

**My Animal, my support, and my new home in a retirement village:  
disability discrimination, assistance animals and old age**

**Paul Harpur and Nancy A. Pachana<sup>1</sup>**

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\* Dr Paul Harpur, Senior Lecturer, TC Beirne School of Law, the University of Queensland, Australia and International Distinguished Fellow, the Burton Blatt Institute, Syracuse University, New York. Professor Nancy A Pachana, School of Psychology, the University of Queensland; Co-Director, UQ Ageing Mind Initiative. We thank Ms Caitlin Hunter, Michael Hughes, Joseph Lelliott and Ellen Wood for their excellent research assistance, and editorial work.

## Introduction

The inequalities confronting older Australians have attracted considerable public attention,<sup>2</sup> and significant attention in this journal.<sup>3</sup> One issue that has not been addressed is how a decision by an older person not to be identified as a person with a disability has important implications for the options they then have to begin or continue to use animals to manage their medical conditions. In this paper we argue that emerging disability anti-discrimination laws and international human rights norms provide new ways of approaching older persons who seek to use animals in managing their quality of life.

Where older persons live in their own home, they generally have the choice whether or not to keep a pet, or to obtain or to continue to use an assistance animal. The situation is much different when older persons live in aged care facilities, retirement villages, and in other dwellings with a body corporate. Residents of retirement villages are highly active, yet many also experience health conditions where use of an assistance animal may be warranted, making this group ideal for an analysis of disability identity and assistance animals. While some retirement villages permit residents to have animals,<sup>4</sup> other schemes expressly exclude them.<sup>5</sup>

Part I analyses the wide range of circumstances where animals are being used to assist people with medical conditions. We then show how many of these animal-human bonds receive the same statutory protection as guide dogs for the blind and deaf. To illustrate the breadth of people who could claim disability rights, and to understand the implications on society more broadly, this paper will analyse the potential numbers of residents in retirement villages who could assert their animals are protected by disability discrimination laws.

Part II identifies the substantial legal and social pressures motivating older persons not to identify as a person with a disability. Whether a person decides to identify as old or person with a disability is a personal preference. If an older person does identify as a person with a disability, and satisfies relevant legal tests which, as analysed below, are quite easy to satisfy, then this creates new regulatory protections with respect to being accompanied by animals in retirement villages.

Finally, in Part III, this paper explores how the new *Convention on the Rights of Persons with Disabilities* ('CRPD'),<sup>6</sup> and paradigm shifting models that focus on ability diversity rather

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<sup>2</sup> Australian Department of Health, *Review of National Aged Care Quality Regulatory Processes* (1 December 2017) Ageing and Aged Care <<https://agedcare.health.gov.au/quality/review-of-national-aged-care-quality-regulatory-processes>>.

<sup>3</sup> David Cripps et al, 'Abuse of Older People: Issues for Lawyers' (2002) 1 *Elder Law Review* 14; Lorna Fox O'Mahony and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' (2006) 5 *Elder Law Review* 1; Cheryl Hastie, 'Progress in the Fight Against Elder Abuse' (2004) 3 *Elder Law Review* 8; Les Jackson, 'Elder Abuse and Queensland Legislation' (2003) 2 *Elder Law Review* 2; Louise Kyle, 'Out of the Shadows - A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1.

<sup>4</sup> Animal Welfare League Australia, *A Message from Animal Welfare League Australia* (2017) <<http://petfriendlyagedcare.com.au/>>.

<sup>5</sup> See, for an example of where a scheme banned cats and dogs on environmental grounds which impacted on a disability assistance animal, *Ondrich v Kookaburra Park Eco-Village* [2009] FMCA 260.

<sup>6</sup> *Convention on the Rights of Persons with Disabilities*, signed 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

than disability inclusion, might reframe the identity of disability in ways that enhance equality outcomes.

Accordingly, this paper has substantial implications for older persons and, of relevance for this paper, managers of retirement villages.

## **Part I. How residents of retirement villages can claim disability discrimination protection for animals that assist with their mental, physical or sensory conditions**

### *Who lives in retirement villages?*

Retirement homes are generally open to people over 55 years old who may or may not be in remunerated work.<sup>7</sup> The statutory regimes in New South Wales,<sup>8</sup> Northern Territory,<sup>9</sup> Victoria,<sup>10</sup> and Western Australia<sup>11</sup> define retired persons to mean people that have either retired from full-time work (permitting them to engage in part-time work), or who are over the age of 55. Tasmania requires a person to be both over 55 years old and retired; however, if the person has a partner (spouse or significant relationship) over 55 who is retired from full-time work, then the partner need not meet this criterion.<sup>12</sup> The Australian Capital Territory and Queensland statutes do not define what constitutes a retired person which means retirement villages can set their own criteria.<sup>13</sup>

The Australian Bureau of Statistics reports that while the majority of people retire to access superannuation and retirement benefits, the second main reason is related to health.<sup>14</sup> A remarkable 19% of men and 14% of women report that the reason they left the workforce was due to 'sickness, injury or disability'.<sup>15</sup> While many workers have accumulated sufficient wealth and embrace the opportunity to retire, many other workers are forced to retire by either their own or their employers' assessment of their ability to perform their job.<sup>16</sup> Forced

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<sup>7</sup> This is subject to the particular rules of the villages.

