A NEW AGED CARE ACT FOR AUSTRALIA? EXAMINING THE ROYAL COMMISSION'S PROPOSAL FOR HUMAN RIGHTS INCLUSIVE LEGISLATION

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The Royal Commission into Aged Care Quality and Safety ('RCAC') revealed that abuse and neglect are widespread in residential aged care facilities ('RACF'). In 2021, the RCAC's Final Report recommended that a new Aged Care Act be enacted to replace the Aged Care Act 1997 (Cth), and the new Act explicitly protect the rights of RACF residents. The recommendation included five uniquely formulated rights to be protected, drawing on international human rights law. This article aims to ensure that the new Act adequately respects, protects and fulfils the rights of RACF residents. This article explores the deficiencies in the current regulatory scheme, documenting the significant opportunity for improvement that rights-based legislation represents. It critiques the five RCAC-formulated rights, analysing the source of the rights within international treaties, and the scope of those rights. The article concludes by evaluating the proposed enforcement mechanisms for the RCAC-formulated rights against international enforcement obligations.

I INTRODUCTION

Despite more than $100 million being invested in the Royal Commission into Aged Care Quality and Safety ('RCAC'), consideration of the protection of the human rights of residents of Residential Aged Care Facilities ('RACF') was an eleventh hour affair. There was no reference to Australia's international human rights obligations in the Terms of Reference establishing the RCAC, witnesses with human rights law expertise were not called during hearings, and consequently there were very few references to human rights in either the Royal Commission's interim report or the special report on the handling of COVID-19 outbreaks in

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RACFs.[1] Nor were human rights the focus of the RCAC's background paper on restrictive practices – despite being highly relevant to this issue.[2]

Human rights considerations were *first* squarely raised in Counsel Assisting's recommendations within their *final* submissions to the Commissioners on 22 October 2020, almost two years into the inquiry.[3] The RCAC took the unusual step of inviting public submissions on these final submissions that were due by 12 November 2020, a consultation timeframe that was both short and very late in the process. The human rights-based recommendations made by Counsel Assisting were adopted by both Commissioners and included in the RCAC's final report tabled in March 2021 ('*RCAC Final Report*'). Significantly, the *RCAC Final Report* recommended that a new Aged Care Act ('new Act') be enacted to replace the *Aged Care Act 1997* (Cth) ('current Act'), and the new Act explicitly protect the human rights of residents of RACFs – recommendations 1 and 2.[4] The recommendation included five uniquely formulated rights that should be protected.

The late inclusion of human rights considerations (or explicitly identifying matters that always engaged human rights as such) and the limited consultation on the proposed new legislation produced a set of recommendations lacking in detail and analysis. Specifically, the *RCAC Final Report* recommended that five uniquely formulated rights (henceforth 'the RCAC-formulated rights') be legislatively protected without exploring the scope of the rights, whether the rights can be limited where reasonable and demonstrably justified, the international treaty source of the rights and thereby the relevant international jurisprudence (beyond naming the treaties in a list), and – significantly – the particular relevance of the rights for residents of RACFs. Undoubtedly, connections exist between the RCAC-formulated rights and the matters exposed by the RCAC; however, these links, and how statutory rights protections address the matters exposed, are not made explicit in the *RCAC Final Report*.

The *RCAC Final Report* recommended that only one of the RCAC-formulated rights – the right to freedom from restraint – should be 'directly enforceable in the courts'. The *RCAC Final Report* indicated that the other rights 'should be seen as aspects of a general duty to provide high quality care imposed by the new Act on approved providers'.[5] This means that these other rights will effectively be filtered through the prism of care, which may dilute the rights analysis and result in unintended consequences. Under international law, the government cannot simply

1 *Royal Commission into Aged Care Quality and Safety* (Interim Report, 31 October 2019) vols 1–3; *Royal Commission into Aged Care Quality and Safety: Aged Care and Covid-19* (Special Report, 1 October 2020).

2 'Royal Commission into Aged Care Quality and Safety: Restrictive Practices in Residential Aged Care in Australia' (Background Paper 4, May 2019) ('Restrictive Practices'). On the absence of human rights considerations, see Andrew Byrnes, 'Human Rights Unbound: An Unrepentant Call for a More Complete Application of Human Rights in Relation to Older Persons' (2020) 39(2) *Australasian Journal on Ageing* 91, 92–3 <https://doi.org/10.1111/ajag.12800>.

3 Counsel Assisting, *Final Submission to the Royal Commission into Aged Care Quality and Safety* (22 October 2020) 46 [151] ('*Final Submission*').

4 *Royal Commission into Aged Care Quality and Safety Final Report: Care Dignity and Respect* (Report, March 2021) vol 3A, 15 (recommendation 1) and 18 (recommendation 2) ('*RCAC Final Report*').

5 Ibid.

outsource its human rights obligations, so the deficiencies and difficulties with the proposed positive and non-delegable statutory duty on service providers identified below must be addressed.

The recommendation that specific human rights be articulated and protected in a new Act is welcome. However, without the broader infrastructure of comprehensive human rights legislation, articulating these rights and establishing a system for their protection will need careful calibration. For instance, the corresponding duties created for each RCAC-formulated right must be specified. It is fundamental to human rights protections that 'every legal right generates a corresponding obligation to protect and promote it'.[6] Moreover, prescribing rights without enacting carefully considered and effective enforcement mechanisms is unlikely to produce the desired effect of protecting residents of RACFs. As Kent Roach notes, '[w]e live in a world rich with rights' but '[a]las, we live in a world poor in remedies'.[7] The transformative impact of human rights is compromised by a lack of effective enforcement, including effective remedies.[8]

At the federal level, the new Act will not sit within a broader human rights infrastructure. To date, comprehensive human rights instruments have only been enacted in three sub-national jurisdictions,[9] and only non-discrimination aspects of human rights are comprehensively protected in federal (as well as state and territorial) anti-discrimination legislation.[10] Moreover, the focus of human rights protections in Australian jurisdictions has been on incorporating rights contained in the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[11] with the RCAC-formulated rights expanding this focus to incorporating rights under the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').[12] Expanding the domestic implementation of Australia's international human rights obligations is long overdue, but must be done with care.

6 Katharine Schulmann et al, 'From Disability Rights towards a Rights-Based Approach to Long-Term Care in Europe: Building an Index of Rights-Based Policies for Older People' (Working Paper No 1, European Centre for Social Welfare Policy and Research, September 2017) 53.

7 Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (Cambridge University Press, 2021) 2 <https://doi.org/10.1017/9781108283618>.

8 See further discussion in Part V.

9 In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'); in the Australian Capital Territory ('ACT'), the *Human Rights Act 2004* (ACT) ('*HRA*'); in Queensland, the *Human Rights Act 2019* (Qld) ('*QHRA*').

10 Beth Gaze, 'Anti-discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 1, ch 7.

11 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); Piers Gooding and Rosemary Kayess, 'Human Rights and Disability: An Australian Experience' in Gerber and Castan (n 10) vol 1, ch 8. The only exceptions to this are the right to education and access to health services contained in sections 36 and 37 of the *QHRA* (n 9), and the rights to education and work and 'work-related rights' contained in sections 27A and 27B of the *HRA* (n 9).

12 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*'). Some of the *CRPD* rights have been included as principles in section 4 of the *National Disability Insurance Scheme Act 2013* (Cth).

The overarching aim of this article is to ensure that the new Act adequately respects, protects and fulfils[13] the rights of residents of RACFs. Part II of this article presents the demographic context for these reforms, while Part III explores the deficiencies in the current regulatory scheme and the justifications offered for improving on the current lack of legal protection of the human rights of residents of RACFs. Part IV then examines the five RCAC-formulated rights in detail, including an examination of the source treaty rights, and critiques the RCAC formulation of the rights. Part V questions the proposed *unenforceability* of the RCAC-formulated rights (excluding the right to be free from restraint) and highlights the need for enforceable rights to be accessible and effective for residents of RACFs.

Whilst strongly supportive of statutory recognition of the human rights of residents of RACFs, there are many key elements to the effective protection, promotion and fulfilment of rights that remain to be addressed.

II THE DEMOGRAPHY OF RESIDENTIAL AGED CARE FACILITIES

The current Act applies to residents of RACFs, and those persons receiving home care and flexible care.[14] This article focuses on the former because residential aged care is relevant to a significant percentage of older persons under the current Act, and it is a setting in which persons are particularly vulnerable. This vulnerability relates to the built environment of RACFs, which allows them to be closed environments, and the level of dependency of residents based on the intersecting factors of age and disability. An understanding of the demography of residential aged care and these intersecting factors allows us to identify the human rights pertinent to this population. Australia has over 2,700 RACFs run by more than 800 providers. The population of RACFs is almost 200,000.[15] In 2021, one in five Australians aged 80 years and over lived in RACFs, a very high proportion compared with other Organisation for

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13 The characterisation of States' duties into the tripartite typology was first developed by Asbjorn Eide, Special Rapporteur, *The Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23 (7 July 1987) [169]–[181]. The tripartite typology was then adopted by academic experts in the International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (Guidelines, 1997) [6] ('*Maastricht Guidelines*') and recognised by the Committee on Economic, Social and Cultural Rights from 2000 onwards: see, eg, Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights*, 24th sess, Provisional Agenda Item 3, UN Doc E/C.12/2000/12 (3 October 2000), which reproduce the *Maastricht Guidelines*; Committee on Economic Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) pts II and III ('*General Comment No 14*'); Committee on Economic Social and Cultural Rights, *General Comment No 22 (2016): The Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) pt IV(B).

14 *Aged Care Act 1997* (Cth) sch 1 (definition of 'aged care').

15 On 30 June 2020, the number of permanent aged care residents was 183,989, below the number of residential aged care places: Australian Healthcare Associates, *Independent Review of Legislative Provisions Governing the Use of Restraint in Residential Aged Care: Supplementary Volume 1* (Report, December 2020) 3 ('*Independent Review vol 1*').

Economic Co-Operation and Development ('OECD') nations.[16] Residential aged care is a form of institutionalisation of older persons. It may be the result of an autonomous decision of an older person, but it can also take the form of 'coerced institutionalisation' where there are few other available options.[17]

Three intersecting aspects of Australia's RACF population are noteworthy. First, most people living in RACFs are aged 85 years or over. Second, women outnumber men two to one.[18] Third, most persons living in RACFs have some type of disability, which the Australian Bureau of Statistics defines as 'any limitation, restriction or impairment which restricts everyday activities and has lasted, or is likely to last, for at least six months'.[19] Of those RACF residents with a disability, 97.9% have a profound or severe disability.[20] Furthermore, over half of the RACF population has dementia[21] and, of this group, they are twice as likely to have nine or more additional impairments than the group without dementia.[22] Dementia is generally understood as a cognitive disability, and it is recognised by the World Health Organization as 'one of the major causes of disability and dependency among older people globally'.[23]

Given these demographics, consideration of the rights of older persons living in RACFs must include analysis of two sector-specific international treaties – the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*')[24] and the *CRPD* – in addition to the overarching international treaties, namely the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[25] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[26] As yet, an international treaty focussed on the rights of older persons does not exist, although drafting work is

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16 Suzanne M Dyer et al, 'Is Australia Over-reliant on Residential Aged Care to Support our Older Population?' (2020) 213(4) *Medical Journal of Australia* 156, 156–7 <https://doi.org/10.5694/mja2.50670>.

17 Claudia Mahler, *Older Persons Deprived of Liberty: Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, UN Doc A/HRC/51/27 (9 August 2022) [30]. Mahler explains that coerced institutionalisation 'may represent de facto deprivation of liberty'.

