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**Building Forward Better for Older Persons post COVID-19**

**‘Building forward better with human rights law and procedures  
and law reform’**

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**Introduction**

1. In this contribution to the discussion on how we should build back our societies post-COVID-19 in a way which reflects the lessons learnt during the pandemic I will focus on law, in particular but not only human rights law at the international, regional and national levels. This brief paper does not purport to be a complete review of how legal systems and systems of human rights protection directly or indirectly failed to ensure protection of the human rights of older persons, but rather points to steps that could be taken to scrutinize existing laws and procedures in many countries to see whether they provide adequate protection against violations of human rights in or on the ground of older age.

2. Many of the policy and practical measures being proposed and adopted to facilitate recovery from the impact of the epidemic are focused on economic recovery – in particular the provision of financial stimulus to preserve and reinvigorate jobs in the sectors that were particularly hard hit by the pandemic. Most of these require action immediately or in the short-term, although other policy measures such as the expansion of the skilled workforce to ensure appropriate care and support to people in the community including those who are older, are longer-term measures.

3. So far as legal measures are concerned, few of these are likely to be immediate or even short-term: they are more likely to be measures that take time to formulate and enact and their impact may be much further down the track than many of the other measures being promoted to build back/forward/better relatively quickly. But if properly designed, they may help to prevent a repeat of some of the missteps and violations of human rights, including those on the basis of older age, that took place during the pandemic and have also been seen as societies have begun to get on top of the pandemic and work their way out the other side.

4. This paper argues that there is an urgent need to make legal changes specifically to ensure the enjoyment of human rights in older age as part of a post-pandemic response. These changes include:

- a. the enactment of new laws or the strengthening of existing laws in relation to ageism and age discrimination in all areas of life and to ensure that these fully integrate an intersectional dimension in their coverage; and

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<sup>1</sup> This paper draws on Andrew Byrnes and Titti Mattsson, *Background paper: The human rights of older persons*, 20<sup>th</sup> Informal ASEM Seminar on Human Rights, February 2021, <https://asef.org/wp-content/uploads/2021/02/ASEMHRS20-Background-paper.pdf>.

- b. reviewing all other areas of law in order to ensure that they are not based on stereotyped and ageist assumptions or treat persons disadvantageously; and
- c. reviewing the mandates and operations of national human rights institutions to ensure that they have the legal authority, incentives and resources to promote and protect the right to equal enjoyment of human rights without discrimination based on older age.

5. One of the challenges faced in undertaking ageing and human rights audits of existing laws and policies against international human rights standards is the as yet incomplete international human rights framework in this area.<sup>2</sup> Even when bodies try to adopt an approach that reflects a human rights approach, the lack of an international convention on the subject prejudices their efforts in that regard, compared with those bodies that can measure their proposal and policies against a framework such as the Convention on the Rights of Persons with Disabilities.

6. This has been graphically illustrated by the work of two major public inquiries in Australia that have been underway over the last couple of years: the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability<sup>3</sup> and the Royal Commission into Aged Care Quality and Safety,<sup>4</sup> the final report of which was made public on 1 March 2021.<sup>5</sup> The former has taken the CRPD as its guiding framework and explicitly drawn on its standards, while the latter has floundered somewhat in rights terms because of the lack of an external point of reference on human rights in older age, though it has on occasion used the CRPD to inform its assessment, though only in relation to younger persons in institutional aged care facilities<sup>6</sup> and also draws on the right to health in the International Covenant on Economic, Social and Cultural Rights

7. While the Aged Care Royal Commission was established before the arrival of COVID-19 and has its rights limitations, the wide-ranging inquiry and examination of aged care including the impact of COVID-19 may nonetheless be an example that might be adapted to other countries which have ongoing rights issues in aged care or have experienced major losses of life and rights violations in care homes during the pandemic.

8. The pressing need for a convention to provide conceptual and policy guidance is underlined by the contrast between these two institutions. There is also a pressing need to develop and enhance explicit protections of human rights in older age at the regional and sub-regional levels (especially in Asia Pacific where the regional protections are sparse indeed).

9. I now turn to three specific areas of action at the national level that should be undertaken as part of the recovery from the COVID-19 pandemic.

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<sup>2</sup> See UN OHCHR, *Update to the 2012 Analytical Outcome Study prepared by the Office of the High Commissioner for Human Rights on the normative standards in international human rights law in relation to older persons*, paper prepared for the 11<sup>th</sup> session of the Open-Ended Working Group 2021.

<sup>3</sup> <https://disability.royalcommission.gov.au/>.

