

Commentary on Aged Care, Housing Rights, and the Right to Housing

Nola Ries and Jessie Hohmann

Introduction

Charlotte Steer's proposed *Aged Care Rights Act* is an important legislative reform in relation to elder law, human rights and access to justice. The legislation offers a neat solution to the lack of rights residents in aged care experience over their home and housing, extending existing housing rights and remedies enjoyed in other tenures to the sector through a novel legal mechanism. In doing so, the legislation sidesteps the politics so often associated with conversations around rights in Australia.¹ At the same time, it brings into play principles that animate pressing 'bigger picture' issues for feminist legislation: autonomy, agency, vulnerability, ethics of care, formal and substantive equality, protection and paternalism, among others.

Elder Law, Human Rights and Access to Justice

A key feature of the proposed *Aged Care Rights Act* is its focus on older people as rights holders. Scholars in the field of elder law have argued for rights-based advocacy, both to raise awareness of the 'indignities and invasions experienced by older adults'² and to enable legal action that can drive systemic changes. Framing these issues in terms of rights reflects existing international law, codified with respect to housing specifically in the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11(1) of the ICESCR enshrines a right to an adequate standard of living, 'including adequate food, clothing and housing'.³ International law also requires states to ensure the equal rights of men and women to the enjoyment of their rights, in ICESCR Articles 2(2) and 3.

At root, the right to housing protects each person's right to live somewhere in peace, dignity and security. It imposes obligations on States Parties – including Australia – to take concrete steps to respect, protect and fulfil this right, including through legislative measures, and without discrimination.⁴ However, efforts to draft a UN Convention on the rights of older persons

demonstrate that they are often not accorded equal dignity, rights and status.⁵ This is true in Australia, where the conceptual model for residential aged care by Ibrahim and others notes that 'rights' are 'an aspect which is rarely considered as it is often taken for granted'.⁶ However, the needs of people living in residential aged care 'are the same in principle as older persons who dwell in the community'.⁷ Steer's legislation implements this principle in practice by giving residents in aged care facilities the same rights as older people in other housing arrangements.

Strengths

Steer's *Aged Care Rights Act* directly responds to key recommendations from the recent Royal Commission into Aged Care Quality and Safety⁸ and the Australian Law Reform Commission (ALRC) report on elder abuse.⁹ To ameliorate the '[s]ubstandard care and abuse [that] pervades the Australian aged care system',¹⁰ the Royal Commission called for embedding a rights-based approach at the core of aged care legislation. Similarly, the ALRC called for strengthening legal frameworks to give 'greater consumer control'¹¹ to older people who seek and receive aged care services.

By giving more robust rights to residents, the proposed legislation addresses the serious failings of the national regulator, the Aged Care Quality and Safety Commission.¹² To the extent that the regulator has 'taken its hands off the wheel',¹³ Steer's Act empowers residents to pursue legal remedies if their rights are breached. The provisions for representative proceedings are also an essential feature of the legislation. Over half of aged care residents have dementia¹⁴ and live with some degree of cognitive impairment that may affect their capacity in relation to legal matters. The rights of these individuals may be safeguarded through a representative proceeding, or by a guardian or other person with a genuine concern for their wellbeing. The provisions for mediation are also a welcome feature. Australian research demonstrates support for mediation for older people who have experienced elder abuse¹⁵ and lessons from elder mediation¹⁶ can inform supportive and effective processes under the new Act.

Because the Act harnesses existing legislation, giving the NCAT jurisdiction to decide disputes in relation to the federal *Charter of Aged Care Rights*, it cleverly avoids opportunities for grandstanding and the politicisation of human rights which have tended to weaken human rights laws in Australia. At the same time, it in fact protects the human rights of aged care residents, ending the discriminatory exclusion of aged care housing in the current legislative scheme and responding to aged care residents as holders of rights, equally entitled to experience aged care as a home to be enjoyed in peace, dignity and security.

