and Ageing (1982),¹⁸ and the Madrid International Plan of Action on Ageing (2002).¹⁹ Whilst not legally binding, these instruments are persuasive and should be seen to represent best practice.
16. The Law Council notes that the UN Principles contain several principles which are highly relevant to the Single Charter, including principles stating that older persons should:
- have access to adequate food, water, shelter, clothing and health care;²⁰
 - be able to live in environments that are safe and adaptable to personal preferences and changing capacities;²¹
 - remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their wellbeing;²²
 - be able to form movements or associations of older persons;²³
 - benefit from benefit from family and community care and protection in accordance with each society's system of cultural values;²⁴
 - have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional wellbeing and to prevent or delay the onset of illness;²⁵

¹⁴ *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)

¹⁵ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**), arts 2(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), arts 2(2), 3.

¹⁶ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008).

¹⁷ *United Nations Principles for Older Persons*, adopted by General Assembly resolution 46/91, 16 December 1991.

¹⁸ *The Vienna International Plan of Action on Ageing*, December 1982. The Plan of Action was endorsed by the United Nations General Assembly in Resolution 37/51, December 1982.

¹⁹ *The Madrid International Plan of Action on Ageing*, adopted at the Second World Assembly on Ageing, April 2002. The Australian Government has stated that '[g]iven Australia's strong existing foundations across the areas for action identified in the MIPAA and commitment to its international obligations, Australia has used the MIPAA to inform ongoing action rather than implement the MIPAA separately' – see Permanent Mission of Australia to the United Nations, *OCHCR Questionnaire to assess the human rights implications of the implementation of the Madrid International Plan of Action on Ageing*, File no 15/9336#10, available at: [Hrrp://www.ohchr.org/Documents/Issues/OlderPersons/MIPAA/Australia.pdf](http://www.ohchr.org/Documents/Issues/OlderPersons/MIPAA/Australia.pdf)

²⁰ UN Principles, Principle 1.

²¹ *Ibid*, Principle 5.

²² *Ibid*, Principle 7.

²³ *Ibid*, Principle 9.

²⁴ *Ibid*, Principle 10.

²⁵ *Ibid*, Principle 11.

- have access to social and legal services to enhance their autonomy, protection and care;²⁶
- be able to utilise appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment;²⁷
- be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.²⁸
- be able to pursue opportunities for the full development of their potential;²⁹
- have access to the educational, cultural, spiritual and recreational resources of society;³⁰
- be able to live in dignity and security and be free of exploitation and physical or mental abuse;³¹ and
- be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.³²

17. Currently, the Single Charter and Consultation Paper are based around the rights of ‘consumers’ rather than ‘older persons’, and their language does not, with the exception of the Consultation Paper’s brief reference to CRPD, include a broader analysis of applicable human rights instruments. The Law Council considers that it is problematic for a document which purports to outline the consolidated ‘rights’ of aged care recipients to omit this analysis. In this regard it emphasises Australia’s responsibilities to ‘respect, to protect and to fulfil’ its international human rights obligations under the seven core international human rights treaties to which it is a party, including the ICCPR, CRPD and IESCR. These obligations are briefly explained in its [Policy Statement on Human Rights and the Legal Profession](#).³³

18. The Law Council recommends that prior to any legislative changes being adopted, the Single Charter should be reviewed carefully in light of relevant human rights standards which are applicable to older persons, with a view to upholding Australia’s international human rights obligations regarding older persons in aged care. It also recommends basing the Charter’s rights around the rights of ‘older persons in aged care’, rather than ‘consumers’.

Specific rights contained in the Single Charter

19. The Law Council welcomes the Single Charter’s emphasis on several core rights, including those which emphasise an individual’s right to safety, dignity and respect, independence and control over decision-making, personal information, make complaints, and to have another person speak on his/her behalf.

²⁶ Ibid, Principle 12.

²⁷ Ibid, Principle 13.

²⁸ Ibid, Principle 14.

²⁹ Ibid, Principle 15.

³⁰ Ibid, Principle 16.

³¹ Ibid, Principle 17.

³² Ibid, Principle 18.

³³ See particularly paragraphs 12-18: Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key principles and commitments*, May 2017.