<sup>8</sup> *Retirement Villages Act 1999* (NSW) s 4.

<sup>9</sup> *Retirement Villages Act (NT)* s 3.

<sup>10</sup> *Retirement Villages Act 1986* (Vic) s 3.

<sup>11</sup> *Retirement Villages Act 1992* (WA) s 3.

<sup>12</sup> *Retirement Villages Act 2004* (Tas) ss 3 and 7; *Retirement Villages Act 2004* (Tas) s 3 defines spouse to include people in 'significant relationship[s]', as defined within the *Relationships Act 2003* (Tas) s 4. Section 4 of that Act relevantly defines 'significant relationships to include those that are appropriately registered, as well as those that satisfy a wide criteria'.

<sup>13</sup> *Retirement Villages Act 2012* (ACT); *Retirement Villages Act 1999* (Qld).

<sup>14</sup> Australian Bureau of Statistics, *6238.0 - Retirement and Retirement Intentions, Australia, July 2014 to June 2015* <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6238.0Main%20Features3July%202014%20to%20June%202015>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> Lynne Bennington, 'Prime Age Recruitment: The Challenges for Age Discrimination Legislation' (2004) 3 *Elder Law Review* 27.

retirement, including for health reasons, leads to poorer health and quality of life outcomes than voluntary retirement.<sup>17</sup> As a consequence, it is probable that many people in retirement villages will have some form of health complaint. Next, we will illustrate how most of these health complaints would meet the test of disability in anti-discrimination laws.

### **How wide is the definition of disability in Australian disability discrimination laws?**

Australian anti-discrimination statutes adopt very wide definitions of disability when compared, for example, with that in the United States.<sup>18</sup> Older workers who are retiring due to their sickness, injuries, or disabilities will almost certainly come within the wide definition of disability.<sup>19</sup> The *Disability Discrimination Act 1992* (Cth) s 4 defines disability to include a range of total loss of functions or capabilities, but also includes lower order medical conditions. For example, these include partial loss of the person's bodily or mental functions or the presence in the body of organisms causing, or capable of causing, disease or illness. The definition also extends to conditions that may exist in the future or that are imputed to a person.

### **How do animals provide support to older persons to help with their medical conditions?**

This paper examines how animals are providing support to older people and then analyses circumstances in which persons with support animals may claim protection under anti-discrimination laws. Animals that are trained to provide assistance are referred to as guide dogs, companion animals, therapy animals, assistance dogs, and service animals.<sup>20</sup> This paper will group animals following the lead of the *Companion Animals Act 1998* (NSW), where the distinction is made between animals trained to assist persons with disabilities with their impairments, who are referred to as assistance animals, and those who are not helping

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<sup>17</sup> Irene Mosca and Alan Barrett, 'The Impact of Voluntary and Involuntary Retirement on Mental Health: Evidence from Older Irish Adults' (2016) 19(1) *Journal of Mental Health Policy and Economics* 33.

<sup>18</sup> Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print Disabled* (Cambridge University Press, 2017) 164.

<sup>19</sup> This can be different for psychiatric impairments: Paul Harpur, Ursula Connolly, and Peter Blanck, 'Socially Constructed Hierarchies of Impairments at Work: Example of the Australian and Irish Workers' Access to Compensation for Injuries' (2017) 27(4) *Journal of Occupational Rehabilitation* 507.

<sup>20</sup> Paul Harpur, 'The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?' (2010) 29(1) *University of Tasmania Law Review* 49. Animals are used to provide support to people in other situations, however this is not regulated by anti-discrimination laws. See for example emerging courthouse facility dog programs: Ellen Wood, Paul Harpur, and Nancy A Pachana, 'Teaching an Old Dog New Tricks: A Look into Courthouse Facility Dogs and their Place in the Australian Courtroom' (2018) *Alternative Law Journal* (forthcoming).

people manage a impairment, such as a pet, working dogs, guard dogs, and the like – referred to as companion animals.<sup>21</sup>

In Australia, when considering common disorders in later life, there are many for which an assistance animal may be warranted. For example, an older adult with hearing loss could benefit from a hearing assistance dog. An older adult experiencing depression or anxiety could benefit from an emotional support animal. Companion animals can help increase functioning and quality of life for persons with dementia.<sup>22</sup> In one study, dogs were demonstrated to help reduce blood pressure in community samples.<sup>23</sup> For conditions which may be a primary medical condition or a secondary symptom, such as seizure disorders, seizure alert dogs may provide the older adult, as well as their carers or family members, increased peace of mind and use their heightened senses to provide early warning to imminent attacks.<sup>24</sup>

Many older adults keep companion animals across a broad range of species and contexts – anything from a caged bird in an apartment to rural properties with livestock. The benefits of interacting with animals on health and well-being are mixed when such companion animals are the focus,<sup>25</sup> although for older adults improved health outcomes have been documented.<sup>26</sup> Animals can provide a sense of meaning, purpose, and a social network between the animal and the older person.<sup>27</sup> These companion animals are not formally included under the headings of assistance or emotional support animal, and thus they will not be further considered in this paper. However, increasingly, older persons endeavour to keep their companion animals with them when they enter retirement communities. This appears to be a growing trend, in line with the numbers of persons keeping pets and considering such companion animals as valued members of their family and social support networks.