Limitations

While Steer's approach has clear benefits, there are also drawbacks. It carries forward current limitations in the legislative scheme, while doing little to advance human rights discourse in Australia: by avoiding the politics of human rights, it also avoids the potential for a more robust claim to housing as a human rights issue. While this may be a sensible political choice, it also means that many of the structural issues that lie behind poor care and conditions in residential aged care will not be addressed. These include the devaluation of care and other 'women's work', and structural issues in Australia's housing and social welfare landscape, which include a housing affordability crisis coupled with poor social safety nets and social rights. Another legislative approach, which explicitly named and claimed a right to housing, might have capitalised on the current moment of broader housing crisis to engage economic, social and cultural rights for Australia. However, despite a widely acknowledged and deep crisis of homelessness and lack of access to adequate and affordable housing in Australia,¹⁷ recent proposals for a federal human rights act do not include a right to housing per se, continuing Australia's exceptionalism in failing to accept economic, social and cultural rights as of equal status and justifiability to civil and political rights.¹⁸ This reinforces our view that Steer has carefully navigated between practical change and the political pitfalls in invoking human rights in Australia in crafting this legislative proposal.

The proposed Act goes some way to strengthen access to justice for older people, but further work will need to address persistent barriers. For example, compared to younger cohorts, older people are more likely to ignore legal problems, delay seeking professional advice and have 'lower confidence in enforcing their rights and approaching official agencies'.¹⁹ As noted above, residents with cognitive impairment will be reliant on others to assist or represent them, but those individuals may be deterred by power imbalances and fear of retaliation.²⁰ The Act could be strengthened with explicit attention to supported decision-making, whereby residents are entitled to supports that enable them to exercise their legal decision-making rights, which may include access to a funded scheme of trained support workers.²¹ Research also demonstrates the importance of scrutinising how statutory protections are applied in practice to older complainants. The decisions of courts and tribunals reveal varying perceptions and characterisations of older people, which may reinforce ageist 'narratives of extreme vulnerability and pitifulness'.²²

Strategies to improve the enforcement of residents' rights in residential aged care must be accompanied by improvements in the staffing levels and working conditions for the aged care workforce. This is a key lesson from the Serious Incident Response Scheme, which was implemented to fortify responses to and reporting of specific forms of abuse or violence against residents.²³ In this respect, the rights of residents in aged care to enjoy their housing are interconnected with other economic and social rights: rights to decent work and working conditions, and to social security in particular. These rights,

which are protected under the ICESCR, will in turn be better protected when ‘women’s work’ such as care work is revalued, working toward equality and non-discrimination in the enjoyment of all human rights.

Conclusion

In conclusion, we wish to highlight the unique contribution of this legislation, which offers achievable law reform based on a model of dignity, autonomy and agency. In our view, it has the capacity to substantially improve access to justice in housing rights, and thus housing conditions, for residents in residential aged care. Operating in a sphere that is highly feminised, the legislation will provide a powerful and much-needed boost to formal equality for older persons and women. While the legislation does not fundamentally unsettle structural biases and limitations that perpetuate inequalities, it provides an additional mechanism to expose abuses and harms in residential care. Illuminating the problems in current institutional structures will support ongoing advocacy and ambition for different models of care and accommodation that advance choice, dignity and respect for older Australians.