<sup>4</sup> <https://agedcare.royalcommission.gov.au/>.

<sup>5</sup> Royal Commission into Aged Care Quality and Safety (Australia), *Final Report: Care, Dignity and Respect*, 8 vols (2020), <https://agedcare.royalcommission.gov.au/publications/final-report>.

<sup>6</sup> See Byrnes, 'Human rights unbound: An unrepentant call for a more complete application of human rights in relation to older persons - -And beyond' (2020) *Australasian Journal on Ageing* 91-98 <https://doi.org/10.1111/ajag.12800>.

**(a) Enactment or strengthening of laws relating to ageism and age discrimination**

10. There are few countries that provide explicit and extensive constitutional or legislative coverage against ageism or discrimination on the basis of older age, although many have protections that cover some areas such as employment (though often these are flawed). The violations of rights during COVID-19 should provide an impetus in many countries to undertake a systematic review of laws providing protection against violations of human rights on the basis of older age and the need to adopt positive measures to ensure equality for all regardless of older age. The pandemic brought into the open many ageist assumptions and practices in countries in different parts of the world (as well as some manifestations of inter-generational solidarity); it also generated its own particular examples of ageist thinking and confected inter-generational competition.

11. As various commentators have noted, international human rights law provides no explicit obligation on States to take steps to eliminate ageism despite its corrosive effects on the rights of persons who are subjected to ageist treatment and indeed who internalize social attitudes of ageism.

12. States need to review their existing laws protecting against discrimination on the basis of older age – and to enact such laws if they do not have them. If a State does not have such laws, then comprehensive legislation should be enacted. Such legislation must adopt a flexible definition of older age (or apply to age discrimination generally) and should not allow for wide exceptions that are based on ageist assumptions or practices. Such legislation should not be confined to one field such as employment, but should be far wider in its coverage, extending to the provision of goods and services, housing, education, and other areas.

13. The definition of discrimination should cover both direct and indirect discrimination on the ground of age and should also allow for remedies for intersectional discrimination so that discrimination on the basis of (older) age in conjunction with sex, race, gender identity, migration status and other relevant characteristics) are covered. Remedies should be accessible, prompt and effective. Any law needs to be accompanied by education so that people are aware of their rights and the avenues for enforcement; national human rights institutions provide one means of doing this promotion and the developing legal and rights literacy.

14. To the extent that technical support would be useful in the preparation of such laws, there may be a role to be played by bodies such as the Commonwealth, the regional commission of the United Nations or other bodies with expertise in this field, though it is important to recognize the importance of local context when making legislative changes of this sort.

**(b) Auditing laws for their consistency with equality on the basis of older age**

15. But it is not just age discrimination and human rights laws that need to be looked at. The pandemic provides an opportunity for all jurisdictions to undertake soul-searching as to whether their laws more generally create and reinforce ageist and age discriminatory practices. States should set themselves a comprehensive goal of an age-based audit of their existing laws to ensure that all laws are consistent with fundamental standards of human rights and their treaty obligations as those apply to older persons. This audit should include labour and employment legislation, criminal and other laws relating to elder abuse, social security, social insurance and pension laws, laws relating to the exercise of legal capacity (eg guardianship laws), health legislation, housing laws legislation regulating long-term care and other laws.

16. There are various options for undertaking such an audit. In some jurisdictions this might be an appropriate inquiry for a law reform commission, an independent human rights commission, or a special inquiry established for the purpose, or indeed for a Parliamentary

committee. All of these should be open to receiving extensive public input, especially from older persons and from their representative organisations. Once again, without a convention, there is something of a challenge involved in ensuring that the body conducting the audit has a comprehensive and coherent set of norms that will ensure that its analysis advances the enjoyment of human rights without discrimination on the basis of older age.

**(c) National human rights institutions and other procedures for the protection and promotion of human rights**

17. One of the problems identified in relation to the protection of human rights in relation to older age is the problem of access to remedies at the national and international levels. Commentators have argued on the basis of empirical evidence that many persons who are seen as ‘older’ because they are of a particular chronological age do not see themselves as ‘old’ and may not therefore view protections and remedies designated for ‘older persons’ as necessarily appropriate to them. Further, there are questions of whether many people, older people included, are aware of their rights and of the avenues to pursue complaints where they consider they have been victims of violations. Often the courts and tribunals seem alien and remote and the time that proceedings take is a disincentive to persons who are looking for a remedy within a reasonable time.