18 'Dementia in Australia: Residential Aged Care', *Australian Institute of Health and Welfare* (Web Page, 23 February 2023) <https://www.aihw.gov.au/reports/dementia/dementia-in-aus/contents/aged-care-and-support-services-used-by-people-with-dementia/residential-aged-care> ('Dementia in Australia').

19 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Catalogue No 4430.0, 24 October 2019).

20 Ibid.

21 'Dementia in Australia' (n 18).

22 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Catalogue No 4430.0, 5 November 2018). The intersectionality of the lived experience of those in residential aged care can be better understood through the interviews conducted by Linda Steele et al: see Linda Steele et al, 'Human Rights and the Confinement of People Living with Dementia in Care Homes' (2020) 22(1) *Health and Human Rights Journal* 7. See also *RCAC Final Report* (n 4) vol 2.

23 See 'Dementia', *World Health Organisation* (Web Page, 2 September 2021) <https://web.archive.org/web/20210901001018/https://www.who.int/news-room/fact-sheets/detail/dementia>.

24 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981) ('*CEDAW*').

25 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

26 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*').

in progress.[27] A dedicated treaty would address the numerous gaps in overlaying existing treaties to the issues faced by older persons.[28] We now examine whether the current Act is consistent with the rights contained within these treaties.

III DEFICIENCIES IN THE CURRENT SCHEME

The RCAC's first recommendation calls for the current Act to be replaced by a new Act that should be in force 'by no later than 1 July 2023'.[29] Recommendations 1 and 2 undoubtedly require that the rights of older persons be central to this new Act.[30] These overarching recommendations acknowledge that the current Act is rights-deficient and cannot be remedied by piecemeal, rights-focused amendments.[31] An examination of the current scheme and its inadequacies, as highlighted by the RCAC and other previous inquiries, is instructive. While the *RCAC Final Report* makes clear that there is a wide range of (human rights) problems in RACFs,[32] in outlining the deficiencies in the current scheme this section focuses in particular on restrictive practices as one example of how the current scheme fails to address the human rights of older persons living in RACFs.

A The *Aged Care Act 1997* (Cth)

The current Act does not recognise that older persons (those over 65 years) living in RACFs have unique rights-needs, and fails to provide direct legal protection of these needs. In 2017, Kate Carnell and Ron Paterson, the authors of the *Review of National Aged Care Quality Regulatory Processes Report* ('*Aged Care Regulation Review Report*'), noted that while 'aged care is highly regulated', at the same time '[t]he *Aged Care Act* is a weak framework for promoting the rights of older people, including the right to be free from abuse and exploitation'.[33]

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27 Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law in Relation to Older Persons* (Working Paper, March 2021) 55–6 ('*Update to the 2012 Analytical Outcome Study*'); 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, 536–8 <https://doi.org/10.1080/1323238X.2021.2009634>.

28 These gaps have been identified by the United Nations Open-Ended Working Group on Ageing and the United Nations Independent Expert on the Enjoyment of All Human Rights by Older Persons: see, eg, Open-Ended Working Group on Ageing, *Report of the Open-Ended Working Group on Ageing*, 11th sess, UN Doc A/AC.278/2021/2 (3 June 2021); Mahler (n 17).

29 *RCAC Final Report* (n 4) vol 3A, 15 [1].

30 For more detail as to what a human rights-based, new Act might look like, see the reports of the Grattan Institute: Stephen Duckett and Hal Swerissen, *Rethinking Aged Care: Emphasising the Rights of Older Australians* (Report No 2020-14, October 2020); Stephen Duckett, Anika Stobart and Hal Swerissen, *Reforming Aged Care: A Practical Plan For a Rights-Based System* (Report No 2020-17, November 2020); Stephen Duckett, Anika Stobart and Hal Swerissen, *The Next Steps for Aged Care: Forging a Clear Path after the Royal Commission* (Report No 2021-03, April 2021).

31 *RCAC Final Report* (n 4) vol 3A, 13–14.

32 See *RCAC Final Report* (n 4) vol 2. While this section is not able to cover this range of problems, a number are discussed in Part IV.

33 Kate Carnell and Ron Paterson, *Review of National Aged Care Quality Regulatory Processes* (Report, 2017) 111, 127.

The current Act has a *service provider-focused* framework aimed at regulating providers and ensuring compliance, rather than having a *person-centred focus* which aims to realise the rights and dignity of older persons. In this service provider-focused framework, residents of RACFs are framed as consumers of aged care who are purportedly positioned to make informed choices. Carnell and Paterson question this framework by explaining that the low statistics of consumers exercising a choice between providers by changing facilities 'do not point to a market in which consumer choice flourishes'.[34] The Grattan Institute also questions how much choice and information 'consumers' have within this framework:

> The current aged care system uses the language of the market and choice. But in practice, providers have much more information, control, and influence than consumers. In residential care, a veil of secrecy makes it very difficult for consumers to make judgments about issues such as staffing levels.[35]

In their report, Carnell and Paterson sought to find how 'a more consumer-driven model' can be devised to improve quality of care in RACFs.[36] However, many scholars and advocates believe the current Act facilitates a *profit* driven model of residential aged care, where profit incentives mean consumers enjoy little autonomy or dignity, and are thus subjected to a high risk of abuse, neglect and de facto detention.[37]

The *Aged Care Regulation Review Report* was triggered by the shocking use of restrictive practices at South Australia's Oakden Older Persons Mental Health Service ('Oakden'). It found that inappropriate and prolonged non-consensual use of restrictive practices, such as physical restraint and sedation, were not unique to Oakden, but prevalent in RACFs across Australia.[38] Internationally, these rights-limiting practices are understood to deprive persons of their dignity and liberty: they are considered serious human rights matters and international experts have called for an abolition of such practices.[39]

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34 Ibid 127. This demography largely mirrors the demography set out in Part II of this article.

35 Duckett, Stobart and Swerissen (n 30) 18.

36 Carnell and Paterson (n 33) 128.

37 Linda Steele et al, 'Ending Confinement and Segregation: Barriers to Realising Human Rights in the Everyday Lives of People Living with Dementia in Residential Aged Care' (2020) 26(2) *Australian Journal of Human Rights* 308, 315–16, 320 <https://doi.org/10.1080/1323238X.2020.1773671> ('Ending Confinement and Segregation').

38 Carnell and Paterson (n 33) 114–26.

39 The United Nations Committee on the Rights of Persons with Disabilities states that 'the use of forced treatment, seclusion and various methods of restraint' is 'not consistent with the prohibition of torture and other cruel, inhumane or degrading treatment or punishment': United Nations Committee on the Rights of Persons with Disabilities, *Guidelines on the Right to Liberty and Security of Persons with Disabilities*, UN GAOR, 72nd sess, Supp No 55, UN Doc A/72/55 (2017) 18 [12] . In addition, the United Nations Special Rapporteur on Torture, Juan Mendez, advocates for 'an absolute ban on all coercive and non-consensual measures, including restraint . . . of people with psychological or intellectual disabilities . . . in all places of deprivation of liberty, including in psychiatric and social care institutions': Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 22nd sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) 14–15 [63] ('*Report of the Special Rapporteur on CIDTP*').

Multiple inquiries into the treatment of residents at Oakden in part led to the establishment of the RCAC and prompted numerous legislative reforms,[40] including the introduction of the restraints principles ('R-Principles') in part 4A of the *Quality of Care Principles 2014* (Cth), regulations made pursuant to the current Act. These R-Principles regulate the use of restrictive practices in RACFs. Arguably these legislative reforms enabling the *regulation* of restrictive practices do not address the essence of the problem: that these non-consensual practices are not compatible with Australia's international human rights obligations. They lock together with Australia's outdated guardianship laws at the state/territory level which deprive many older persons with disabilities of their liberty. In the view of Claudia Mahler, the United Nations Independent Expert on the Enjoyment of all Human Rights by Older Persons ('UN Expert'), such '"safeguards" laws … remain highly controversial and inadequate … as they are usually understood as authorizations to render the deprivation of an individual's liberty lawful, based on age or disability'.[41] She explains that '[s]uch laws enable the deprivation of liberty and coercive care and health interventions and are contrary to international human rights standards, including the [*CRPD*].'[42]

It is worth noting that Parliament chose not to regulate restrictive practices via primary legislation. This was despite the 2017 recommendation of the Australian Law Reform Commission ('ALRC') that restrictive practices regulation be brought into the primary legislation 'to discourage the use of restrictive practices and set a clear and high standard'.[43] Parliament also ignored the recommendation of a 2020 independent review (the 'AHA 2020 Review') which urged Parliament to 'consider incorporating references to aged care consumer rights in the legislation' and that it take a person-centred approach to care.[44]

B The *Charter*

Within the current regulatory scheme for RACFs, rights are articulated in the *Charter of Care Recipients' Rights and Responsibilities: Residential Care*

40 Australian Healthcare Associates, *Independent Review of Legislative Provisions Governing the Use of Restraint in Residential Aged Care* (Final Report, December 2020) 10 ('*Independent Review Final Report*').

41 Mahler (n 17) 15 [69].

42 Ibid.

43 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) 142–3 ('*Elder Abuse*').

44 Australian Healthcare Associates, *Independent Review Final Report* (n 40) 4. It is worth noting that the supplementary volume of the review aligns 'person-centred' focus/care with human rights principles: Australian Healthcare Associates, *Independent Review vol 1* (n 15) 6. In mid-2021, as a response to the RCAC's recommendation 17 and the 2020 Review, Parliament took a piecemeal approach by amending the current Act by introducing a definition of 'restrictive practices': see *Aged Care Act 1997* (Cth) ss 54-9, 54-10 and the dictionary in Schedule 1. Previously this Act referred to physical restraint or chemical restraint but did not offer any definition. While the amendments reflect elements of human rights guarantees, this is not comprehensively so.

(‘the *Charter*’), which is scheduled to regulations under the current Act.[45] These consumer rights were incorporated in the *Charter* in 2019, arguably as a response by the Federal Government to the *Aged Care Regulation Review Report*. The *Charter* comprises 14 protections for consumers and users of RACFs, including the right to be treated with dignity and respect, the right to complain free from reprisal, and the right to have control over and make choices about care.

Although this set of protections does include a number of rights, some of which directly align with Australia’s treaty obligations, it is not a comprehensive suite of relevant rights for residents of RACFs, and the protections are not framed as enforceable rights that can be vindicated in a court or tribunal setting. Moreover, the National Older Persons Legal Services Network (‘NOPLS Network’) describes the *Charter* as ‘lack[ing] clarity and specificity about the normative content of those rights’ that are protected, particularly their ‘scope, legal guarantees, availability and accessibility, remedies and redress’.[46] The NOPLS Network states that ‘Australia’s current system of aged care quality and safety does not provide individuals with enforceable guarantees of their human rights’.[47] It notes that the current framework is founded on the ‘consumer (rights) protection model’, which it argues is a ‘fundamentally flawed method of protecting older Australians from serious human rights breaches’ because consumer laws do not provide effective or appropriate rights and remedies to those who are subjected to the use of restraints.[48]

According to the AHA 2020 Review, the *Charter* indicates that the RACF sector is shifting ‘towards person-centred and consumer-directed care … in line with community expectations’.[49] However, the review acknowledges that there is ‘poor awareness’ of both the R-Principles and ‘consumer rights more generally’ in the sector.[50] One peak organisation observed that the R-Principles were ‘not easily accessible to the average consumer’.[51] The AHA 2020 Review notes that stakeholders consider ‘it is important for consumers to have at least a high-level awareness of their rights in order to invoke them’.[52] This is unsurprising, given that neither the R-Principles nor the consumer rights within the *Charter* are in the primary legislation, and neither are enforceable.[53] Furthermore, stakeholders believe that an ‘external source of advice and information is needed to help

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45 *User Rights Principles 2014* (Cth) sch 1.