20. It is particularly positive that the Single Charter acknowledges the right of older persons in aged care to 'personal privacy and to have personal information kept confidential', as many elder abuse cases occur when rights such as these are ignored.
21. With respect to item (c) ('to have my identity, culture and diversity valued and supported', the Law Council notes that diversity is a characteristic of groups, not individuals. This could be amended to 'have my identity, culture and language valued and supported' as this would, in effect, realise broader diversity aims.
22. The Law Council has not conducted a detailed analysis of the rights contained in the Existing Charters, and the extent to which these are taken up or omitted from the Single Charter. Noting that legislative changes will be required to implement the Single Charter, it considers it would be helpful for the Department to accompany such changes with this analysis as it would assist a more informed community response. This analysis would include an explanation of which certain rights are no longer included, the rationale and the extent to which these are addressed elsewhere including in the Draft Aged Care Quality Standards.
23. As an illustration, based on a comparison with the rights which currently exist for residential care recipients,³⁴ the Law Council raises several key rights which are omitted in the Single Charter. These include:
- *The right to full and effective use of an individual's personal, civil, legal and consumer rights.*³⁵ Instead, the Single Charter's preamble states that its rights 'sit alongside other laws that inform the delivery and quality of aged care, including the Act, the consumer outcomes in the new Aged Care Quality Standards, and rights under the Australian Consumer Law and anti-discrimination law.' the Single Charter makes it arguably less clear to aged care recipients that they have a full range of specific rights. The signal to providers to act consistently with, and to facilitate, recipients' 'full and effective use' of their rights is also lost. The Law Council considers that the inclusion of this statement would be an important and empowering signal, particularly having regard to the significant concerns currently held nationally about their treatment in aged care. It is also highly relevant that the Law Council's recent Justice Project has recently reinforced that many older people lack awareness of their legal rights, as further discussed below.³⁶
 - *The right to live without discrimination.* While the Single Charter includes a preamble reference to sitting alongside 'rights under anti-discrimination law', the rights to equality and non-discrimination are important human rights,³⁷ which are also reflected in the UN Principles.³⁸ In this regard, the Australian Law Reform Commission has emphasised that older persons' vulnerability stems not only from intrinsic factors such as health, but also from social or structural factors including community attitudes such as ageism.³⁹ The Justice Project also emphasised that the age-based stereotyping and discrimination

³⁴ Contained in the User Rights Principles, Sch 1.

³⁵ User Rights Principles, Sch 1, item 1(a).

³⁶ The Justice Project, which is further discussed below, is based on both an extensive review of available literature and feedback from stakeholders including experts, academics and practitioners.

³⁷ ICCPR, art 2, 26.

³⁸ UN Principles, Principle 18.

³⁹ Australian Law Reform Commission, *Elder Abuse Report*, 18. See also Community Legal Centres NSW, *Submission No 106*; Consultation, 29/08/2017, Townsville (Seniors Creating Change, Townsville Community Legal Service).

are critical barriers which must be addressed,⁴⁰ and further explored the likelihood that age discrimination in Australia is significantly underreported.⁴¹ Further, many people with disability – including older people in aged care – face high levels of discrimination in the community.⁴² Inclusion of the right to be free from discrimination, including on the basis of age, disability, gender, race, sexual orientation, gender identity or intersex status, would send an important message to aged care recipients and providers in this regard. The Draft Aged Care Quality Standards do not address this right.

- *Several key freedoms for aged care recipients in residential care.* These include the freedoms to:
 - move freely both within and outside the residential care service without undue restriction⁴³;
 - select and maintain social and personal relationships with anyone else without fear, criticism or restriction⁴⁴;
 - continue their cultural and religious practice and language⁴⁵; freedom of speech⁴⁶; and
 - be involved in the activities, associations and friendships of his or her choice, both within and outside the residential care service.⁴⁷

Several of these freedoms align with key human rights under the ICCPR, including the rights to freedom of movement⁴⁸, to freedom of opinion and expression,⁴⁹ to freedom of thought, conscience and religion or belief,⁵⁰ and to freedom of assembly and association.⁵¹ They also align with several of the UN Principles.⁵²

The Law Council acknowledges that the Draft Aged Care Quality Standards address several of these freedoms, including with respect to aged care recipients maintaining relationships, participating in their community, and freedom of movement.⁵³ However, it suggests that their inclusion of freedoms in the Single Charter, which is intended to summarise core rights, is important. This could be achieved after the right ‘to maintain my independence’ by adding the words ‘and my freedoms of movement, relationships, speech, religion and cultural practice’.

