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Dear Dr Popple

### **Development of an international legally binding instrument on the human rights of older persons**

Thank you for the opportunity to provide feedback on the consultation by the United Nations Human Rights Office of the High Commissioner Intergovernmental Working Group (IGWG) regarding the development of an international legally binding instrument on the promotion and protection of the human rights of older persons. The Queensland Law Society (QLS) appreciates being consulted on this important consultation.

This response has been compiled by the QLS Elder Law Committee, whose members have substantial expertise in this area. Our responses to the three questions posed by the IGWG are below followed by additional commentary on Australian law reform implications.

#### **1. Overarching framework**

QLS supports the international legally binding instrument being grounded in the international human rights framework established by the Universal Declaration of Human Rights (UDHR) and the core United Nations (UN) human rights treaties, while directly addressing the systemic and well-documented protection gaps affecting older persons. The United Nations Human Rights Council has mandated the elaboration of a treaty that promotes, protects, and ensures the full enjoyment of all human rights by older persons, explicitly recognising them as rights-holders.<sup>1</sup>

#### ***Human rights-based, autonomy-centred framework***

QLS suggests the overarching framework should:

- affirm older persons as full rights-holders, regardless of age-related impairments, cognitive decline, or support needs;

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<sup>1</sup> United Nations, *Intergovernmental Working Group on older persons* (2026)  
<<https://www.ohchr.org/en/hrc-subsiaries/iwg-older-persons>>.

## Development of an international legally binding instrument on the human rights of older persons

- be grounded in the principles of universality, indivisibility, interdependence, and interrelatedness of human rights, consistent with the UDHR and core treaties;
- explicitly recognise age as a prohibited ground of discrimination, including discrimination based on perceived or actual cognitive impairment in older age, addressing a persistent gap in international human rights law;<sup>2</sup> and
- incorporate a legal capacity and supported decision-making framework, drawing on the paradigm established by Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), which recognises that all persons enjoy legal capacity on an equal basis with others and are entitled to support in exercising that capacity.<sup>3</sup>

### ***Recognition of autonomy despite cognitive impairment***

QLS suggests the instrument should clearly reject approaches that equate cognitive impairment with loss of autonomy or legal capacity. Instead, it should:

- affirm that older persons retain the right to make decisions about their own lives, even where they experience cognitive impairment or require support;
- require States Parties to replace substitute decision-making regimes (such as plenary guardianship or best-interests determinations imposed without regard to will and preferences) with supported decision-making models that respect the individual's autonomy, will, and preferences; and
- recognise supported decision-making as a means of exercising legal capacity, not as a limitation upon it, consistent with UN human rights guidance and practice.

This approach reinforces the recognition of older persons not as passive recipients of care, but as active agents entitled to self-determination throughout the life course.

## **2. Core principles**

In addition to established human rights principles, QLS recommends the instrument articulate a set of core, binding principles that explicitly safeguard autonomy and decision-making in older age.

### ***Core principles***

#### *1. Equality and non-discrimination on the basis of age*

Including discrimination based on perceived or actual cognitive impairment, and intersectional discrimination (e.g. age combined with disability, gender, or Indigenous status).<sup>4</sup>

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<sup>2</sup> Cecilia Brocca, 'The Rights of Older Persons: A Historic Step Forward' on *EJIL: Talk! Blog of the European Journal of International Law* (30 April 2025) <<https://www.ejiltalk.org/the-rights-of-older-persons-a-historic-step-forward/>>.

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Article 12 <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>>;

Centre for Public Representation, *SDM as an International Movement* (2026)

<<https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>>

<sup>4</sup> The Global Alliance for the Rights of Older People, *Conceptual framework, underlying principles and*

## Development of an international legally binding instrument on the human rights of older persons

### 2. *Autonomy, dignity, and self-determination*

Recognising that older persons have the right to make decisions about their own lives, including decisions relating to health care, living arrangements, finances, and relationships, regardless of support needs.

### 3. *Equal recognition before the law and legal capacity*

Affirming that older persons enjoy legal capacity on an equal basis with others in all aspects of life, and that cognitive impairment must never justify the automatic removal or restriction of that capacity.

### 4. *Supported decision-making*

Requiring States Parties to:

- provide access to appropriate, accessible, and effective support for decision-making where needed;
- ensure that such support respects the will and preferences of the older person; and
- establish safeguards against abuse, undue influence, and conflicts of interest, consistent with international human rights standards.