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<sup>21</sup> *Companion Animals Act 1998* (NSW) s 5. Section 5 cross references to disability assistance animals in the *Disability Discrimination Act 1992* (Cth) s 9.

<sup>22</sup> M Baunand and B McCabe, 'Companion Animals and Persons with Dementia of the Alzheimer's Type: Therapeutic Possibilities' (2003) 47(1) *American Behavioural Scientist* 42.

<sup>23</sup> E Friedmann et al, 'Evaluation of a Pet-Assisted Living Intervention for Improving Functional Status in Assisted Living Residents with Mild to Moderate Cognitive Impairment: A Pilot Study' (2015) 30(3) *American Journal of Alzheimer's Disease and Other Dementias* 276; S L Duncan, 'APIC State-of-the-Art Report: The Implications of Service Animals in Health Care Settings' (2000) 28(2) *American Journal of Infection Control* 170; M O'Haire, 'Companion Animals and Human Health: Benefits, Challenges, and the Road Ahead' (2010) 5(5) *Journal of Veterinary Behavior: Clinical Applications and Research* 226.

<sup>24</sup> E Friedmann et al, 'Evaluation of a Pet-Assisted Living Intervention for Improving Functional Status in Assisted Living Residents with Mild to Moderate Cognitive Impairment: A Pilot Study' (2015) 30(3) *American Journal of Alzheimer's Disease and Other Dementias* 276.

<sup>25</sup> S L Duncan, 'APIC State-of-the-Art Report: The Implications of Service Animals in Health Care Settings' (2000) 28(2) *American Journal of Infection Control* 170.

<sup>26</sup> K A Miltenberger et al, 'An Investigation of the Effects of Dog Visits on Depression, Mood, and Social Interaction in Elderly Individuals Living in a Nursing Home' (2008) 23(3) *Behavioural Interventions* 181; M Rijken and S Beek, 'About Cats and Dogs ... Reconsidering the Relationship between Pet Ownership and Health Related Outcomes in Community-Dwelling Elderly' (2011) 102(3) *Social Indicators Research* 373.

<sup>27</sup> N Kawamura, M Niiyama, and H Niiyama, 'Long-Term Evaluation of Animal-Assisted Therapy for Institutionalized Elderly People: A Preliminary Result' (2007) 7(1) *Psychogeriatrics* 8.

Assistance animals are trained to assist people with disabilities in everyday tasks. This might involve picking up items from the ground, helping detect a diabetic event, or reducing depression by specific interactions.<sup>28</sup> Other animals can assist with memory and routines.<sup>29</sup> While these animals clearly assist people with disabilities, without the support the person could cope with difficulty in day-to-day operations through other measures. In some cases, the animal provides assistance that is essential for a person to perform daily tasks. A person who uses a guide dog for the blind may have no functional white cane skills, so if they did not have their guide dog they would not be able to effectively or safely mobilise to university, work, and shops, on public transport, or generally outside the home environment. Similarly, hearing dogs may augment other types of assistive hearing devices, in a manner that allows the person functionality in and out of the home which can be matched in no other way.<sup>30</sup> The important role assistance animals have in mitigating disability has resulted in them being referred to as 'living accommodations'.<sup>31</sup> This constructs assistance animals as disability aids in the same way that an electric wheelchair is an aid for a person who experiences quadriplegia.

### **Assistance animals under disability discrimination laws**

The wide readings of disability and assistance animal in the *Disability Discrimination Act 1992* (Cth) results in animals trained to provide some level of emotional or functional support (as opposed to untrained companion animals) being classified as assistance animals. The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) transformed the scope of legal protection offered to animals assisting persons with disabilities. This amendment introduced an increased protection for persons using disability assistance animals and introduced new definitions into the *Disability Discrimination Act 1992* (Cth)<sup>32</sup> to include an animal that is trained to assist a person with a disability to alleviate the effect of the disability.<sup>33</sup>

The Full Court of the Federal Court of Australia recently had the opportunity to consider just how wide the definition of assistance animal should be; the Court determined it should be read very widely indeed. *Mulligan v Virgin Australia Airlines Pty Ltd* involved the decision

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<sup>28</sup> R Matamoros and L Seitz, 'Effects of Assistance Dogs on Persons with Mobility or Hearing Impairments: A Pilot Study' (2008) 45(4) *Journal of Rehabilitation Research and Development* 489.