46 National Older Persons Legal Services Network, Submission No 4 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (September 2019) 2.

47 Ibid.

48 Ibid.

49 Australian Healthcare Associates, *Independent Review Final Report* (n 40) 25.

50 Ibid 39.

51 Ibid 38.

52 Ibid.

53 The restraints principles (‘R-Principles’) are not described as ‘rights’. Until the mid-2021 amendments, the regulatory scheme did not explain the hierarchy between the R-Principles and the *Charter*: section 15FA(1)(i) of the *Quality of Care Principles 2014* (Cth) requires that ‘the use of the restrictive practice is not inconsistent with the *Charter of Aged Care Rights* set out in Schedule 1 to the *User Rights Principles 2014*’.

consumers exercise their rights'.[54] This is because 'providers may knowingly or unknowingly communicate in a way that prevents the resident or family member from realising that a particular practice constitutes restraint and, therefore, that the Restraints Principles apply'.[55] This lack of knowledge and confusion – possibly even obfuscation – about the few rights RACF residents do have operate at a number of levels and impacts on the realisation of those rights.

These issues suggest that the set of consumer rights or protections in the *Charter* are predominantly symbolic. This is reinforced by the *Charter*'s status in the current system: the *RCAC Final Report* notes that the *Charter* 'sits below, and is subordinate to, the provisions of the current Act. It does not govern or even inform the approach to interpreting other aspects of the aged care system administered under the Act.'[56] The *RCAC Final Report* describes this placement of the *Charter* as 'unhelpfully symbolic'.[57] The low priority given to the rights of residents of RACFs supports the claim to symbolism, and the counterproductive nature of piecemeal and unenforceable rights supports the claim to unhelpfulness.

C Redress Options

For RACF residents who are subjected to the unlawful use of restrictive practices, the current Act and *Charter* offer minimal direct legal protection for their rights. Their options are limited to a torts action of battery or false imprisonment, a police complaint regarding criminal assault or unlawful deprivation of liberty, a complaint under the Serious Incident Response Scheme operated by the Aged Care Quality and Safety Commissioner ('Quality Regulator'), and/or waiting for the Quality Regulator to issue a written notice and possibly impose civil penalties where the action is repeated.

As Linda Steele et al explain, the barriers to legal redress are many:

> practical (eg, isolation from legal and advocacy support due to institutional setting), procedural (eg, legal incapacity preventing standing in court), and economic (eg, the cost of proceedings) … [Some abuses are] beyond legal remedy because they are legally permitted. For example, substituted decision-making laws and the doctrine of necessity render confinement and segregation of particular individuals lawful in certain circumstances.[58]

All too often, coroners courts are the forum where the abuse perpetrated via excessive restraints is subjected to judicial scrutiny – an ineffective mechanism for the victim who, by definition, is deceased.[59] As the RCAC concluded, legislative

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54 Australian Healthcare Associates, *Independent Review Final Report* (n 40) 37.

55 Ibid.

56 *RCAC Final Report* (n 4) vol 3A, 17.

57 Ibid.

58 Steele et al, 'Ending Confinement and Segregation' (n 37) 311.

59 See references in Yvette Maker and Bernadette McSherry, 'Regulating Restraint Use in Mental Health and Aged Care Settings: Lessons from the Oakden Scandal' (2019) 44(1) *Alternative Law Journal* 29, 31 <https://doi.org/10.1177/1037969X18817592>. See also Emma Bellenger et al, 'Physical Restraint Deaths in a 13-year National Cohort of Nursing Home Residents' (2017) 46(4) *Age and Ageing* 688 <https://doi.org/10.1093/ageing/afw246>; Laura Grenfell, Anita Mackay and Julie Debeljak, 'Human

change is required if governments and parliaments are serious about harnessing the legal system to help reduce the risk of violence, abuse and neglect.

D Transformational Change

The *RCAC Final Report* is one of multiple inquiries that emphasise the rights-deficiencies of the current regulatory scheme, including the current Act and *Charter*. As has been highlighted by others in the context of the current Act and the *Charter*, the Commissioners commented that the 'consumer-directed' focus of Australian Government policy has 'accord[ed] a *measure* of freedom of choice to some people in some circumstances', but that 'will never be enough'.[60] The *RCAC Final Report* concluded that '[p]eople need to be placed at the centre of the system in a manner that … ensures their dignified and respectful care', and considered 'that a rights-based approach which permeates all aspects of aged care is far more likely to ensure that older people are treated with humanity, dignity and respect'.[61] We now consider whether a new Act, with its RCAC-formulated rights, will achieve the transformation needed.

IV THE RCAC-FORMULATED RIGHTS FOR INCLUSION IN A NEW ACT

Recommendation 2 in the *RCAC Final Report* sets out the five RCAC-formulated rights to be afforded to residents in RACFs. The recommendation is to include the rights in the 'purposes' section of the new Act, thus indicating that these rights 'may be taken into account in interpreting the Act and any instrument under the Act'.[62]

The RCAC-formulated rights are worded as follows:

i. the right to freedom from degrading or inhumane treatment, or any form of abuse
ii. the right to liberty, freedom of movement, and freedom from restraint
iii. the right of autonomy, the right to the presumption of legal capacity, and in particular the right to make decisions about their care and the quality of their lives and the right to social participation
iv. the right to fair, equitable and non-discriminatory treatment in receiving care
v. the right to voice opinions and make complaints.[63]

The *RCAC Final Report* states that 'the proposed rights of older people seeking or receiving care … are each elements of a core human right derived from Article

Rights Accountability for Systems of Ill-Treatment in Residential Aged Care' (2021) 47(3) *Monash University Law Review* 57 <https://doi.org/10.26180/20341488.v2>.

60 *RCAC Final Report* (n 4) vol 3A, 19 (emphasis added).

61 Ibid.

62 Ibid 18. The recommendation also contains specific rights for 'people seeking aged care', 'people receiving end-of-life care' and 'people providing informal care', but these are outside the scope of this article.

63 Ibid.

12(1) of the [*ICESCR*]', an article which recognises 'the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[64] The link between the predominantly civil rights reflected in the RCAC-formulated rights and the right to health is not apparent, as will be demonstrated below.[65] The *RCAC Final Report* notes that the *ICCPR*, *ICESCR*, *CEDAW* and *CRPD* are the most significant treaties for protecting the human rights of residents in RACFs, unfortunately omitting the *CAT* from this list. The *RCAC Final Report* then acknowledges that 'references to older people in binding international human rights instruments are scarce' and that 'there is no international consensus on a common set of human rights … that should underpin aged care'.[66] Given the lack of consensus, the *RCAC Final Report* 'identified those [rights] which we think are necessary elements of a human rights-based aged care system, best adapted to the Australian context'.[67] Beyond this, the *RCAC Final Report* does not detail how the RCAC-formulated rights are derived from article 12(1), nor which of these international treaties the RCAC-formulated rights have been drawn from.

These gaps will be filled by analysing the relevant provisions and jurisprudence of these five treaties, all of which Australia has ratified.[68] The analysis will demonstrate that many of the RCAC-formulated rights are amalgams of rights contained in a number of treaties, allowing for guidance from equivalent international human rights obligations. However, numerous gaps and omissions in coverage have been identified, and a more comprehensive approach to embedding human rights within a domestic setting is needed.

A The Right to Freedom from Degrading or Inhumane Treatment, or Any Form of Abuse

The RCAC found many examples of degrading and inhumane treatment in RACFs around Australia, including instances of abuse (discussed below). Of the five RCAC-formulated rights, this right aligns most closely with Australia's treaty obligations. Article 7 of the *ICCPR* imposes an absolute prohibition on torture and cruel, inhumane or degrading treatment or punishment ('CIDTP'). The *CAT* expands upon the article 7 *ICCPR* prohibition, and relevantly article 16(1) requires that States Parties 'shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment'. The *CRPD* requires States Parties to 'prevent *persons with disabilities*, on an equal basis with others, from

64 Ibid 17.

65 See Committee on Economic, Social and Cultural Rights, *General Comment No 14* (n 13); Committee on Economic, Social and Cultural Rights, *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons*, 13th sess, UN Doc E/1996/22 (8 December 1995).

66 *RCAC Final Report* (n 4) vol 3A, 19.

67 Ibid.

68 Australia ratified the *CRPD* on 17 July 2008, the *ICCPR* on 23 November 1980, the *CAT* on 10 December 1985, the *CEDAW* on 27 August 1983 and the *ICESCR* on 10 March 1976: 'UN Treaty Body Database', *United Nations Human Rights Treaty Bodies: Ratification Status for Australia* (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN>.

being subjected to' CIDTP (article 15(2)), and 'from all forms of exploitation, violence and abuse, including their gender-based aspects' (article 16(1)).[69]

1 Degrading or Inhumane Treatment

The RCAC-formulation focuses on 'degrading or inhumane treatment', and omits reference to 'cruel', which is a term that accompanies 'degrading or inhumane' in the *CAT*, *ICCPR* and *CRPD*. Although no explanation of this omission is offered, no individualised definitions of or distinctions between the three terms have developed under the treaties, such that the absence of 'cruel' may be of little consequence.[70]

The international prohibition of CIDTP has typically focused on protecting persons deprived of their liberty – being those held in detention or prison. There are many instances where residents in RACFs meet the definition of detention, either *de jure* or *de facto*. This is particularly pertinent to those RACF residents in closed dementia wards where they are not free to leave.[71] It may also apply to other residents who are not free to leave due to chemical restraints (eg, heavy sedation), mechanical restraints (eg, shackling or a pelvic restraint in a chair), physical restraint, or environmental restraints (eg, locked doors, fences and keypads). The United Nations Committee against Torture has outlined in a General Comment that States Parties to the *CAT* have a responsibility to 'prevent and redress torture and ill-treatment in all contexts of custody and control', giving places where 'the aged' are accommodated as a specific example.[72]

Where residents of RACFs are deprived of their liberty, the monitoring regime established by the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*OPCAT*') applies;[73] however, Australia has indicated that the initial focus of *OPCAT* implementation will be 'primary places of detention', which excludes RACFs.[74] The Australian Human Rights Commission has recommended that the Australian government ensure all places covered by the OPCAT are included in monitoring by the National Preventive Mechanism,[75] in the way that many other countries have done.[76]

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69 Emphasis added.

70 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) [9.35].

71 Steele et al, 'Ending Confinement and Segregation' (n 37).

72 Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [15].

73 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) ('*OPCAT*'). The *OPCAT* applies to all places where people are deprived of their liberty as defined in article 4(2) of the *OPCAT*.

74 Australian Human Rights Commission, *Road Map to OPCAT Compliance* (Report, 17 October 2022), 10–11.

75 Ibid 12 (recommendation 4).

76 Nick Hardwick et al, 'Human Rights and Systemic Wrongs: National Preventive Mechanisms and the Monitoring of Care Homes for Older People' (2022) 14(1) *Journal of Human Rights Practice* 243 <https://doi.org/10.1093/jhuman/huab050>.