⁴⁰ Law Council of Australia, *Justice Project: Final Report (2018)*, Older Persons Chapter (Part 1), 7-8, citing Kelly Purser et al, *Submission No 69*.

⁴¹ *Ibid*, 13.

⁴² Law Council of Australia, *Justice Project: Final Report (2018)*, People with Disability Chapter (Part 1), 17-18.

⁴³ User Rights Principles, Sch 1, item 1(g)

⁴⁴ *Ibid*, 1(j).

⁴⁵ *Ibid*, 1(i).

⁴⁶ *Ibid*, 1(k).

⁴⁷ *Ibid*, 1(o)

⁴⁸ ICCPR, arts 12 and 13.

⁴⁹ ICCPR, arts 19 and 20.

⁵⁰ ICCPR, art 18.

⁵¹ ICCPR, arts 21 and 22.

⁵² Including that older persons should remain integrated in society; should be able to form movements or associations of older persons; must enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility; should have the ability to pursue opportunities for the full development of their potential; and should have access to society’s educational, cultural, spiritual and recreational resources: UN Principles, Principles 7, 9, 14, 15, 16.

⁵³ Draft Aged Care Quality Standards, Standard 1 (item 1(3)(c)(iii) and (iv); Standard 4 (item 4(1)(3)(c); Standard 5(1)(3)(b)(ii).

- *The right to have access to advocates and other avenues of redress.*⁵⁴ The Law Council considers that access to advocates, including lawyers, must be acknowledged as a fundamental safeguard and accountability tool in aged care policy. The reasons for its concern are detailed below. It acknowledges that the Draft Aged Care Quality Standards require that aged care recipients are made aware of and, have access to, advocates, language services and other methods of raising and resolving complaints.⁵⁵ However, it is important that the Single Charter also reflects this core right.

24. As noted above, the Law Council has, in the limited time available, only conducted a comparison between the existing rights of recipients of residential care, with the Single Charter and the Draft Aged Care Quality Standards. It has not made a similar comparison with the rights of recipients of home care or short-term restorative care under the Existing Charters. However, it considers that conducting this kind of transparent comparison is important, prior to introducing any legislative change.

Addressing the needs of vulnerable and disadvantaged aged care recipients

25. The Law Society of New South Wales (**LSNSW**) queries whether, in developing the Single Charter and Consultation Paper, adequate consideration has been given to the fact that many 'consumers' who will be covered by the Single Charter will be vulnerable or disadvantaged. In this respect, the LSNSW notes that the Productivity Commission's Inquiry Report into the Review of Australia's Consumer Policy Framework highlights the importance of paying 'particular attention to the needs of vulnerable and disadvantaged consumers'.⁵⁶ The LSNSW emphasises that a Charter which is designed to protect 'consumers' in the aged care sector should appropriately contemplate and cater for the fact that not all consumers – particularly older people in aged care - are equally able to understand and exercise their rights, and provide a service delivery framework for how this may be addressed.

26. In ensuring that the needs of vulnerable and disadvantaged aged care recipients are met, and in developing a service delivery framework which supports them to exercise their rights in practice, the Law Council emphasises the importance of:

- access to justice – that is, specialist legal advice, representation and education which responds to the needs of aged care recipients; and
- an effective, responsive complaints system.

The role of access to justice in upholding rights

27. The recent Ibrahim report emphasises that older Australians living in residential aged care services are at significant risk of experiencing abuse, mistreatment and injury-related harm.⁵⁷ This mistreatment often arises in scenarios in which residents are vulnerable including physical frailty, cognitive impairment, multiple co-morbidities and

⁵⁴ User Rights Principles, Sch 1, item 1(t).

⁵⁵ Draft Aged Care Quality Standards, Standard 6.6 (item 6(3)(b)).

⁵⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45, Productivity Commission, Canberra 2008, Vol 1 at 51.

⁵⁷ Joseph Ibrahim, 'Recommendations for Prevention of Injury-Related Deaths in Residential Aged care Services' (Victorian Institute of Forensic Medicine, 2017) 30.

complex drug regimens.⁵⁸ These factors undermine their ability to exercise their rights effectively.