<sup>29</sup> A Swall et al, 'Can Therapy Dogs Evoke Awareness of One's Past and Present Life in Persons with Alzheimer's Disease?' (2015) 10(2) *International Journal of Older People Nursing* 84; C Travers et al, 'An Evaluation of Dog-Assisted Therapy for Residents of Aged Care Facilities with Dementia' (2013) 26(2) *Anthrozoös* 213.

<sup>30</sup> *Ibid.*

<sup>31</sup> Laura Rothstein, 'Puppies, Ponies, Pigs, and Parrots Policies, Practices and Procedures in Pads, Professions, Pubs, and Planes: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation' (2018) 24(1) *Animal Law Review* (forthcoming).

<sup>32</sup> Paul Harpur, 'The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?' (2010) 29(1) *University of Tasmania Law Review* 49.

<sup>33</sup> *Disability Discrimination Act 1992* (Cth) s 9.

by Virgin Airlines to refuse to recognise Mulligan's animals as protected assistance animals.<sup>34</sup> Mulligan had trained his animals to a standard assessed by a generalist dog training association, the Coffs Harbour Dog Training Club Inc., as safe for the animal to interact with the public.<sup>35</sup> In addition to identification and certification that his animals could travel on the New South Wales rail network and Queensland public transport as an assistance dog,<sup>36</sup> Mulligan presented a 'short' letter of support from a Dr Platt stating that Mulligan 'has cerebral palsy and problems with his hearing and eyesight', and that he required the use of 'an "assistance dog" when travelling by rail'.<sup>37</sup> On appeal and at first instance there was no information provided to how long Dr Platt had been seeing Mr Mulligan or whether Dr Platt had any skills in assessing the role animals can have in mitigating impairment. There was also no evidence from a specialist disability assistance training body as to the animal's level of training. As there was no process available by which Mr Mulligan could choose to have his dogs certified for flying, the decision to include or exclude came down to the airline in question.

In the Federal Circuit Court of Australia Virgin was successful.<sup>38</sup> Mulligan successfully appealed to the Full Court of the Federal Court of Australia, which determined that an assistance dog that was not accredited by a disability training organisation was entitled to claim protection as an assistance animal under federal anti-discrimination laws. The Court held that an animal may be an assistance animal under the federal *Disability Discrimination Act 1992* (Cth) if it has received relevant training, regardless of who has provided that training. The Court did not require that the animal was certified by a government agency (as Mulligan's dogs were), and unfortunately provided no guidance on what type of evidence a person who claims they have an assistance animal can be asked to provide to show that their animal is: (a) an assistance animal; and (b) trained to meet appropriate levels of hygiene and behaviour. Because of the Court's findings, it did not need to consider the questions of what kind of evidence a person can ask for, how much evidence they can ask for, and how persuasive it must be.

There is significant uncertainty about the level of information that a duty holder can demand from a person asserting that their animal enjoys protected status. It could be that obtaining some accreditation from one of the many local government or state bodies that the animal should be permitted into some public spaces will be sufficient. There are varying standards across Australia and forum shopping is occurring.<sup>39</sup> Of greater concern is the fact that people

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<sup>34</sup> *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130.

<sup>35</sup> *Ibid* (5)(a).

<sup>36</sup> *Ibid* (5)(b) and (c).

<sup>37</sup> *Ibid* (5)(d).

<sup>38</sup> *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157.

<sup>39</sup> Ellen Wood, Paul Harpur, Martie-Louise Verreynne and Nancy Pachana, 'Operationalizing the Test for Protection in Australia and Canada: Distinguishing Between Disability Assistance Animals and Pets' (Australian Regulatory Responses to Disability Service animals, 4 February 2017, Co-Hosted by the Faculty of Social Sciences at McMaster University (Canada) and the TC Beirne School of Law at The University of Queensland (Australia)).

with no disability are claiming their pets as assistance animals to gain benefits.<sup>40</sup> The use of dubious or fake documentation creates a substantial challenge for a retirement village manager. If they refuse to accept the documentation then they will need some evidence that the documentation is not authentic, for if they are incorrect in their assessment they will likely find themselves before a human rights tribunal. On the other hand, a person with a genuine disability may feel more intimidated when faced with pressure to relinquish an assistance animal, or not pursue acquiring such an animal once they are living in a retirement village.