Internationally, Australia has been found in violation of article 15 of the *CRPD* (prohibition against CIDTP) in three communications concerning men with disabilities who were imprisoned without being convicted of a criminal offence.[77] The United Nations Committee on the Rights of Persons with Disabilities ('Disabilities Committee') found that two of these men were subjected to treatment that included being isolated and being treated involuntarily.[78] The involuntary treatment included being administered medication without consent,[79] which in the RACF context is understood as the *unlawful* use of sedation/chemical restraint. In addition to constituting degrading/inhumane treatment, involuntary treatment may also violate the right to autonomy and legal capacity, discussed below.

2 Abuse

The RCAC's second recommendation proscribes 'any form of abuse'. The RCAC's research paper about the prevalence of abuse found that a staggering 39.2% of residents in RACFs have experienced abuse, and this finding excluded several categories of abuse: financial, social and sexual abuse.[80] The research focused on only three categories of abuse, with the incidence of each reported separately, as follows.[81]

Table 1: Royal Commission into Aged Care Quality and Safety, Experimental Estimates of the Prevalence of Elder

Type	Incidence	Defined to Include
Physical abuse	5.0%	'pushing/shoving, hitting/slapping, punching and kicking'
Neglect	30.8%	'the failure to provide access to essentials such as food and hydration, … adequate hygiene or medical care'
'Emotional/ psychological abuse'	22.6%	'verbal abuse such as yelling insults …; intimidation/bullying and harassment; damaging or destroying property; threatening to harm the older person or their family members/friends or pets; threatening to withdraw care and preventing or attempting to prevent access to funds, telecommunication or transport'

77 Committee on the Rights of Persons with Disabilities, *Views: Communication No 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016); Committee on the Rights of Persons with Disabilities, *Views: Communication No 18/2013*, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (17 October 2019) ('*Doolan*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 17/2013*, 22nd sess, UN Doc CRPD/C/22/D/17/2013 (18 October 2019) ('*Leo*').

78 *Doolan* (n 77) [8.10]; *Leo* (n 77) [8.10]. When ratifying the *CRPD*, Australia made the following reservation: 'Australia further declares its understanding that the *Convention* allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards': 'Chapter IV: Human Rights', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec>.

79 *Doolan* (n 77) [4.19]; *Leo* (n 77) [4.19].

80 Royal Commission into Aged Care Quality and Safety, 'Experimental Estimates of the Prevalence of Elder Abuse in Australian Aged Care Facilities' (Research Paper 17, December 2020) 1.

81 Ibid 1 (statistics), 3 (definitions).

This evidence clearly justifies the inclusion of abuse in the RCAC-formulated rights. Internationally, 'abuse' is a concept used in relation to persons with disabilities in article 16 of the *CRPD*, but it is not employed in other treaties. Accordingly, there is less international human rights jurisprudence on 'abuse' than there is about torture and CIDTP. Consequently, analogies will have to be drawn to extrapolate both the torture and CIDTP jurisprudence to expand upon concept of abuse, and the *CRPD* jurisprudence on abuse to apply to all residents in RACFs, regardless of whether they have a disability or not. The United Nations High Commissioner for Human Rights supports a prohibition of abuse of older persons, noting that elder abuse is broader than behaviour captured by the prohibition of 'inhuman or degrading treatment'.[82] This means that some – but not all – behaviour considered elder abuse may also constitute torture or degrading/inhuman treatment. Examination of 'violence, abuse and neglect against older persons' is part of the mandate of the UN Expert and this is a concern that recurs consistently in her thematic reports.[83] These reports will be useful for developing protections against abuse for residents in RACFs.

B The Right to Liberty, Freedom of Movement, and Freedom from Restraint

This RCAC-formulated right has three components: 'liberty', 'movement' and absence of 'restraint'.

1 Liberty and Freedom of Movement

The rights to liberty and freedom of movement are protected by separate articles in both the *ICCPR* and *CRPD*, as follows:

Table 2: The Rights to Liberty and Freedom of Movement under the *ICCPR* and *CRPD*

	ICCPR	***CRPD***
Liberty	Article 9(1): 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.	Article 14(1): '[P]ersons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty'.
Movement	Article 12(1): 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement'.	Article 19(a): 'Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement'.

82 Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study* (n 27) 34.

83 See, eg, Mahler (n 17) [56].

The right to freedom of movement in article 12(1) of the *ICCPR* typically focuses on the right to move around within, leave and re-enter a country.[84] Accordingly, the relevant jurisprudence has limited application to RACFs. The Commissioners were likely focussed on the impact that restraints have on freedom of movement more generally, given that this was drawn to their attention by Counsel Assisting's final submissions.[85] While this explains the inclusion of this right alongside the right to 'freedom from restraint', it means that article 12(1) jurisprudence is not pertinent.

International guidance on the right to liberty, however, is pertinent for RACF residents. RACFs are internationally considered 'less traditional places of [civil] detention'.[86] The jurisprudence on the *ICCPR*'s article 9(1) right to liberty focuses on protecting persons arbitrarily deprived of their liberty. Arbitrary deprivation includes unlawful deprivation of liberty, but goes beyond this. Arbitrariness is not equated with against the law. If non-arbitrariness meant only according to the law, any conduct within domestic legislation would be considered lawful. Instead, arbitrariness is interpreted broadly, to include notions of inappropriateness, injustice and proportionality.[87] As per Sarah Joseph and Melissa Castan, '"arbitrary" deprivations of liberty goes further than the prohibition of "unlawful" deprivations, as "arbitrariness" is a principle above rather than within the law'.[88]

While the RCAC did not focus on the *unlawful* detention of some RACF residents, this problem was noted in a Senate Committee report on indefinite detention of people with cognitive impairment.[89] Based on evidence before the Senate Committee, it concluded that 'indefinite detention of people with cognitive or psychiatric impairment is a significant problem within the aged care context ... It is also clear this detention is often informal, unregulated and *unlawful*'.[90] Australian courts have confirmed that a person can be considered unlawfully detained regardless of whether the restrictions placed on their liberty are total or partial.[91] This means that many – but not all – residents of RACFs may meet the definition of being *unlawfully* detained and thus *unlawfully* deprived of their liberty. An enforceable right to liberty within the new Act may assist those affected by intersecting vulnerabilities to invoke and realise their right to liberty, which is otherwise very difficult given the complexity and expense of making a *habeas corpus* claim in the courts.

The right to liberty under article 14(1) of the *CRPD* states 'that the existence of a disability shall in no case justify a deprivation of liberty', with Australia's

84 Joseph and Castan (n 70) ch 12.

85 Counsel Assisting, *Final Submission* (n 3).

86 AG Hallo de Wolf, 'Visits to Less Traditional Places of Detention: Challenges Under the OPCAT' (2009) 6(1) *Essex Human Rights Review* 73, 73.

87 Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

88 Joseph and Castan (n 70) [11.11] (emphasis omitted).

89 Senate Community Affairs References Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Report, November 2016).

90 Ibid 169 (emphasis added).

91 *Public Advocate v C, B* (2019) SASFC 58; *Antunovic v Dawson* (2010) 30 VR 355; *White v Local Health Authority* [2015] NSWSC 417; *Skyllas v Retirement Care Australia (Preston)* [2006] VSC 409.

compliance being the subject of debate.[92] The Disabilities Committee has indicated that article 14(1) does not allow Australia to detain people with disabilities in mental health facilities or use community-based compulsory treatment orders.[93] Accordingly, older persons with disabilities should not be detained in RACFs because of their disability (such as dementia).[94] Article 19 of the *CRPD* focuses on abolishing enforced institutionalisation of people with disabilities[95] and requires provision of support for people to live in the community.[96] The Disabilities Committee acknowledges that the article 19 obligation may be progressively realised[97] (meaning that States Parties must work towards eventual full realisation of this right) (see further below).

The international legal obligation is clear: persons with disabilities must not be forced to reside in RACFs against their will. Yet this is often the reality when people require levels of care beyond that which family members can provide. As Linda Steele et al note in relation to persons with dementia, 'many people experience limited choice and control around the decision to move into residential care' and 'movement into a care home can occur for people living with dementia under duress or against their will'[98] (see further the right to autonomy discussion below). Currently, guardianship laws across Australia allow for persons assessed as lacking in mental capacity to be forced via tribunal order to, among other things, reside in a RACF.[99]

2 Freedom from Restraint

The main types of restraint are chemical, mechanical, physical or those imposed by the built environment. The *RCAC Final Report* found that forms of restraint are being overused in RACFs, and use of restraints where not necessary is 'substandard

92 Bernadette McSherry, 'Mental Health Laws: Where to from Here?' (2014) 40(1) *Monash University Law Review* 175, 183.

93 Committee on Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia Adopted by the Committee at its Tenth Session (2 – 13 September 2013)*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [34] ('*Concluding Observations*').

94 Linda Steele et al, 'Questioning Segregation of People Living with Dementia in Australia: An International Human Rights Approach to Care Homes' (2019) 8(18) *Laws* 1, 12 <https://doi.org/10.3390/laws8030018> ('Questioning Segregation').

95 János Fiala-Butora, Arie Rimmerman and Ayelet Gur, 'Article 19: Living Independently and Being Included in the Community' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 530 <https://doi.org/10.1093/law/9780198810667.003.0020>.

96 Steele et al, 'Questioning Segregation' (n 94) 15.

97 Committee on the Rights of Persons with Disabilities, *General Comment No 5 (2017) on Living Independently and Being Included in the Community*, 18th sess, CRPD/C/GC/5 (27 October 2017) [39]–[46].

98 Steele et al, 'Questioning Segregation' (n 94) 2.

99 Under guardianship laws, once appointed by a tribunal, guardians have wide and discretionary powers to make decisions about many aspects of a person's life, from where a person lives, to the healthcare they receive, to with whom and when they socialise, and to whether they may be subject to restrictive practices. Even though these decisions directly impact on the protection and promotion of the human rights of persons subjected to guardianship orders, there is little ongoing and direct oversight of guardians. Although beyond the scope of this article, reform of guardianship laws is urgently needed. See, eg, *Guardianship Act 1987* (NSW) s 6E; *Guardianship and Administration Act 1993* (SA) s 32.

care'.[100] In the final quarter of 2019–20, RACFs nationally reported using *physical* restraint 62,800 times.[101] The RCAC's background paper on restrictive practices identified a lack of national data about the prevalence of *chemical* restraint, but cited a 2018 literature review establishing that 'the proportion of residents prescribed antipsychotic medication ranged from 13 to 42%'.[102] A Human Rights Watch investigation found that the use of chemical restraint on people with dementia in RACFs in major Australian cities Canberra, Brisbane, Cairns, Melbourne and Sydney is widespread and not used as a last resort.[103]

Persons with disabilities are particularly at risk vis-à-vis the *unlawful* use of restraints and would benefit from an *enforceable* right to be free from restraint in the new Act. This risk is underlined by the United Nations Special Rapporteur on the Rights of Persons with Disabilities:

> Persons with disabilities deprived of their liberty are invariably placed into an extremely vulnerable position … They also experience a higher risk of being subjected to torture and inhuman and degrading treatment, including forced medication and electroshock, restraints and solitary confinement.[104]

This highlights the interconnectedness of rights. Restraints inhibit the right to liberty and movement and, simultaneously, their excessive or prolonged use may also constitute CIDTP as per the first RCAC-formulated right. The United Nations Special Rapporteur on Torture has specified that 'any restraint on people with mental disabilities for even a short period of time may constitute torture and ill-treatment', and that it should be prohibited.[105] In prisons, the use of 'instruments of restraint which are inherently degrading or painful' are prohibited by Rule 47 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (commonly known as the Nelson Mandela Rules).[106] In New Zealand, the use of restraints – specifically tie-down beds and waist restraints – for prolonged periods on prisoners assessed as being at-risk was characterised by the national Ombudsman as amounting to CIDTP under article 16 of the *CAT*.[107]

Given that international human rights obligations indicate that use of restraint may constitute CIDTP in certain circumstances, arguably the RCAC should have included 'freedom from restraint' in the first RCAC-formulated right ('right to freedom from degrading or inhumane treatment'). On the other hand, confining

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100 *RCAC Final Report* (n 4) vol 2, 162.