28. The Law Council's Justice Project further outlines that many barriers render older persons more vulnerable, and therefore less likely to uphold their rights effectively. These issues are exacerbated for older persons in aged care, given their increased frailty, likelihood of disability, dependence on their carers and frequently disempowering care environments. Relevant barriers include:
- a lack of awareness amongst many older persons of their rights or how to respond effectively when they do arise;
 - financial disadvantage, noting that a substantial proportion of older persons experience some level of economic deprivation. Additionally, older persons may have restricted access to personal funds because they are subject to a guardianship order or are experiencing financial elder abuse;
 - inadequate disability and age-related support, noting that the likelihood of experiencing disability significantly increases with age;
 - psychological barriers, including individual disempowerment, diminished self-confidence, shame, embarrassment and concerns about retribution;
 - digital exclusion, noting that older persons are ranked as the most digitally excluded age group; and
 - ageist or otherwise biased staff attitudes, including a tendency to disbelieve reports by residents with cognitive impairment or mental health conditions.⁵⁹
29. The Justice Project also reinforces that older persons are vulnerable to a wide range of legal problems associated with retirement housing and aged care facilities, such as contracts, consumer, negligence, elder abuse and human rights problems.⁶⁰ Older persons also have lower levels of finalising legal problems,⁶¹ and their legal needs often remain unmet.⁶² For aged care recipients, this is likely to leave them in situations which are clearly unsafe or otherwise substandard.
30. While the Consultation Paper envisages that fact sheets will be made available to aged care recipients to support the Single Charter, the Law Council considers that the Department should take a much more proactive stance, in collaboration with the Attorney-General's Department, in addressing the above issues.
31. There is little evidence to suggest that changes to the Single Charter on their own will result in any meaningful change for residents.⁶³ To be effective, it must be supported by increased access to legal assistance services, as well as to accessible legal education, to ensure that aged care recipients and their families are able to uphold

⁵⁸ It may also be exacerbated by the facility's poor or inadequate coordination, infrastructure and design, lack of training for staff, limited access to specialist services, and lack of adequate monitoring of preventable harm and injuries: *Ibid* 30-31.

⁵⁹ Law Council of Australia, *Justice Project: Final Report* (2018), Older Persons Chapter (Part 1), 17-23, and People With Disability Chapter (Part 1), 34

⁶⁰ Law Council of Australia, *Justice Project: Final Report* (2018), Older Persons Chapter (Part 1), 14-15.

⁶¹ *Ibid*, 16, citing Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey Legal Need in Australia* (2012), xxiii

⁶² *Ibid*, citing Susanna Sage-Jacobson, 'Access to Justice for Older People in Australia' (2015) 33(2) *Law in Context* 142, 151.

⁶³ Law Council of Australia, *Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia*, Submission to the House of Representatives Standing Committee on Health, Aged Care and Sport, 1 March 2018, 14.

their rights and that aged care providers are held accountable for breaches of these rights. This fundamental safeguard is recognised in the UN Principles.⁶⁴

32. The Justice Project has particularly highlighted the parlous state of funding for legal assistance services⁶⁵ for older people, noting the critical importance of these services in filling the access to justice gap for those who cannot afford legal services.⁶⁶
33. While there is increasing demand for legal aid resources for older people, funding constraints place significant limits on the amount of legal aid resources that can be allocated to civil law matters – which is the primary area of legal need for older persons. Between 2012 and 2013, only three per cent of legal aid grants were for civil matters, compared to 63 per cent for criminal matters and 34 per cent for family matters. Further, legal aid means tests are so constrained that older people, while often ‘income poor’, often cannot meet these tests.⁶⁷
34. While community legal centres tend to have a greater focus on civil law issues, they are similarly constrained by limited funding and resources. For example, due to the increased recognition of elder abuse nationally, there has recently been a 64 per cent increase in calls to Seniors Rights Victoria’s helpline, but its funding levels have remained static in that time. It has emphasised that ‘without increased investment in access to justice, older people are under threat of losing their right to be free from abuse as they age’.⁶⁸
35. In addition to funding specialist legal assistance services with specific elder law expertise, key answers in this area include:
 - outreach legal services and community legal education;⁶⁹
 - integrated services delivering combined legal and non-legal services. Health-justice partnerships are considered particularly beneficial for older persons, as health professionals often develop ongoing relationships with older clients and can identify legal problems early on and refer older clients to legal help. These solutions require cross-portfolio backing to succeed;⁷⁰ and
 - empowerment strategies, including through peer-to-peer networks.⁷¹

Effective complaints system

36. As noted by the Queensland Law Society, the Single Charter will be of little positive effect for the residents of aged care that it purports to protect without the establishment and resourcing of adequate services and infrastructure to support its operation. In addition to ready and affordable access to legal assistance by appropriately qualified staff, it has stressed that a functioning complaints system for residents, families and support persons, as well as facility staff, must also be established and implemented to ensure that breaches of the Single Charter are reported, reviewed and resolved in a timely manner.