18. This is an area in which national human rights institutions and similar procedures might be able to do more. Many national human rights institutions have general mandates that would cover persons discriminated against on the ground of older age, though as with the international treaties, there may not be a specific age-related mandate. Some NHRIs do have an explicit age mandate and some even have dedicated commissioners with responsibility for dealing with violations of human rights on the basis of older age.

19. One concrete step that regional networks of NHRIs could undertake would be to encourage their member NHRIs to undertake an audit of their work in relation to equality and discrimination on the basis of older age. Individual NHRIs could also undertake this on their own initiative but sharing experiences through the regional networks or the Global Alliance of National Human Rights Institutions (GANHRI) and its Working Group on Ageing might give rise to cross-fertilization and stimulate further action among NHRIs.

20. Any review of an NHRI’s work, which might involve an internal review but also an independent external review, should examine whether it has an explicit mandate to address discrimination on the basis of older age (or attributed older age) and ageist stereotypes, and discrimination on the basis of age more generally. If it does not have a clear mandate in this regard, then the NHRI should urge the legislature to provide it with such a mandate. Further, each NHRI should also examine whether its mandate in relation to older age allows intersectional discrimination to be taken into account in determining whether there is discrimination and that individual grounds of discrimination are not ‘siloes’ in different parts of the NHRI. Thirdly, it should examine what proportion of its activities and funds are directed to the protection of human rights in older age and whether it has or has devoted sufficient resources to have an impact. Finally, the NHRI should also assess whether the criterion of representativeness under the *Paris Principles relating to national human rights institutions* is reflected in the make-up of its commissioners and staff.

**(d) A concluding general point about law-making in a state of exception**

21. While it is important to focus on legal reviews and reforms with a specific focus on ageing, there is also a broader point that should be considered, as this also has relevance for the protection of human rights without regard to older age and human rights more generally.

22. In many countries the implementation of responses to the pandemic, in particular restrictions on movement and requirements for self-isolation were often implemented pursuant to regulations, decrees or orders made under public health, quarantine or emergency legislation. The use of those procedures of subordinate legislation or administrative regulation was not focused on issues that primarily or exclusively affected older sections of the population; but they were in some cases defined by reference to (older) chronological age or had an indirect impact on older cohorts. They had a broader impact on rights as well.

23. There have been and will be many more post-mortems on how systems of human rights protection held up in the face of rights-restrictive pandemic responses or failed to do so. However, worthy of mention is the extensive use of administrative law making where the regulations or subordinate instruments that are used are not subject to the normal processes of Parliamentary review and possible disallowance that give rise to serious concerns about the protection of human rights in times of emergency

24. For example, in Australia most regulations, orders or other instruments made under Acts of the Commonwealth or State and Territory Parliaments must be laid before the legislature and may be disallowed by the legislature within a certain period. The reasons for disallowance are not specified in the laws or Parliamentary procedures that provide for this review mechanism: they may be substantive objections to the policy the regulations implement, arise from concerns about the encroachment on human rights or violation of other principles of good administration, or may reflect a political assessment. In the Australian context this power is supplemented by various standing Parliamentary committees that perform the role of scrutinizing these subordinate instruments against a set of stated standards and they report to Parliament on problems with them. Motions to disallow a regulation may be moved by any member of the Parliament, though often scrutiny committees are active in doing so. These procedures provide an important procedure that allows a more systematic and transparent scrutiny of subordinate legislation that is essentially made by the executive government, albeit within the framework set out in primary legislation enacted by the legislature.

25. During the pandemic, there was an explosion of subordinate instruments. Many of these were not reviewable by the Parliament in the normal manner, so the usual processes of Parliamentary scrutiny were not available. These public health orders were essentially emergency powers that permitted restrictions on citizens' movements under threat of criminal penalty, often valid for an initial period, but renewable, with neither the initial proclamation nor the subsequent renewals subject to the scrutiny and disallowance by the legislature. Fortunately this practice has led to some pushback by Parliaments,<sup>7</sup> but it is not clear whether it will lead to a change in practice.

26. However, this illustrates that those committed to the protection of human rights without discrimination on the ground of older age must focus not only on age-specific legislation and concerns, but also engage with the procedures for the protection of human rights generally, as limitations on those procedures can lead to restrictions on the rights of persons of older age.

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<sup>7</sup> See, eg, Australian Senate Standing Committee on the Scrutiny of Delegated Legislation, *Interim report: Inquiry into exemption of delegated legislation from parliamentary oversight*, 2 December 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptionfromoversight/Interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptionfromoversight/Interim_report).