101 Ibid.

102 Kerrie Westaway et al, 'The Extent of Antipsychotic Use in Australian Residential Aged Care Facilities and Interventions Shown to be Effective in Reducing Antipsychotic Use: A Literature Review' (2020) 19(4) *Dementia* 1189 <http://dx.doi.org/10.1177/1471301218795792>, cited in RCAC, 'Restrictive Practices' (n 2) 12.

103 Human Rights Watch, *'Fading Away': How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia* (Report, 2019) 3, 7.

104 Human Rights Council, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/54 (11 January 2019) 7 [24].

105 Human Rights Council, *Report of the Special Rapporteur on CIDTP* (n 39) 14–15 [63]. See further Maker and McSherry (n 59).

106 *The United Nations Standard Minimum Rules for the Treatment of* Prisoners *(the Nelson Mandela Rules)*, 70th sess, Agenda Item 106, UN Doc A/Res/70/175 (17 December 2015).

107 Office of the Ombudsman, *A Question of Restraint: Care and Management for Prisoners Considered to be at Risk of Suicide and Self-Harm* (OPCAT Findings Report, 1 March 2017) 42.

persons to certain sections of a RACF, including their room, restricts their liberty and freedom of movement, and may be considered restraint by the built environment, which may explain why restraint has been included alongside the right to 'liberty and freedom of movement'. If the Australian Government and Parliament follow recommendation 2 by making 'freedom from restraint' the only enforceable right in the new Act, it may be preferable to have it as a standalone, sixth RCAC-formulated right. However, as discussed in Part V, having only one enforceable right is not supported.

C The Right of Autonomy, the Right to the Presumption of Legal Capacity, and in Particular the Right to Make Decisions about Their Care and the Quality of Their Lives and the Right to Social Participation

This RCAC-formulated right contains three components: autonomy, legal capacity and social participation. 'Care' and 'quality of their lives' are key to the second component of this third right, with 'care' also part of the fourth right ('fair, equitable and non-discriminatory treatment in receiving care').

The *RCAC Final Report* clarifies that 'care' encompasses more than decisions about health care delivered by health care professionals. The *RCAC Final Report* refers to both 'routine care' and 'complex care'. 'Routine care' was defined as assistance with tasks associated with daily living, such as diet, hydration, incontinence management, oral hygiene, skin care, infection control, assistance with mobility, supporting 'social and emotional needs', and support to remain 'socially connected to the broader community' (the latter being discussed under 'social participation').[108] Assistance with such matters may avoid the need for health care and they are definitely relevant to 'quality' of life. 'Complex care' requires more skill to deliver. It involves managing behaviour associated with dementia, addressing mental health conditions and the provision of palliative care at end-of-life.[109]

The two types of 'care' outlined in the *RCAC Final Report* accord with the UN Expert view that 'social and health care' be integrated for older persons.[110] The UN Expert has also emphasised that legal capacity is particularly relevant to being able to make decisions about medical care (including whether or not to consent to treatment),[111] which is reflected in the RCAC-formulated right.

108 *RCAC Final Report* (n 4) vol 1, 69–71. See also vol 2, 107–38.

109 Ibid vol 1, 69. See also vol 2, 100–7.

110 Rosa Kornfeld-Matte, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, 30th sess, Agenda Item 3, UN Doc A/HRC/30/43 (13 August 2015) 13 [70].

111 Ibid 10 [51].

1 Autonomy and Legal Capacity (in Particular Relating to Care)

The first two components – autonomy and legal capacity – are an amalgam of rights contained in the *ICCPR* (article 16 right to equality before the law),[112] *CRPD* (article 12 right of persons with *disabilities* to equal legal capacity) and *CEDAW* (article 15(2) right of *women* to the same opportunity to exercise legal capacity as men). Autonomy is specifically referred to in an overarching principle of the *CRPD*: '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' (article 3(a)).

Although the *CRPD* places autonomy and independence side-by-side, Katharine Schulmann et al highlight the importance of not conflating the two, given that persons in RACFs are no longer living independently without provision of care. They explain:

> the two are distinct terms, with autonomy being a prerequisite for independence, while the converse does not hold true … Collopy's differentiation between 'executional autonomy' and 'decisional autonomy' implies that an individual maintains his/her autonomy even if he/she is not able to carry out tasks independently, as long as he/she has a voice in the decisions leading to the execution of those tasks.[113]

The UN Expert has explained the link between autonomy and legal capacity as follows:

> [t]he denial or restriction of legal capacity directly impacts the autonomy of older persons, as they will no longer be able to exercise these other rights, including making decisions regarding civil, commercial, administrative, judicial or health-related matters concerning their well-being.[114]

The term 'legal capacity' is defined by the Disabilities Committee as 'includ[ing] the capacity to be both a holder of rights and an actor under the law', a two-limb test requiring

> legal standing to hold rights and to be recognized as a legal person before the law. This may include, for example, having a birth certificate, seeking medical assistance, registering to be on the electoral role or applying for a passport … [and] legal agency to act on those rights and to have those actions recognized by the law.[115]

The RCAC's articulation of the right to a presumption of full legal capacity is surprising given that most, if not all, Australian jurisdictions continue to use substituted decision-making regimes (this is consistent with Australia's reservation to the *CRPD*, indicating that substituted decision-making is allowed 'only where such arrangements are necessary, as a last resort and subject to safeguards').[116] The substituted decision-making regimes mean that many RACF residents are not considered to have full legal capacity, such that someone outside the RACF (eg, a family member) may be appointed their legal guardian and have the power to

112 There is also some international jurisprudence indicating that forced medical treatment violates article 17 of the *ICCPR* (the right to privacy), but it is beyond the scope of this article to discuss this right. See Joseph and Castan (n 70) [16.39].

113 Schulmann et al (n 6) 29.

114 Kornfeld-Matte (n 110) 9 [45].

115 Committee on the Rights of People with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) 3 [14] ('*General Comment No 1*').

116 'Chapter IV: Human Rights', *United Nations Treaty Collection* (n 78).

consent to the use of restrictive practices on their behalf. The Disabilities Committee urges States Parties to the *CRPD* to shift from substituted decision-making to 'supported decision-making',[117] as required by article 12(3): 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[118] The supported decision-making model has the added advantage of assisting residents of RACFs that are not subject to legal guardianship orders, but who require support to exercise their legal capacity.

In 2014, the ALRC developed the National Supported Decision-Making Principles and a Commonwealth decision-making model.[119] In 2017, the ALRC considered how these should be applied in RACFs specifically in the context of their inquiry into elder abuse,[120] and recommended 'that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles' as set out in its 2014 *Equality, Capacity and Disability in Commonwealth Laws* report.[121] This detailed consideration by the ALRC should guide the introduction of the presumption of legal capacity into the new Act.

2 Social Participation

The third component of this right – the 'right to social participation' – is not specifically contained in any international human rights treaties.[122] However, the Disabilities Committee describes legal capacity as 'the key to accessing meaningful participation in society'.[123] 'Participation' is more commonly used in relation to people with disabilities, whereas 'social participation' is more commonly used in relation to older people, and has been described as 'a key determinant of successful and healthy aging'.[124]

The *RCAC Final Report* considers that part of the routine care of residents of RACFs requires facilitation of 'social connection',[125] noting that 'it is important that

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117 Committee on the Rights of People with Disabilities, *General Comment No 1* (n 115) 6 [26]–[29].

118 Ibid 6 [29]. Australia issued an interpretive declaration in July 2008 in relation to article 12: 'Chapter IV: Human Rights', *United Nations Treaty Collection* (n 78).

119 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 63, 92.

120 Australian Law Reform Commission, *Elder Abuse* (n 43) 147–53 [4.204]–[4.224].

121 Ibid 147 (recommendation 4-12).

122 The preamble of the *CEDAW* makes it clear that discrimination against women 'is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries', article 19 of the *CRPD* refers to 'full inclusion and participation in the community' and article 30 of the *CRPD* relates to '[p]articipation in cultural life, recreation, leisure and sport'; but these articles are not the same as directly protecting a 'right to social participation'. Elements of *ICESCR* are relevant to, but are not specifically articulated as, a 'right to social participation', including article 13 which indicates that the right to education 'shall enable all persons to participate effectively in a free society', and the article 15 'right of everyone … to take part in cultural life'.

123 Committee on the Rights of People with Disabilities, *General Comment No 1* (n 115) 3 [13].

124 Barbara Piškur et al, 'Participation and Social Participation: Are They Distinct Concepts?' (2014) 28(3) *Clinical Rehabilitation* 211, 212 <https://doi.org/10.1177/0269215513499029>.

125 *RCAC Final Report* (n 4) vol 1, 71.

they remain engaged, valued and socially connected'.[126] This may explain why the Commissioners included a 'right to social participation' in this recommendation.

One element of participation is to ensure residents are involved in decision-making about the planning of the care provided in RACFs. This approach is consistent with a recommendation made by the UN Expert that '[o]lder persons should be included in the design, planning, implementation and evaluation of care, be these social or health-related services and facilities.'[127] It is also consistent with Principle 7 of the *United Nations Principles for Older Persons* that specifies that older persons should 'participate actively in the formulation and implementation of policies that directly affect their well-being'.[128] The social participation right is supported by the right to 'voice opinions', which is a component of the fifth right, as discussed below.

D The Right to Fair, Equitable and Non-discriminatory Treatment in Receiving Care

The *RCAC Final Report* exposes the diverse and intersectional needs of RACF residents, and highlights that these needs are not currently well-understood or being respected. The *RCAC Final Report* notes:

> The aged care system often struggles to provide appropriate care to people with diverse needs. We heard evidence in this regard from people with culturally and linguistically diverse backgrounds, people who identify as part of the LGBTI communities, care leavers, Aboriginal and Torres Strait Islander people[,] … veterans, and people who are experiencing, or are at risk of, homelessness … we heard there can be a lack of understanding and respect for people's culture, background and life experiences.[129]

This diversity of need must be addressed in implementing this right to fair, equitable and non-discriminatory treatment. The *ICCPR*, *CEDAW* and *CRPD* all prohibit discrimination. Article 2(1) of the *ICCPR* provides a wide and inclusive list of characteristics (such as, race, sex and religion) upon which discrimination in the enjoyment/provision of *ICCPR* rights should not occur. Under the inclusive 'other status' category, the rights of older persons have been recognised.[130] Article 26 of the *ICCPR* also ensures all persons are 'equal before the law' and enjoy 'equal protection of the law'. Article 26 is an 'autonomous right', such that it reaches beyond ensuring equality and prohibiting discrimination vis-à-vis the *ICCPR* rights (which articles 2(1) and 3 cover) and applies generally: 'when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory'.[131] Thus, non-discrimination under article 26 is not limited to the protection of civil and political rights, but extends to the

126 Ibid vol 3A, 13.
127 Kornfeld-Matte (n 110) 19 [116].
128 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th sess, 74th plen mtg (16 December 1991) 161–2.
129 *RCAC Final Report* (n 4) vol 1, 71.
130 See Joseph and Castan (n 70) [23.62]–[23.64].
131 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989) [12].

protection of economic, social and cultural rights.[132] Therefore, in the provision of aged care services that fall beyond the remit of civil and political rights, the article 26 right requires non-discrimination.