Notes

- 1 See eg Hilary Charlesworth et al., ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423; John Piccini, *Human Rights in Twentieth-Century Australia* (Cambridge 2019); Louise Chappell et al., *The Politics of Human Rights in Australia* (Cambridge 2009).
- 2 Nina A Kohn, ‘Elder Rights: The Next Civil Rights Movement’ (2011) 21(2) *Temple Political & Civil Rights Law Review* 321, 326.
- 3 *International Covenant on Economic, Social and Cultural Rights*, UNGA Res 2200A (XXI), opened for signature 16 December 1966 (entered into force 3 January 1976).
- 4 For discussion of the right to housing in international law, see Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013) 17–32; see also UN CESCR, CESCR General Comment No 4: *The Right to Adequate Housing (Article 11(1))*, UN Doc E/1992/23 (1992); UN CESCR, CESCR General Comment No 3: *The Nature of States Parties’ Obligations (Article 2(1))*, UN Doc E/1991/23 (1990); UN CESCR, ‘Non-Discrimination in Economic, Social and Cultural Rights’ (art 2 para 2 of the *International Covenant on Economic, Social and Cultural Rights*) (2009) E/C.12/GC/20; Jessie Hohmann, ‘The Right to Housing: A Research Agenda’ in Markus Moos (ed.) *A Research Agenda for Housing* (Edward Elgar 2019) 18–20.
- 5 *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, UN GA ‘Resolution Adopted by the General Assembly on 20 December 2012: Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons’ A/Res/67/139 (13 February 2013).
- 6 Joseph E. Ibrahim et al., ‘Meeting the Needs of Older People Living in Australian Residential Aged Care: A New Conceptual Model’ (2020) 39(2) *Australasian Journal on Ageing* 148, 153.
- 7 *Ibid* 154.

- 8 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect Volume 1, Summary and Recommendations* (final report, 28 February 2021). https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-1_0.pdf.
- 9 Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report 131, 14 June 2017). <https://www.alrc.gov.au/publications/elder-abuse-report>.
- 10 Royal Commission into Aged Care Quality and Safety (n 8) 68.
- 11 Australian Law Reform Commission (n 9) 4.2.
- 12 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 2: The Current System* (Final Report, 1 March 2021), 4.14 'Ineffective Regulation'. <https://agedcare.royalcommission.gov.au/publications/final-report-volume-2>.
- 13 Ibid 229.
- 14 Australian Institute of Health and Welfare, *Dementia in Australia, Residential Aged Care* (2023). <https://www.aihw.gov.au/reports/dementia/dementia-in-aus/contents/aged-care-and-support-services-used-by-people-with/residential-aged-care>.
- 15 Annie Herro et al., 'Elder Mediation Services Among Diverse Older Adult Communities in Australia: Practitioner Perspectives on Accessibility' (2021) 61(7) *The Gerontologist* 1141.
- 16 Dale Bagshaw, 'Elder Mediation: An Emerging Field of Practice' in Maria F Moscati et al. (eds), *Comparative Dispute Resolution* (Edward Elgar, 2020) 202–16.
- 17 See eg Hal Pawson, 'The Housing and Homelessness Crisis in NSW Explained in 9 Charts', *The Conversation* (16 March 2023). <https://theconversation.com/the-housing-and-homelessness-crisis-in-nsw-explained-in-9-charts-200523>; ACOSS, 'A Secure, Affordable Home for Everybody' (2020). <https://www.acoss.org.au/housing-homelessness/>; J Hohmann, 'Toward a Right to Housing for Australia: Reframing Affordability Debates through Article 11(1) of the ICESCR' (2020) 26(2) *Australian Journal of Human Rights* 292; J Hohmann, 'A Right to Housing for the Victorian Charter of Human Rights and Responsibilities? Assessing Potential Models under the International Covenant on Economic, Social and Cultural Rights; the European Social Charter; and the South African Constitution' (2022) 48 *Monash University Law Review*.
- 18 AHRIC, 'Free and Equal: Position Paper: A Human Rights Act for Australia' (Position Paper, 2022) 146–65.
- 19 Law Council of Australia, *The Justice Project: Final Report* (2018) 16. <https://www.lawcouncil.asn.au/justice-project/final-report>.
- 20 Royal Commission into Aged Care Quality and Safety, vol 2 (n 12) 148.
- 21 For further details on supported decision-making models, see eg Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-Making* (Research Program, 24 January 2023). <https://disability.royalcommission.gov.au/policy-and-research/research-program>.
- 22 Michal Segal et al., 'The Judicial Construction of Older Consumers' Rights: A Qualitative Case-Law Analysis' (2021) 36(1) *Canadian Journal of Law and Society* 159, 174.
- 23 Lise Barry and Patrick Hughes, 'The New Serious Incident Response Scheme and the Responsive Regulation of Abuse in Aged Care' (2022) 29(2) *Journal of Law and Medicine* 465.