## **Part II. How social and legal norms discourage older people from identifying as persons with disabilities**

The previous section analysed how residents in retirement villages could use anti-discrimination laws to bring animals into retirement villages, or to pursue acquiring assistance animals after moving into such a residence. To assert legal rights under disability discrimination laws requires a person to identify as a person with a disability. This section will demonstrate how policies and practices can erect high walls around particular social constructs, making them seem irrelevant or inapplicable to a person. While identity politics can help in mobilizing advocacy efforts, strong boundaries around these identities can lead to persons being unwilling or unable to take on these identities as their own, and claim benefits or privileges they might thus be afforded. Negative stereotyping and siloing in public constructs of disability and old age has resulted in the mantle of disability being regarded as something innately negative.<sup>41</sup> This conclusion is supported by legal norms which partition (arbitrarily, in our view) social security support into separate tracks for disability and old age. Finally, this part of the paper will analyse how being identified as a person with a disability can do more than attract negative social stigma; it can increase the probability of loss of economic and social freedoms, both perceived and actual.

### **A. The Two Track System: Laws and Policies Partition Benefits into Old Age and Disability Categories**

Before an older person can use anti-discrimination laws to have their animal protected as an assistance animal, that older person must identify, at least for the purposes of their legal status, as a person with a disability. We will show here how Australian welfare laws have created a two track system which motivates, and in some cases forces, people to be classified

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<sup>40</sup> Paul Harpur, Simon Bronitt, Peter Billings, Martie-Louise Verreynne, and Nancy Pachana, 'Regulating Fake Assistance Animals - A Comparative Review of Disability Law in Australia and the United States' (2018) 24(1) *Animal Law Review* (forthcoming).

<sup>41</sup> Paul Harpur, 'From Disability to Ability: Changing the Phrasing of the Debate' (2012) 27(3) *Disability and Society* 325.



as either a person with a disability or an older person, and provides no space for a person to identify as an older person with a disability.

The majority of people proceed through life moving from a state of greater dependency in childhood and adolescence, to a state of independence in adulthood and return to greater dependence in older life. Although cognitive and functional abilities may remain largely intact well into later life, legal and health authorities often see the age of 65 as the point where the definition of ‘old age’ commences, and increased disability is assumed, often with little evidence. Likewise, those aged 64 and under are often assumed to be independent, even when evidence accrues to the contrary. The labelling of these phases are social constructs, and the assumption of lack of ability associated with age is one form of ageism.<sup>42</sup>

Nevertheless, under the premise of facilitating the delivery of services, law makers have established age and impairment criteria to dictate to which category a person is designated. Interestingly, this categorization process has resulted in people being assigned to either an old age track or a disability track, where older persons with disabilities are not constructed as people with disabilities, even though their range of abilities meets the definition for disability.

For an extended period of time Australian laws have adopted separate tracks to regulate people who have impairment in old age and people who have impairment in other periods of their lives. This has resulted in old age pensions, which are based upon age, and disability pensions, that are based upon impairment.<sup>43</sup> Most recently, this two track system is illustrated by the approach in the *National Disability Insurance Scheme Act 2013* (Cth) s 22 to exclude all people who are over 65 from being eligible to enter the scheme. The Explanatory Memorandum explains that preventing people over 65 from entering the scheme ‘implements part of recommendation 3.6 of the Productivity Commission report, and reflects that the NDIS is one part of a broader system of support in Australia with people over the age of 65 able to access the aged care system’.<sup>44</sup>

The division of people into either an old age track or a disability track is taken further by what happens where an NDIS participant reaches the age of 65. If a person enters the NDIS prior to turning 65, then they are able to remain with the NDIS,<sup>45</sup> however older persons are able to elect to transfer to the old age track system once they turn 65.<sup>46</sup> Considering assessments are made based upon the delegate’s view of the needs of the member of the NDIS, and considering how reluctant these delegates have been thus far in providing benefits,<sup>47</sup> it is reasonable to assume that older persons with disabilities who are seeking support from the National Disability Insurance Agency will find the level of support reduced once they turn 65 years of age.

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<sup>42</sup> T Calasanti, ‘Combating Ageism: How Successful is Successful Aging?’ (2015) 56(6) *The Gerontologist* 1093.

<sup>43</sup> Andrew Herscovitch and David Stanton, ‘History of Social Security in Australia’ (2008) 80 *Family Matters* 51.

<sup>44</sup> Explanatory Memorandum, National Disability Insurance Scheme Bill 2013 (Cth).

<sup>45</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 22(1)(a).

<sup>46</sup> NDIS participants are able to resign from the scheme at any time: *National Disability Insurance Scheme Act 2013* (Cth) s 22(1)(d).

<sup>47</sup> As evinced by the case of *Mulligan v National Disability Insurance Agency* [2015] FCA 544.

Even if a NDIS member desires to remain in the scheme, there are a number of events that will result in their automatic transfer to the old age track if they occur once they have turned 65 years of age. For example, if a NDIS member enters a residential care service on a permanent basis, or starts being provided with home care on a permanent basis, and this first occurs only after the person turns 65 years of age, then they will automatically cease to be a participant in the NDIS.<sup>48</sup> Even though being excluded from the NDIS does not impact upon an older person claiming rights under disability anti-discrimination laws, being directed to move into the age related law track and taken away from the disability track, would reduce an individual being sent to different specialists, being provided different educational information, and encouraged not to think of themselves as an older person with a disability.