The *CEDAW* (articles 5 and 12(1)) and *CRPD* (article 5) focus on the protection of women and persons with disabilities from discrimination respectively, and both treaties refer specifically to health care services, which makes them particularly relevant to the way this right has been drafted (although, as noted above, care encompasses more than health care).

The only reference of relevance to 'fair' in the treaties relates to the provision of health and life insurance to people with disabilities, which the *CRPD* stipulates is to be 'provided in a fair and reasonable manner' (article 25(e)). It is unclear what 'fair' adds from a rights-perspective, and it may be preferable to remove it given the lack of international explication. However, the term may have substantive and procedural benefits in other areas of the law, such as administrative law.

It should also be acknowledged that discrimination is not always confined to a single attribute and may be based on intersecting grounds. Indeed, the demographic evidence demonstrates at least the intersection of gender and disability, with other attributes identified in the *RCAC Final Report* as quoted above. When discrimination is based on intersecting attributes, the impact of each discriminatory component can be experienced very differently, and the deprivation of rights is compounding in a manner that amplifies the harm. Greater attention to intersectionality in the context of older persons is warranted.[133]

E The Right to Voice Opinions and Make Complaints

This fifth RCAC-formulated right has two components. The first is expression of opinion and the second is an avenue of complaint.

1 Voicing Opinions

The *ICCPR* (article 19) and *CRPD* (article 21) both protect the rights to hold and express opinions. The United Nations Human Rights Committee ('Human Rights Committee') has noted that the freedom of opinion under article 19 is 'indispensable … for the full development of the person', and emphasised the connection between article 19 and other *ICCPR* rights by noting that other *ICCPR* rights cannot be impaired on the basis of a person's opinion.[134] The holding of an opinion, which is an absolute right,[135] is distinct from the expressing of an opinion

132 See Human Rights Committee, *Communication No 172/1984*, 29th sess, UN Doc CCPR/C/29/D/172/1984 (9 April 1987); Human Rights Committee, *Communication No 182/1984*, UN Doc CCPR/C/29/D/182/1984 (9 April 1987).

133 For a pragmatic approach to addressing intersectionality, see United Nations Partnership on the Rights of Persons with Disabilities and United Nations Entity for Gender Equality and the Empowerment of Women, 'Intersectionality Resource Guide and Toolkit: An Intersectional Approach to Leave No One Behind' (Toolkit, 2021).

134 Human Rights Committee, *General Comment No 34 Article 19: Freedom of Opinions and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) 1 [2], 2 [9] ('*General Comment No 34*').

135 Article 19 'is a right to which the *Covenant* permits no exception or restriction': ibid [9].

– which is akin to the right to freedom of expression,[136] and seems to be what the RCAC-formulated 'voicing of opinions' protects. There is a difference between impermissibly interfering with freedom of opinion by way of involuntarily influencing another's opinion – a real risk with older persons – and permissibly attempting to influence opinion.[137] Indeed, the Human Rights Committee has stated that '[a]ny form of effort to coerce the holding or not holding of any opinion' is prohibited.[138] The Human Rights Committee has also clarified that the right to freedom of expression is two-way – it includes 'the right to seek, receive and impart' – and that parties are obliged 'to ensure that persons are protected from any acts by private persons or entities that would impair' the freedom, which would include private providers of RACFs.[139]

2 Making Complaints

Given that the all-but-one component (restraint) of one RCAC-formulated right is envisaged to be enforceable in court, the importance of the right to complain is elevated. There is a real question, however, about who residents will be able to complain to. The *RCAC Final Report* recommended that a 'Complaints Commissioner' be part of the Aged Care Quality and Safety Commission and outlined a detailed plan for how this role could function, including that it be incorporated into the new Act.[140]

The RCAC also envisages that complaints may be made on behalf of residents where residents do not have the capacity to complain directly. The *RCAC Final Report* considers that 'older people, their family and friends, and workers' should all be able to complain to the Complaints Commissioner.[141] Moreover, the *RCAC Final Report* outlines a role for advocacy services in making complaints and assisting residents to make complaints.[142] Further, legislative protections for whistle-blowers, covering 'a person receiving aged care, their family, carer, independent advocate or significant other', were proposed.[143] Counsel Assisting advocated that such legislative protection be informed by provisions in the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act').[144] Such legislative

136 Joseph and Castan (n 70) [18.05].

137 Ibid, citing Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR-Commentary* (NP Engel, 2nd ed, 2005), 442. Nowak uses 'brainwashing' as an example of the former, and mass-media propaganda as an example of the latter.

138 Human Rights Committee, *General Comment No 34* (n 134) 3 [10]. See further, Fleur Beaupert, 'Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness' (2018) 7(3) *Laws* 1 <https://doi.org/10.3390/laws7010003>.

139 Human Rights Committee, *General Comment No 34* (n 134) [7], [11].

140 *RCAC Final Report* (n 4) vol 3B, 518–19, especially 519 (recommendation 98). See also 507–18.

141 Ibid 512.

142 Ibid 548–50. The report also referred to the need to expand advocacy services: at 550–2.

143 Ibid 521 (recommendation 99). See also 520–1.

144 Counsel Assisting, *Final Submission* (n 3) 452 [1525]. However, since this recommendation was made, significant problems with the NDIS have been identified by the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*. It is outside the scope of this article to detail these problems.

protection is necessary because the RCAC heard evidence that instances of abuse or mistreatment are often not reported due to fear of reprisal.[145]

Introducing the right to make complaints in the new Act will be only as effective as the practical framework developed for making complaints. The right to make complaints should be inclusive and accessible, and reference to the UN Special Rapporteur on the Rights of Persons with Disabilities' *International Principles and Guidelines on Access to Justice for Persons with Disabilities* may be of assistance with the development of the framework.[146]

F Conclusion on the RCAC-Formulated Rights

This analysis of the RCAC-formulated rights demonstrates that they are well-aligned with the concerns about treatment of RACF residents raised by the RCAC. With the exceptions of 'social participation' in the third right and 'fair' in the fourth right, the wording draws on Australia's treaty obligations, allowing interpretation of the new Act to benefit from the extensive international jurisprudence.

The RCAC-formulated rights diverge from existing soft law charters in Australia, such as the *Charter* and the *South Australian Charter of the Rights and Freedoms of Older People*, whose normative content is criticised for lacking adequate clarity and specificity for the purposes of enforcement. The clarity and specificity provided by the RCAC-formulated rights is welcome. Moreover, this clarity supports arguments in favour of the full enforceability of these rights.

There are, however, some omissions with the RCAC-formulated rights. First, the RCAC-formulated list of rights notably does not include a right to be treated with dignity and respect. These two norms are recognised in the title of the *RCAC Final Report – Care, Dignity and Respect* – and in the Foreword, where the Commissioners note their reform plan is 'designed to deliver high quality and safe aged care with dignity and respect'.[147] The RCAC received evidence about widespread lack of treatment with dignity in RACFs. A survey found that 24% of residents in RACFs expressed concern about lack of dignity[148] and this was highlighted particularly in relation to routine care associated with incontinence management.[149] Admittedly, some of the RCAC-formulated rights, such as the right to liberty, are underpinned in international jurisprudence by the requirement that states treat persons deprived of their liberty with dignity (*ICCPR* article 10(1))[150]. Similarly, it is axiomatic that the right to be free from CIDTP (*ICCPR* article 7) assumes that persons are to be treated with dignity: these are 'two sides

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145 *RCAC Final Report* (n 4) vol 3B, 520.

146 United Nations Human Rights Special Procedures, 'International Principles and Guidelines on Access to Justice for Persons with Disabilities' (Guidelines, August 2020) 23–4 (Principle 8). See further William Mitchell, 'The Human Right to Justice for Older Persons with Mental Health Conditions' (2021) 29(10) *American Journal of Geriatric Psychiatry* 1027 <https://doi.org/10.1016/j.jagp.2021.07.007>.

147 *RCAC Final Report* (n 4) vol 1, 58.

148 Ibid vol 2, 150.

149 Ibid 127.

150 Article 10 of the *ICCPR* (n 11) provides that 'all persons deprived of their liberty shall be treated with humanity and … dignity'.

of the same coin, with one requirement being positive and the other negative'.[151] Reliance on underpinnings and assumptions is less ideal than explicitly protecting dignity and respect.

Moreover, there is an inconsistency between the respect and dignity afforded to older persons and that afforded to persons with disabilities. Dignity and respect are included in the NDIS Act principles (section 4(6)) in line with *CRPD* (article 1), which states that promoting respect for dignity is one of the purposes of the *CRPD*.[152] Given that dignity and respect are afforded to those under 65 (to whom the NDIS applies), it is a small and recommended step for the Australian Government and Parliament to extend rights to be treated with dignity and respect to persons over 65.

Second, the *RCAC Final Report* does not canvass the suite of restrictions that may impact on the enjoyment rights. Not all rights are absolute, with the scope of some rights being qualified, and limitations on some rights being permitted where those limitations are considered reasonable and justifiable – which usually occurs where one right is balanced against or limited by another competing right(s) or some other non-protected value(s) of society. The RCAC-formulated rights cover the range of rights.

For example, the article 7 prohibition on CIDTP under the *ICCPR* is an absolute right, such that 'no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons'.[153] Proportionality may be relevant to assessing whether an act or omission constitutes a violation of article 7 – that is, if the act or omission is, in all the circumstances, serious enough to be classified as torture or CIDTP (the scope question); but once a violation of article 7 is found, proportionality is irrelevant because nothing justifies a violation (the justification question).

The right to liberty is an example of a qualified right. The right to liberty is qualified to the extent that non-arbitrary arrest or detention does not fall within the scope of the protected right, such that non-arbitrary arrest or detention do not constitute a violation of the right. Human rights considerations, such as appropriateness, justice and proportionality, may be relevant to assessing arbitrariness (the scope question); but if arbitrariness is found, they are irrelevant because there is no scope for justifications (the justification question). The right to fair, equitable and non-discriminatory treatment is treated similarly in international law.

151 Anita Mackay, 'The Fourth Prerequisite: Support Prison Staff to Treat Imprisoned People in a Human Rights-Consistent Manner' in Anita Mackay, *Towards Human Rights Compliance in Australian Prisons* (ANU Press, 2020) 236 <http://doi.org/10.22459/THRCAP.2020>.

152 This should not be taken to suggest that the NDIS is compliant with the *CRPD*. This is a matter that has been the subject of extensive commentary. See, eg, Elroy Dearn et al, 'Supported Residential Services as a Type of "Total Institution": Implications for the National Disability Insurance Scheme (NDIS)' (2022) 58(2) *Australian Journal of Social Issues* 1 <https://doi.org/10.1002/ajs4.233>; Jessica Cadwallader et al, 'Institutional Violence against People with Disability: Recent Legal and Political Developments' (2018) 29(3) *Current Issues in Criminal Justice* 259 <https://doi.org/10.1080/10345329.2018.12036101>; Gooding and Kayess (n 11).

153 Human Rights Committee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, HRI/GEN/1/Rev.9 (Vol 1) (10 March 1992) 38 [3].

The rights to freedom of opinion, expression and movement may be permissibly limited. This means that the right may be violated, but that violation is excused or accepted if the legislative objective being pursued by the limitation is reasonable and the legislative means used to achieve the legislative objective is demonstrably justified. The international instruments, such as the *ICCPR*, tend to dictate which objectives are reasonable (eg, national security, public order, public health, and respecting the rights of others), but the human rights instruments within the sub-national jurisdictions do not.[154] Demonstrable justification invariably involves matters of rational connection, minimum impairment and proportionality.[155]

The issue of restrictions on rights is linked to the earlier discussion regarding the lack of a comprehensive human rights framework within which the new Act will operate. Careful consideration must be given to whether and how the RCAC-formulated rights may be permissibly restricted.