⁶⁴ These state that older persons should have access to social and legal services to enhance their autonomy, protection and care: UN Principles, Principle 12.

⁶⁵ Legal assistance services include legal aid commissions, community legal centres, and Aboriginal-community controlled legal services.

⁶⁶ Law Council of Australia, *Justice Project: Final Report* (2018), Older Persons Chapter (Part 1), 24-29.

⁶⁷ *Ibid.*, 25

⁶⁸ *Ibid.*

⁶⁹ Law Council of Australia, *Justice Project: Consultation Papers* (2017), Older Persons Paper, 27-28.

⁷⁰ *Ibid.*, 85.

⁷¹ *Ibid.*

37. The Law Council has noted that residents and their families are able to make complaints about service providers' responsibilities under the Act.⁷² In practice, however, there appears to be limited community awareness of the options available. The complaints process can be very lengthy and onerous for a complainant. Persons experiencing abuse in aged care who do not have family or friends may not be able to communicate a complaint against a service provider. These people are therefore reliant on staff and community visitors to report abuse.⁷³ These concerns suggest that more can be done to ensure an effective and responsive complaints system.

⁷² Law Council of Australia, *Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised*, Submission to the Senate Community Affairs References Committee, 10 August 2017.

⁷³ *Ibid.*

Recommendations

- **Make the Single Charter accessible to a wide audience through:**
 - user-friendly formats such as large print, audio-accessible, and braille; and
 - listing its rights in a numeric rather than alphabetical order.
- **Amend the Single Charter's preamble to clarify that its rights sit alongside other 'Commonwealth and state and territory' laws.**
- **Ensure that the Single Charter is accompanied by supporting fact sheets which explain: its legal status, including the ramifications of breaches of the rights included; how aged care recipients can make complaints regarding potential breaches; and how they can access legal assistance to exercise their rights.**
- **Prior to any legislative changes being adopted, review the Single Charter carefully in light of relevant human rights standards, with a view to upholding Australia's international human rights obligations regarding older persons in aged care.**
- **Frame the Single Charter's rights around the rights of 'older persons in aged care', rather than 'consumers'.**
- **Replace the word 'diversity' in item (c) of the Single Charter with 'language'.**
- **Include in the Charter the following additional rights:**
 - the 'right to full and effective use of an individual's personal, civil, legal and consumer rights';
 - the right to live without discrimination;
 - freedoms of movement, relationships, speech, religion and cultural practice; and
 - the right to access advocates, language services and other methods of raising and resolving complaints.
- **Support the Single Charter's implementation with a service delivery framework which enables vulnerable and disadvantaged aged care recipients to exercise their rights in practice, including through:**
 - increased national access to specialist legal assistance services which deliver legal advice, representation and education, including through innovative service delivery approaches such as multi-disciplinary servicing and outreach; and
 - prioritising the delivery of an effective, responsive complaints system.

Appendix – Single Charter rights

38. The Single Charter states that individual consumers *'have the right to:*

- *receive safe and high quality care and services;*
- *be treated with dignity and respect and to have my individuality valued;*
- *have my identity, culture and diversity valued and supported;*
- *maintain my independence;*
- *live without abuse and neglect;*
- *be informed about their care in a way that meets my needs, have access to information about my rights, care, accommodation and anything else that relates to them personally, and get the information I need in a timely way;*
- *maintain control over, and continue to make decisions about, my care and personal and social life;*
- *be listened and understood;*
- *choose to have another person speak on my behalf;*
- *complain, and have my complaints dealt with fairly and promptly;*
- *exercise my rights without it affecting the way they are treated; and*
- *personal privacy and to have my personal information kept confidential'.⁷⁴*

⁷⁴ Department of Health, 'Single Charter of Aged Care Rights', 8 September 2018
<<https://agedcare.health.gov.au/quality/single-charter-of-aged-care-rights>>.