## **B. Legal norms which discount the rights of older persons with disabilities**

There is a paradox: the more disability related rights an older person asserts, the greater the probability that their economic freedom may be curtailed by social and legal norms related to discounting the rights of older members of the community. The regulatory frameworks analysed in the previous section encourage older workers not to identify as person with a disability. This section will analyse how law and society actively discourage older workers from identifying as a person with a disability.

Society encourages people to resist the transition from full citizenship to old age where citizenship is discounted and the person is constructed as a burden on society. Older people can be regarded as expensive and a burden on younger generations. This perceived burden of an ageing population has been constructed in certain circles as an inter-generational economic time bomb.<sup>49</sup> The Australian Human Rights Commission observes that the number of Australians aged 65 and over is projected to more than double by 2055, when there will be around 40,000 people aged 100 and over.<sup>50</sup> As a result of this existential anxiety, people are encouraged by society to do all in their power to keep their body as youthful as long as possible. Under this young-is-beautiful model, people are encouraged to regard the signs of aging as inherently undesirable.<sup>51</sup> Older people are encouraged to eschew thinking or acting ‘elderly’, as to be old is equated with a reduction of abilities and rights.<sup>52</sup> In such a climate it

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<sup>48</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 29(1)(b).

<sup>49</sup> Donald L Venneberg and Barbara Welss Eversole, *The Boomer Retirement Time Bomb: How Companies Can Avoid the Fallout from the Coming Skills Shortage* (ABC-CLIO, 2010).

<sup>50</sup> Australian Human Rights Commission, *National Prevalence Survey of Age Discrimination in the Workplace 2015* <<https://www.humanrights.gov.au/our-work/age-discrimination/publications/national-prevalence-survey-age-discrimination-workplace>>; see also J Irving, C Kulik, B Pocock, and S Charlesworth, ‘Work Well; Retire Well: Findings from the Work, Care, Health and Retirement: “Ageing Agenders” Project (Report, University of South Australia, 2017) <[http://www.unisabusinessschool.edu.au/contentassets/c1e59cbff88641749ebfc9bc7377fc21/v3\\_workwell-retirewell\\_13dec17\\_ji.pdf](http://www.unisabusinessschool.edu.au/contentassets/c1e59cbff88641749ebfc9bc7377fc21/v3_workwell-retirewell_13dec17_ji.pdf)>.

<sup>51</sup> B Bytheway, *Ageism* (Open University Press, 1995); Maurice Charney, *Wrinkled Deep in Time: Aging in Shakespeare* (Columbia University Press, 2009).

<sup>52</sup> John Braithwaite, Toni Makkai, and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007) 3.

is not surprising that many older persons resist broadcasting their reducing abilities and embrace the label of ‘disability’.<sup>53</sup>

Being labelled as ‘people with disabilities’ can have substantial legal and cultural consequences for an individual. This can create legal complications pertaining to capacity. The individual will likely find their capacity to manage their own medical, economic, personal, and sexual affairs reduced.<sup>54</sup> Where a person has been identified as having reduced capacity, this then increases the risk that family members will inappropriately use powers of attorneys and take other steps to economically disadvantage the older person.<sup>55</sup>

### ***Part III. How Can Disability Scholarship Around the CRPD Influence Law and Society?***

The identification of oppressed minorities has been a key component of the struggle for equality.<sup>56</sup> This has resulted in international human rights frameworks and domestic anti-discrimination laws protecting people against attribute based discrimination.<sup>57</sup> Recognition of the harm caused by ageism, for example, helped contribute to the adoption of the *Age Discrimination Act 2004* (Cth) and improved policies, if not always outcomes, for older persons.<sup>58</sup> While this identity politics has achieved significant gains, this approach has created legal, political, and theoretical silos which limit the potential for cross-fertilization between attributes and the protection afforded to people experiencing multiple attributes.<sup>59</sup> Where there

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<sup>53</sup> Stephanie Tierney, ‘A Reluctance to be Defined “Disabled”: How Can the Social Model of Disability Enhance Understanding of Anorexia?’ (2001) 16(5) *Disability and Society* 749.

<sup>54</sup> Dale Bagshaw et al, ‘Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members’ (2013) 66(1) *Australian Social Work* 86; Suzanne Doyle, ‘The Notion of Consent to Sexual Activity for Persons with Mental Disabilities’ (2010) 31(2) *Liverpool Law Review* 111; Michael Perlin and Alison Lynch, *Sexuality, Disability, and the Law: Beyond the Last Frontier?* (Springer, 2016) 53; Shih-Ning Then, ‘Evolution and Innovation in Guardianship Laws Assisted Decision-Making’ (2012) 35(1) *Sydney Law Review* 133; Cheryl Tilse et al, ‘Managing Older People’s Money: Assisted and Substitute Decision Making in Residential Aged-Care’ (2011) 31 *Ageing and Society* 93; Penelope Weller, *New Law and Ethics in Mental Health Advance Directives: The Convention on the Rights of Persons with Disabilities and the Right to Choose* (Routledge, 2013) 38.