V INTERPRETIVE TOOLS AND EFFECTIVE ENFORCEMENT OF RIGHTS

The RCAC-formulated rights are intended to aid interpretation of the new Act, with only one RCAC-formulated right (restraint) to be separately and directly enforceable. Obligations flowing from the relevant international treaties will be considered, before attention turns to enforcement proposals under recommendation 2 of the *RCAC Final Report*.

A International Obligations

As discussed earlier, the *RCAC Final Report*, perhaps mistakenly, states that the RCAC-formulated rights are elements of the right to health under *ICESCR*. The *RCAC Final Report* then refers to Australia's obligations under the *ICESCR*, which 'provides that governments must use "all appropriate means" to work towards the stated ends, "particularly the adoption of legislative measures"'.[156] It then states that '[w]e intend that the list of rights … may be invoked by individuals seeking protection from neglect, and its effects, by providers or governments', and

154 Where general limitations provisions are used, such as in the sub-national human rights instruments, the reasonableness of an object of a limitation must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' which, 'at a minimum', requires the objective to 'relate to concerns which are pressing and substantial in a free and democratic society': *R v Oakes* [1986] 1 SCR 103, 138–9 (Dickson CJ for Chouinard, Lamer, Wilson and Le Dain JJ), citing *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

155 Demonstrable justification under the *ICCPR* has developed under the Human Rights Committee's jurisprudence. However, the test for demonstrable justification under the sub-national human rights instruments has been embedded in the relevant instrument, building upon the Canadian and South African limitations provisions. For example, section 7(2) of the *Victorian Charter* (n 9) structures the proportionality assessment against the following factors: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. See also section 28 of the *HRA* (n 9) and section 13 of the *QHRA* (n 9).

156 *RCAC Final Report* (n 4) vol 3A, 17.

that '[t]he prescription of these rights recognises Article 12 of the *Covenant* and opens avenues for its enforcement.'[157]

Reference to the obligations of States Parties under the *ICESCR* is curious. The RCAC-formulated rights are based predominantly on civil rights guaranteed in the *ICCPR*, which imposes quite different obligations on States Parties compared with the *ICESCR*. Article 2(1) of the *ICESCR* states that '[e]ach "State Party"… undertakes to take steps … to the maximum of its available resources, with a view to achieve progressively the full realisation of the rights'. This obligation is circumscribed, allowing for progressive rather than immediate realisation of the rights, and realisation based on the availability of resources.[158] This is in contrast to article 2(2) of the *ICCPR*, which provides that 'each "State Party" … undertakes to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights'. This obligation requires immediate and full realisation of the *ICCPR* rights.[159]

Article 2(3) of the *ICCPR* requires States Parties '[t]o ensure that any person whose rights or freedoms … are violated shall have an *effective* remedy'.[160] The Human Rights Committee 'attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law', and notes that 'the obligation to provide an effective remedy … is central to the efficacy' of article 2(3).[161] It also recognises that 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person'.[162]

Moreover, the article 2(3) obligation to ensure effective remedies includes the duty to investigate alleged violations of human rights obligations. According to the Human Rights Committee:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. … A failure by a "State Party" to investigate allegations of violations could in and of itself give rise to a separate breach of the *Covenant*. Cessation of a violation is an essential element of the right to an effective remedy.[163]

Article 2(3) is also to be read in conjunction with the substantive rights. For example, under the article 7 (right to freedom from torture and CIDTP), States Parties have specific procedural obligations to ensure that 'competent authorities' investigate complaints of ill treatment 'promptly and impartially … so as to make

157 Ibid.

158 See further, Committee on Economic, Social and Cultural Rights, *CESCR General Comment 3: The Nature of States Parties' Obligations*, 5th sess, UN Doc No E/1991/23 (14 December 1990).

159 There are equivalent obligations of immediate and full realisation contained in article 4(1) of the *CRPD* (n 12), article 2(1) of the *CAT* (n 26) and article 2 of the *CEDAW* (n 24).

160 Emphasis added.

161 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 6 [15], [16] ('*General Comment No 31*').

162 Ibid 6 [15].

163 Ibid.

the remedy effective'.[164] Accordingly, Australia has a positive legal duty to prevent and investigate human rights abuses. Other relevant treaties impose duties on States Parties to take effective measures under the treaty, including legislative, administrative, judicial and other measures.[165]

Finally, States Parties cannot outsource their international human rights obligations to service providers. For example, if non-state actors, such as private RACFs, were to deprive residents of their liberty, this does not absolve Australia of its responsibilities.[166] According to the Human Rights Committee, under article 9 of the *ICCPR*:

> States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties. … They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals.[167]

More generally, Australia has a 'due diligence' obligation to prevent, punish, investigate and redress violations of rights caused by private persons or entities (ie, non-state actors). This addresses 'horizontal' violations of rights between non-state actors, which gives rise to the legal obligations on States Parties to investigate human rights violations by private entities, such as private RACFs.[168] Given the clear links between the RCAC-formulated rights and the *ICCPR* rights, the goal of the new Act should be the full and immediate realisation of the relevant rights, including effective remedies.

B The *RCAC Final Report*

The *RCAC Final Report* emphasised that the current Act 'should be replaced with legislation that articulates the purpose of the new aged care system from the perspective of *enforceable* rights', and proposed 'that the new system for aged care should be based squarely on the *protection* and *promotion* of the rights of the people who require support and care'.[169] These laudable goals, which are consistent with international obligations, may be elusive under the current proposals.

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164 Committee on Economic, Social and Cultural Rights, *Human Rights Instruments: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (27 May 2008) vol 1, 192 [14].

165 *CRPD* (n 12) art 4; *CAT* (n 26) art 2(1); *ICESCR* (n 25) art 2(1); *CEDAW* (n 24) art 2.

166 The federal government has international legal personality and only the federal government can enter into binding international obligations under sections 51(xxix) and 61 of the *Australian Constitution*: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 237–8 (Murphy J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 282 (Mason CJ and Deane J). From an international law perspective, it is the federal government that is held to account for violations of human rights within Australia, even if those violations are committed by sub-national jurisdictions, such as states or territories: see, eg, *ICCPR* (n 11) art 50. The operation of international law in a federation is well-illustrated by Australia's first individual communication before the Human Rights Committee: see Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994).

167 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) 2 [7] (citations omitted). See also at 14–16 [44]–[52].

168 Human Rights Committee, *General Comment No 31* (n 161) 3 [8]; Human Rights Committee, *General Comment No 36: Article 6*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 5 [21].

169 *RCAC Final Report* (n 4) vol 3A, 14, 16 (emphasis added).

1 Interpretative Function

The RCAC-formulated rights are envisaged to serve an interpretative function – that is, the rights ‘may be taken into account in interpreting the Act and any instrument under the Act’.[170] Like other statutory and common law interpretative obligations, the RCAC-formulated rights ‘will guide the interpretation of all aspects of the new Act and will help to resolve any uncertainty or ambiguity in its provisions’.[171] Although this interpretative obligation is weaker than the rights-compatible statutory interpretation obligations under the three sub-national human rights instruments,[172] interpretative obligations are worthwhile components to a broader suite of remedies.[173] An interpretation of a statutory provision that *is* consistent with the RCAC-formulated rights, that otherwise would *not* have been interpreted consistently with RCAC-formulated rights, may provide a complete remedy. Moreover, an interpretative obligation offers a systemic fix, ensuring that all future interpretations and applications of the relevant statutory provisions are interpreted in a manner consistent with the RCAC-formulated rights. This is compatible with the *ICCPR* ‘obligation integral to article 2 to take measures to *prevent* a recurrence of a violation of the *Covenant*’.[174]

2 Freedom from Restraint

The problems with enforcement under the new Act arise, however, because the full range of enforcement mechanisms are not being contemplated for all of the RCAC-formulated rights. Despite the *RCAC Final Report* noting that ‘[r]ights are … of little use if they are not enforceable’,[175] and acknowledging that, ‘[t]ypically, rights are supported by a related enforceable duty’, the *RCAC Final Report* recommended that only the ‘right to freedom from restraint’ is to ‘be separately and directly enforceable in the courts’.[176] Despite the Commissioners’ intention ‘that the list of rights … may be *invoked* by individuals seeking protection from neglect, and its effects’, and that ‘[t]he prescription of these rights … opens avenues for its *enforcement*’,[177] the *RCAC Final Report* takes a narrow view of the ‘enforceability’ of rights potentially creating numerous problems.

It is difficult to understand *why* only one component of one of the RCAC-formulated rights is to be ‘separately and directly enforceable in the courts’; and

170 Ibid vol 3A, 18 (recommendation 2).

171 Ibid vol 3A, 15.

172 See *Victorian Charter* (n 9) s 32(1); *HRA* (n 9) s 30; *QHRA* (n 9) s 48(1).

173 For a discussion of the problems with the judicial approach to rights-compatible statutory interpretation obligations under the Victorian human rights instrument (and hence the ACT and Queensland instruments) see Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights that Parliament Intended It to Have’ (2011) 22(1) *Public Law Review* 15; Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond’ (2014) 40(2) *Monash University Law Review* 340 <https://dx.doi.org/10.2139/ssrn.2603929>.

174 Human Rights Committee, *General Comment No 31* (n 161) 7 [17] (emphasis added).

175 *RCAC Final Report* (n 4) vol 1, 14.

176 Ibid vol 3A, 19.

177 Ibid 17 (emphasis added).

how only one component of one of the rights (freedom from restraint) might be 'separately and directly enforceable in the courts' without the other components of that right (the right to liberty and freedom of movement) being similarly enforceable, given the RCAC-formulation of these rights as being amalgamated in the new Act. The failure to match the rights rhetoric with 'separately and directly enforceable' rights will compromise the attainment of those rights.

3 Non-Delegable Statutory Duty

The *RCAC Final Report* recommended that the other RCAC-formulated rights 'be seen as aspects of a general duty to provide high quality care imposed by the new Act on approved providers',[178] which is supported by a separate statutory duty on RACF providers: '[t]he new Act should include a general, positive and non-delegable statutory duty on any approved provider to ensure that the personal care or nursing care they provide is of high quality and safe so far as is reasonable'.[179] The general duty on RACF providers is 'to ensure, so far as is reasonable, the quality and safety of its aged care services', sending 'a clear message … about the primary duty of an approved provider: to protect the health, wellbeing and safety of its residents'.[180] The duty will be similar to 'an employer's duty under occupational health and safety law – a duty that the vast majority of approved providers already owe to their employees and contactors'.[181]

The consequences of breaching the statutory duty are not discussed within the rights framework outlined in volume 3A, but rather addressed under the 'chapter regarding effective regulation' in volume 3B.[182] The enforcement discussion within the effective regulation discussion is the most relevant: enforcement is said to aid deterrence, and 'must be credible and effective'.[183] Civil penalties are recommended as 'one of the more serious forms of enforcement action available', and should be available to the Quality Regulator 'in response to serious failures in the provision of care', including for a breach of the restraint provision and breach of the statutory duty.[184] The civil penalty provisions do not displace any action against providers under the general criminal law. Moreover, the *RCAC Final Report* also recommended empowering courts to award compensation to persons who have suffered harm as a consequence of a contravention of a civil penalty provision. A compensation application can be made by the Quality Regulator when it brings civil penalty proceedings, or directly by the person receiving aged care services – with this private right of action requiring both a breach of the statutory duty *and* consequential harm.[185] Further, court-enforceable undertakings are recommended to ensure the remedying of non-compliance, being described as

178 Ibid 19.

179 Ibid 19, 97 (recommendation 14).

180 Ibid vol 3A, 98.

181 Ibid. The statutory duty is in addition to the 'non-delegable common law duty to exercise reasonable care for the health and safety of residents': at 98.