### 5. *Participation and inclusion*

Guaranteeing the right of older persons to participate fully and meaningfully in decisions that affect them, including through supported decision-making arrangements where required.<sup>5</sup>

### 6. *Accountability and access to remedies*

Ensuring access to effective remedies where autonomy, legal capacity, or decision-making rights are violated, including in care and institutional settings.<sup>6</sup>

### ***Reaffirming existing rights and addressing normative gaps***

QLS recommends the instrument reaffirm all civil, political, economic, social, and cultural rights as they apply in older age, while developing clearer norms in areas where existing treaties have failed to protect older persons effectively, particularly:

- decision-making in health, aged care, and long-term care settings;
- financial decision-making and protection from exploitation;
- consent to care, treatment, and living arrangements; and

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*Possible scope of a new legally binding instrument on the human rights of older persons* (30 January 2026)

<<https://rightsofolderpeople.org/wp-content/uploads/2026/02/GAROP-DISCUSSION-PAPER-on-CONCEPTUAL-BASIS-AND-SCOPE-FINAL-30-Jan-2026.pdf>>

<sup>5</sup> Human Rights Watch, *UN: Treaty on Older People's Rights Moves Ahead* (3 April 2025)

<<https://www.hrw.org/news/2025/04/03/un-treaty-older-peoples-rights-moves-ahead>>

<sup>6</sup> Above n 4.

- access to justice for older persons subject to guardianship or substituted decision-making regimes.

### 3. Overall structure or architecture

To ensure clarity, coherence, and effectiveness, the legally binding instrument should follow established UN treaty architecture, while clearly embedding autonomy and supported decision-making throughout.

#### **Recommended structure**

##### 1. *Preamble*

- Acknowledges demographic ageing, ageism, and the widespread denial of autonomy and legal capacity in older age.
- Reaffirms the UDHR, core treaties, and the relevance of CRPD principles on legal capacity and supported decision-making.

##### 2. *Definitions*

Includes definitions of “older persons,” “legal capacity,” and “supported decision-making” to ensure clarity and consistency.

##### 3. *General Principles*

Explicitly includes autonomy, legal capacity, and supported decision-making as foundational principles, similar to the CRPD’s approach.

##### 4. *General Obligations*

Requires States Parties to respect, protect, and fulfil the rights of older persons, including by:

- reforming laws that permit substitute decision-making based on age or cognitive impairment; and
- establishing supported decision-making frameworks applicable in health, care, financial, personal and legal contexts.

##### 5. *Specific Rights*

Substantive rights articulated in ways that explicitly safeguard autonomy and decision-making, particularly in care, health, housing, and justice contexts.

##### 6. *Implementation, Monitoring, and Accountability*

- Reporting obligations addressing legal capacity and decision-making practices.
- Oversight mechanisms to monitor compliance and prevent abuse.
- Requirements for age-disaggregated and impairment-sensitive data collection.<sup>7</sup>

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<sup>7</sup> Above n 4.

This framing:

- aligns the older persons instrument with settled UN human rights law on legal capacity;
- avoids recreating outdated welfare or “best interests” models; and
- directly addresses one of the most frequent and harmful rights violations experienced by older persons — loss of autonomy through guardianship and substituted decision-making.

### **Additional comments – Australian Law Reform Implications: Autonomy and Supported Decision-Making**

An international legally binding instrument on the human rights of older persons would have direct and constructive implications for Australian law, particularly in relation to guardianship and administration regimes, aged care legislation, and health consent frameworks. While Australia has made important reforms, significant structural inconsistencies and protection gaps remain, especially for older persons with cognitive impairment.

#### **1. Guardianship and Administration Law in Australia**

##### ***Current position***

Guardianship and administration laws in Australia are state and territory-based, and historically rely on substitute decision-making models, particularly guardianship and financial administration orders. Although these regimes generally include a presumption of capacity, they continue to authorise the removal or restriction of legal capacity once a person is assessed as lacking decision-making capacity.<sup>8</sup>

National inquiries and reviews have identified that guardianship can expose individuals — including older persons — to loss of autonomy, exclusion from decision-making, and heightened risks of abuse, neglect, and exploitation, even where protective intent exists.<sup>9</sup>

##### ***Emerging reform trends***

Recent Australian developments demonstrate a clear shift toward supported decision-making, but implementation remains uneven:

- The Australian Capital Territory has amended its guardianship legislation to require decision-makers to consider whether a person could make decisions with support, and to facilitate such support wherever practicable.<sup>10</sup>

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<sup>8</sup> Dementia Australia, *Planning ahead: Decision making capacity and the law* (2020) <<https://www.dementia.org.au/sites/default/files/2023-12/Planning-Ahead-Decision-Making-Capacity-And-The-Law.pdf>>.

<sup>9</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Supported decision-making and guardianship - proposals for reform roundtable* (3 June 2022) <<https://disability.royalcommission.gov.au/publications/supported-decision-making-and-guardianship-proposals-reform-roundtable>>;

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Roundtable Supported decision-making and guardianship: Proposals for reform* (16 May 2022) <<https://supporteddecisionmaking.com.au/wp-content/uploads/sites/4/2023/02/Roundtable-Supported-decision-making-and-guardianship-Proposals-for-reform.pdf>>.

<sup>10</sup> Department of Health, Disability and Ageing, *Recommendation 6.4 – Terms and definitions in guardianship and administration legislation* (27 November 2025) <<https://www.health.gov.au/resources/publications/disability-royal-commission-progress-report>>.

- Other jurisdictions, including New South Wales, Victoria, South Australia and Western Australia, are considering reforms following recommendations of the Disability Royal Commission, but many have not yet enacted substantive legislative change.<sup>11</sup>
- Anecdotally, substitute decision-making is often invoked too quickly, without adequate exploration of supported decision-making alternatives.