<sup>55</sup> Margaret Hall, ‘Care for Life: Private Care Agreements Between Older Adults and Friends or Family Members’ (2003) 2 *Elder Law Review* 24; Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies – It’s Time to Face the Facts!’ (2013) 7 *Elder Law Review* 1.

<sup>56</sup> Harlan Hahn, ‘Towards a Politics of Disability: Definitions, Disciplines and Policies’ (1985) 22(4) *The Social Science Journal* 87, 94.

<sup>57</sup> Dagmar Schiek, ‘Organizing EU Equality Law Around the Nodes of ‘Race’, Gender and Disability’ in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate, 2011); Iyiola Solanke, ‘Infusing the Silos in the Equality Act 2010 with Synergy’ (2011) 40 *Industrial Law Journal* 336.

<sup>58</sup> Susan Bisom-Rapp, Andrew Frazer, and Malcolm Sargeant, ‘Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States’ (2011) 15 *Employee Rights and Employment Policy Journal* 44; Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *The Sydney Law Review* 99.

<sup>59</sup> Paul Harpur and Michael Ashley Stein, ‘Children with Disabilities, Human Rights, and Sustainable Development’ in Claire Fenton-Glynn (ed), *Children’s Rights and Sustainable Development: Implementing the UNCRC for Future Generations* (Cambridge University Press, 2017).

are limited bridges between silos, then each group seeks to lobby for its own interests. Where there are strong crossovers between silos, or in the case of older persons with disabilities where many of the interests are the same, then a failure to move outside the identities is artificial and unnecessarily limits equality outcomes. The *CRPD* anticipates moving outside the identity of ‘disability’ and therefore opens a space where the intersection of age and disability advocacy and rights can flourish.

There was significant debate over who should benefit from the rights in the *CRPD*. For example, the Seventh Ad Hoc Meeting was devoted almost exclusively to considering the different means of defining disability.<sup>60</sup> Ultimately, the definition of disability was substantially reduced from a detailed definition to a general statement about what constituted a disability. This watered down statement was moved from the definition article in the Convention to the Preamble and introductory provision in article 1. The Preamble emphasises the social nature of disability, where it provides in paragraph (e) that

disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others ...

The *CRPD* then contains a non-exhaustive statement (this is not a definition) of disability in article 1:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>61</sup>

Importantly, the *CRPD* draws upon the concept of disablement as explained through the disability social model. The disability movement has successfully drawn a distinction between the medical aspects of impairment, and the role society has in turning that ability difference into a site of inequality.<sup>62</sup> This model is known as the social model. Professor Michael Oliver, one of the leading social model scholars, argues that once impairments are constructed as the cause of disablement, then this arguably reduces the social consciousness about the role society plays in disabling people who fall outside the ‘normal’ range of abilities.<sup>63</sup> Social model scholars rejected the notion that disability was caused by impairment and focused on the external sources of disablement.<sup>64</sup> Instead of focusing on ability issues, social model scholars deconstructed disability discrimination to identify the actual causes of disablement.<sup>65</sup> Following the trend set by the World Health Organization

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<sup>60</sup> Arlene S Kanter, ‘The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law and Commerce* 287, 289.

<sup>61</sup> *CRPD*, art 1.

<sup>62</sup> Samuel Bagenstos, *Law and the Contradictions of The Disability Rights Movement* (Yale University Press, 2009) 7-13 (describing ‘the endorsement of a social rather than a medical model of disability’ as ‘the one position that approaches consensus within the movement’).

<sup>63</sup> Michael Oliver, *Understanding Disability: From Theory to Practice* (Palgrave Macmillan, 1996) 37.

<sup>64</sup> Michael Oliver, *The Politics of Disablement* (Macmillan, 1990) 11.

<sup>65</sup> Paul Harpur, ‘From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age’ (2013) 40 *Northern Kentucky Law Review* 529, 535.

and the World Bank,<sup>66</sup> the *CRPD* embraces a weak social model approach and emphasises the role society has in creating disablement.<sup>67</sup>

How would claiming rights under the *CRPD* assist people who are reluctant to be identified as persons with disabilities in the first place? The *CRPD* is a powerful advocacy tool to lobby for change.<sup>68</sup> Old age advocates can lobby for ability equality without individual members needing to identify as being persons with disabilities. Moreover, the *CRPD* is not just about disability. The *CRPD* sets out a roadmap for transforming how ability differences are approached and regulated.<sup>69</sup> The *CRPD* mentions equality, or a variation of this term, 67 times throughout the convention. Out of the 8 general principles of the *CRPD*, 6 principles seek to promote ability diversity generally in society and only 2 specifically target persons with disabilities. These general principles include:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;<sup>70</sup>
- Non-discrimination;<sup>71</sup>
- Full and effective participation and inclusion in society;<sup>72</sup>
- Equality of opportunity;<sup>73</sup> and
- Accessibility.<sup>74</sup>

The focus on ability diversity is strongly emphasised by the *CRPD*'s focus on universal design. Article 2 provides 'Universal design', meaning the design of products, environments, programmes and services shall be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. Universal design has wide benefits for everyone in society as products and systems become more inclusive of ability differences.<sup>75</sup> Of relevance for this paper, universal design includes physical access and ensuring that public spaces include spaces for assistance animals to toilet.<sup>76</sup>

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<sup>66</sup> The World Health Organization and World Bank adopt a bio-psycho-social model of disability which acknowledges 'the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environmental and personal factors). See World Health Organization and World Bank, *World Report on Disabilities* (Report, 2011) 3.