182 Ibid vol 3A, 98.

183 Ibid vol 3B, 529.

184 Ibid 530. See generally 532–3, especially 533 (recommendation 101).

185 Ibid vol 3B, 534–5. See especially 535 (recommendation 102).

'an efficient, effective and flexible tool for responding to potential or actual non-compliance'.[186] In any later enforcement proceedings regarding the undertaking, a court order could include a compensation award for loss associated with a breach. The other enforcement powers recommended are infringement notices, banning orders and the appointment of an external manager.[187]

Although a positive and non-delegable statutory duty backed by a range of enforcement measures including civil penalties, compensation and enforceable undertakings is welcome, it may provide *insufficient* coverage across the range of behaviours that potentially violate the RCAC-formulated rights in a manner that a freestanding statutory duty that applied directly to the RCAC-formulated rights would not. First, this non-delegable statutory duty to ensure the personal or nursing care is of high quality and safe will admittedly capture some violations of the right to freedom from CIDTP or abuse, to liberty and movement, and to autonomy, legal capacity and social participation, and to fair, equitable and non-discriminatory treatment. However, it seems ill-suited to capturing violations of the right to voice opinions and make complaints, and it remains to be seen if all violations of the RCAC-formulated rights occur in the context of personal or nursing care alone.

Second, it is unclear why the *RCAC Final Report* supports the making of arguments about rights-violations through the filter of high quality and safe personal care or nursing care, rather than simply in their own right. We should anticipate gaps in coverage to emerge and unintended consequences to develop by filtering rights arguments through quality and safety of care arguments, as opposed to establishing a separate and directly enforceable statutory duty for all of the RCAC-formulated rights. 'Piggybacking' rights-remedies onto other causes of action has been trialled in two of the sub-national human rights instruments and has been shown to be an ineffective means of enforcement (see below), which itself is reason to avoid 'piggybacking' rights claims onto quality and safety of care claims.

Third, given the proposed centrality of rights protection, promotion and enforcement within the new Act, it is unclear why enforcement is aligned with occupational health and safety measures, rather than freestanding rights enforcement. There is value in identifying errant behaviour as a statutory breach of *rights*, rather than *occupational health and safety*, with the stigma attached to rights-violations offering more by way of deterrence, credibility and effectiveness. Further, aligning the statutory duty owed by RACF providers to residents of RACFs with the duties owed by RACF providers to employees and contractors fails to recognise the vulnerability of RACF residents, undermining the recognised need to appropriately adapt remedies to account for *vulnerabilities*.

186 Ibid 536.
187 Ibid 536–9. See especially 539 (recommendation 103).

4 Statutory Rights Instruments

Relatedly, this brings us to the Australian experience with enforcement of rights vis-à-vis public authorities under the three sub-national statutory rights instruments. Under these instruments, it is unlawful for public authorities to act in a way that is incompatible with rights (the substantive limb) and to fail to give proper consideration to a right when making a decision (the procedural limb).[188] The addition of the procedural limb to the substantive limb in the context of the RCAC-formulated rights better supports the fifth right to voice opinions and make complaints, and adds important procedural protections that may *prevent* the substantive breaches from arising with respect to all of the RCAC-formulated rights.

The *Human Rights Act 2004* (ACT) provides a direct cause of action[189] for such unlawfulness, which is essentially an action for a separate and enforceable breach of statutory duty, but it excludes an award of damages.[190] The Australian Capital Territory ('ACT') model provides the most effective remedies for violations of rights of the three jurisdictions. The adoption of a statutory duty with a freestanding cause of action as per the ACT model, alongside the additional proposed enforcement powers proposed by the *RCAC Final Report* (which include compensation), would best protect and promote the RCAC-formulated rights. Were the ACT model to be adopted and adapted to this context, additional improvements regarding the enforceability of rights against public authorities in the context of statutory rights legislation are well rehearsed and ought to be considered.[191]

In contrast, the Victorian and Queensland legislation require rights-claims to unlawfulness to be 'piggybacked' onto another cause of action,[192] with damages being permitted only if damages are an available remedy for that other cause of action.[193] Reliance on the 'piggyback' mechanism has meant that remedies for rights infringement have been inaccessible and ineffective. Weinberg J stated that the relevant section of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), section 39, 'is drafted in terms that are convoluted and extraordinarily difficult to follow'.[194] Janina Boughey has described the *Victorian Charter* as 'remedially weak and procedurally complex', with the 'cost

188 *Victorian Charter* (n 9) s 38(1); *HRA* (n 9) s 40B; *QHRA* (n 9) s 58(1).

189 *HRA* (n 9) s 40C(2).

190 *HRA* (n 9) s 40C(4).

191 For a discussion of the *Victorian Charter* that includes details of numerous other references see Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 219 <https://doi.org/10.5040/9781509919857.ch-011>; Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, September 2015) ch 4. For a discussion of the *HRA* see Helen Watchirs, Sean Costello and Renuka Thilagaratnam, 'Human Rights Scrutiny under the *Human Rights Act 2004* (ACT)' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook, 2020) 177. For a discussion of the *QHRA* see Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward' (2020) 45(1) *Alternative Law Journal* 12 <https://doi.org/10.1177/1037969X19898538>.

192 *Victorian Charter* (n 9) s 39(1); *QHRA* (n 9) s 59(1).

193 *Victorian Charter* (n 9) s 39(3); *QHRA* (n 9) ss 59(3), 59(6).

194 *Director of Housing v Sudi* (2011) 33 VR 559, 596 [214].

and complexity' of proceedings making it 'especially problematic for vulnerable people at most risk of their [*Victorian*] *Charter* rights being impinged'.[195] Boughey criticises section 39(1) of the *Victorian Charter* because it 'over-complicates the process of applying for a remedy for breach of the [*Victorian*] *Charter*, and its possible effect of denying remedies to many persons whose [*Victorian*] *Charter* rights have been breached'.[196] Indeed, Michael Brett Young, who undertook the eight-year review of the *Victorian Charter*, found that the complexity of section 39 added to the cost of *Victorian Charter* litigation, creating a disincentive for victims to pursue their human rights claims.[197] The 'piggyback' device for a cause of action under the Victorian and Queensland instruments should not be replicated; and the problems 'piggybacking' has created for access to remedies should ward against the filtering of rights claims through quality and safety of care claims.

5 Effective Remedies

The international obligation to provide *effective* remedies is key to the realisation of rights. Effective remedies are broad ranging: they might involve interpreting legislation to be compatible with rights; the enforcement of statutory duties against aged care providers in a court/tribunal; the development of policy and practice within a legal regulatory framework to prevent or cease infringements of a right; an apology to the victim; or a payment of damages. Not providing a *full* range of *freestanding* remedies for all of the RCAC-formulated rights arguably violates the article 2(3) *ICCPR* obligation, undermining the efficacy of rights.

The Australian Government and Parliament must carefully calibrate the enforcement mechanisms under the new Act to ensure that remedies are accessible and effective, leading to real improvements in the lives of residents in RACFs. The power of an interpretative tool should not be underestimated – particularly given its systemic reach; and the adoption of an interpretative obligation more closely formulated to that contained in the three sub-national human rights instruments should be considered, the advantage being the obligation for rights-compatible interpretation 'does not fall to be applied only whether the ordinary meaning of a statutory provision … is ambiguous'.[198] When considering enforcement vis-à-vis service providers in the aged care setting, standalone enforcement mechanisms should be extended to all of the RCAC-formulated rights, not just the right to freedom from restraint. Moreover, the mode of enforcement ought to align with models for rights enforcement, rather than occupational health and safety for maximum deterrence and credibility, with the ACT model warranting the closest consideration for the new Act.

195 Boughey (n 191) 219.

196 Ibid. The limits of enforcing the rights contained in the *HRA*, *Victorian Charter* and *QHRA* in practice has been raised in a variety of contexts (for example, in relation to prisons, see Mackay (n 151) 81–90).

197 Young (n 191) 119–22.

198 Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2018) 269.

VI CONCLUSION

This article examines the peripheral position of rights in the current regulatory scheme for residents of RACFs. Relegating rights to the periphery has contributed to facilitating the abuse and neglect of RACF residents which has been extensively documented by the RCAC and other inquiries. Human rights can assist Australia in shifting toward a more person-centred regulatory approach. This shift, recommended by the *RCAC Final Report*, has been endorsed by 12 'Aged Care Consumer Organisations', including Dementia Australia, Older Persons Advocacy Network and the Council on the Ageing, who emphasise the need for 'significant consultation with older people using aged care' as well as 'experts in the legislating of human rights protections'.[199]

This article offers some analysis to help calibrate this shift, drawing on international human rights jurisprudence. This shift away from unhelpfully symbolic protections toward the guarantee of properly formulated and scoped rights, accompanied by effective and accessible enforcement mechanisms, under a new Act is necessary for those who live in institutionalised settings and who daily face the risks posed by institutionalisation.

In terms of scope, this requires the addition of the right to be treated with dignity and respect, and consideration of if and how rights may be restricted. In terms of enforcement, this requires all of the guaranteed rights to be fully, effectively and equally enforced – particularly in relation to the interpretative tool and enforcement tools against actors in the aged care settings. Filtering rights through care is sub-optimal because it obfuscates these rights in a context where consumers already have minimal understanding of their rights. All the rights need to be made equally enforceable if they are to have effective remedies.

Much more than new legislation will be required to address the problems uncovered by the RCAC. At a minimum, legislation needs to be accompanied by preventive monitoring and organisational cultural change.[200] The Grattan Institute details some of the structural reforms that will be required to the aged care sector[201] to accompany the new legislative scheme. It highlights that rights 'will not be upheld without structural reform' and that such reform includes:

> accountability, adequate funding of supports, sufficient staffing, and availability of services. Appropriate funding and regulatory incentives will be needed to promote cultural change in both government and service providers towards a focus on rights and outcomes rather than efficiency and profit.[202]

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199 Council on the Ageing Australia, 'Joint Statement by 12 Aged Care Consumer Organisations: Actions to Be Taken Following the Royal Commission into Aged Care Quality and Safety Final Report' (Joint Statement, 10 April 2021) 8.

200 Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 221.

201 Duckett and Swerissen (n 30) 28.

202 Ibid.

The 'cultural change' referred to here would include education of staff working in RACFs.[203]

Furthermore, human rights scholars have identified further challenges to be addressed, including the need to improve community attitudes and ensure communities are more inclusive, 'engage with the political economy of the aged care system and challenge the ways in which regulatory frameworks, funding, and contractual arrangements prevent the realisation of human rights', and reduce reliance on institutionalised care.[204]

This article considers one piece of the puzzle of this multidimensional and much-needed structural reform. This analysis is offered in the hope that bipartisan support exists for reform of the aged care sector. After so many inquiries and reviews consistently finding that a service provider-focused framework is no longer tenable, there is urgent need to reform the system so as to protect the dignity of those living in RACFs.

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203 This was recommended by the Royal Commission into Aged Care Quality and Safety: *RCAC Final Report* (n 4) vol 3B, 472 (recommendation 89).

204 Steele et al, 'Ending Confinement and Segregation' (n 37) 325.