### ***Implications of an international instrument***

A convention on the rights of older persons would:

- require Australia to systematically prioritise supported decision-making over guardianship for older persons with cognitive impairment;
- reinforce the obligation to respect will and preferences, rather than applying “best interests” standards that override autonomy; and
- drive national consistency across jurisdictions by aligning guardianship laws with international human rights standards on legal capacity and decision-making support.

## **2. Aged Care Law and Practice**

### ***Rights-based reform under the Aged Care Act 2024***

Australia's new *Aged Care Act 2024* (Cth) represents a significant shift to a rights-based framework. The Act's Statement of Rights explicitly affirms that older people have the right to:

- make decisions about their own lives and care;
- be supported to make decisions where necessary;
- take personal risks in pursuit of quality of life; and
- have decisions respected, including in the presence of cognitive impairment.<sup>12</sup>

The Aged Care Act also introduces a registered supporter role, signalling legislative recognition of supported decision-making in aged care settings.

### ***Ongoing challenges***

Despite these advances, aged care practice often remains influenced by:

- risk-averse cultures that prioritise organisational liability over autonomy;
- informal substitution of decision-making by providers or family members; and
- over-reliance on guardianship orders rather than support-based approaches.

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[2025/volume-6-enabling-autonomy-and-access/recommendation-64-terms-and-definitions-in-guardianship-and-administration-legislation>](https://www.agedcarequality.gov.au/older-people/your-rights/statement-rights).

<sup>11</sup> Ibid.

<sup>12</sup> Aged Care Quality and Safety Commission, *Statement of Rights* <<https://www.agedcarequality.gov.au/older-people/your-rights/statement-rights>; *Aged Care Act 2024* (Cth) s 23.

An international instrument would reinforce that cognitive impairment alone cannot justify the erosion of autonomy, and that aged care systems must be designed to support, not replace, decision-making.

### 3. Health Consent and Medical Decision-Making

#### ***Legal framework***

Australian health law recognises that:

- adults with decision-making capacity have the right to consent to or refuse treatment;
- capacity is decision-specific and time-specific, and not determined solely by diagnosis; and
- people with cognitive impairment retain the right to participate in decision-making and must be supported to do so wherever possible.<sup>13</sup>

However, where a person is assessed as lacking capacity, substitute consent mechanisms (advance directives or substitute decision-makers) are typically relied upon, particularly in acute and aged care settings.

#### ***Supported decision-making in healthcare***

National guidance increasingly recognises supported decision-making as best practice in healthcare, including under the Australian Charter of Healthcare Rights and the National Safety and Quality Health Service Standards.<sup>14</sup>

Nonetheless, supported decision-making is not consistently embedded in legislation or clinical protocols, and older persons with dementia are particularly vulnerable to premature exclusion from consent processes.

#### ***Implications of a convention***

An international instrument would:

- strengthen Australia's obligation to ensure that health consent laws and clinical practice prioritise supported decision-making;
- require safeguards to ensure that substitute decision-making is used only as a last resort, and in a manner consistent with the person's will and preferences;
- support national alignment between aged care, health, and guardianship frameworks.

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<sup>13</sup> ELDAC, *Overview: Capacity and Consent to Medical Treatment* (2025)

<<https://www.eldac.com.au/Our-Toolkits/End-of-Life-Law/Capacity-and-Consent-to-Medical-Treatment/Overview>>;

Australian Commission on Safety and Quality in Health Care, *My Healthcare Rights - A guide for people with cognitive impairment* <[https://www.safetyandquality.gov.au/sites/default/files/2020-07/sq18-046\\_consumer\\_guide-charter\\_of\\_healthcare\\_rights-cognitive\\_impairment\\_8am-8pm\\_accessible.pdf](https://www.safetyandquality.gov.au/sites/default/files/2020-07/sq18-046_consumer_guide-charter_of_healthcare_rights-cognitive_impairment_8am-8pm_accessible.pdf)>.

<sup>14</sup>Australian Commission on Safety and Quality in Health Care, *Spotlight issue: Supported decision-making* (2026) <<https://www.safetyandquality.gov.au/publications-and-resources/resource-library/nsqhs-standards-user-guide-health-care-people-intellectual-disability/partnering-consumers-standard/spotlight-issue-supported-decision-making>>;

Australian Commission on Safety and Quality in Health Care, above n 13.

#### 4. Why an International Instrument Matters for Australia

While Australia has taken important steps toward recognising autonomy and supported decision-making, current protections remain fragmented, jurisdiction-dependent, and inconsistently applied.

An international legally binding instrument on the rights of older persons would:

- provide a clear normative benchmark for law reform across Australian jurisdictions;
- reinforce the shift away from paternalistic models toward autonomy-centred support;
- strengthen accountability for systemic practices that erode older persons' legal capacity; and
- ensure that older Australians with cognitive impairment are recognised as rights-holders, not exceptions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on [REDACTED].

Yours faithfully



Peter Jolly  
**President**