<sup>67</sup> Ron McCallum and Hannah Martin, 'The CRPD and Children with Disabilities' (2013) 20 *Australian International Law Journal* 17.

<sup>68</sup> Paul Harpur, 'Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change' (2011) 45(3) *Valparaiso University Law Review* 1271.

<sup>69</sup> Professor Gerard Quinn heralds the *CRPD* as the Declaration of Independence for persons with disabilities: Gerard Quinn, 'Closing: Next Steps-Towards a United Nations Treaty on the Rights of Persons with Disabilities' in Peter Blanck (ed), *Disability Rights* (Ashgate, 2005) 519, 541.

<sup>70</sup> *CRPD*, art 3(a).

<sup>71</sup> *CRPD*, art 3(b).

<sup>72</sup> *CRPD*, art 3(c).

<sup>73</sup> *CRPD*, art 3(e).

<sup>74</sup> *CRPD*, art 3(f).

<sup>75</sup> Paul Harpur, 'From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age' (2013) 40(3) *Northern Kentucky Law Review* 529.

<sup>76</sup> Paul Harpur, Martie-Louise Verreynne, Nancy Pachana, Peter Billings, Brent Ritchie, 'Disability Assistance Animals or Not? Problems in Policy and Practice Workshop: Summary and Scoping Discussion Paper' (2016) <<http://espace.library.uq.edu.au/view/UQ:409735>>.

Most relevantly for this paper, the *CRPD* enables old age advocates to draw upon its extensive rights regime to cast their desire to bring assistance animals into retirement villages, not as a simple matter of choice, but instead as a human right. This requires States to ensure laws protect older persons with disabilities can exercise their right to use their assistance animal and that State actors, such as State funded or supported retirement villages, do not deny access. It has also been argued that the *CRPD* extends to private actors where those private actors receive some State funding.<sup>77</sup> For the purposes of promoting rights, the *CRPD* represents a powerful tool that old age advocates would do well to utilize.

## Conclusion

The transition from a private dwelling, often from a family home, to a retirement village can create problems for people who have companion animals or disability assistance animals. Some retirement villages exclude pets. As analysed in Part I above, disability discrimination laws adopt a very wide approach to when animals become protected as disability assistance animals. In addition to their traditional roles as guide dogs for the blind and deaf, assistance animals can help people better manage a range of psychological and physical conditions. Once an animal has protected status, then the grounds for excluding that animal from a retirement village are considerably narrowed.

However, public perceptions of assistance animals, and indeed, perceptions of those in HR, housing, and other fields which might intersect with assistance animals often do not understand the various roles animals might play in their assistive capacity (e.g. guide dog vs emotional assistance animal). Moreover, the area of training, certifying, and advocating for assistance animals varies between and within countries. More research on attitudes, perceptions, and concerns around assistance animals is needed, as well as guidelines for stakeholders, particularly trainers and employers.

Reluctance to identify as a person with a disability can prevent older persons from benefiting from laws that protect assistance animals' access rights. In Part II we analysed how anti-discrimination laws confer protection in relation to assistance animals and how both laws and social norms create barriers to older persons embracing the mantle of disability. In addition to society creating norms that pressure older persons to suppress the signs of aging, legal structures can discount the rights of older persons who identify as persons with a disability. This in turn brings up the issue of how users of assistance animals have been adversely affected by discrimination, harassment, or bias. Such research on the lived experience of

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<sup>77</sup> Paul Harpur and Michael Ashley Stein, 'Universities As Disability Rights Change Agents' (2018) *North-Eastern University Law Review* (forthcoming); Paul Harpur and Michael Ashley Stein, 'University Students with Disabilities' (Symposium honouring the memory and contributions of Professor Hope Lewis, North-Eastern University, Boston, 17 November 2017).

persons with assistance animals, as well as descriptive and quantitative research on the extent of the problems encountered, is required.

In Part III we analysed how old age advocates can utilize emerging ability diversity norms, adopted in the *CRPD*, to lobby for paradigm shifts in practices, policies, and regulations. Older adults in general are often confronted with stereotypes and ageist preconceptions about how they live out their later years. Further research is required to understand how these attitudes are internalised by older persons, and to understand how animals can have to enhance the lives of older persons.