



**Community Legal Centres  
Australia**

## **OPEN-ENDED WORKING GROUP ON AGEING**

### **RESPONSE TO THE CO-FACILITATORS' QUESTIONNAIRE**

**December 2023**

**Re: Information issued by the co-facilitators of the intergovernmental process to consider the existing international framework of the human rights of older persons and identify possible gaps in the protection of the human rights of older persons and how best to address them**

## Table of Contents

<b><i>About us</i></b> .....	<b>3</b>
<b><i>Our engagement</i></b> .....	<b>3</b>
<b><i>Our position</i></b> .....	<b>3</b>
<b><i>Our expectations of the co-facilitation process</i></b> .....	<b>4</b>
Importance of comprehensive collation, analysis and synthesis.....	4
Importance of findings reflecting the evidence base .....	5
Importance of consistent recommendations .....	6
<b><i>Our response to the questions</i></b> .....	<b>6</b>
<b>Older Australians</b> .....	<b>6</b>
<b>Australia as an example of the need for a convention</b> .....	<b>7</b>
<b>Thematic areas</b> .....	<b>8</b>
Equality and non-discrimination .....	8
Violence, neglect and abuse .....	9
Long-term care and palliative care.....	9
Autonomy and independence .....	10
Social Security (including Social Protection Floors).....	11
Education, training, lifelong learning and capacity-building .....	11
Right to Work and Access to the Labour Market.....	11
Access to justice .....	12
Contribution of Older Persons to Sustainable Development.....	12
Economic security .....	12
Right to Health and Access to Health Services.....	12
Social Inclusion .....	13
Accessibility, infrastructure and habitat (transport, housing and access) .....	13
Participation in the public life and in decision-making processes .....	13
<b><i>Options on how best to address the gaps</i></b> .....	<b>14</b>

## About us

Community Legal Centres Australia (CLCs Australia)<sup>1</sup> is the national peak body for the Australian community legal sector. CLCs Australia is an independent, non-profit organisation set up to support the community legal sector to provide high-quality, free, and accessible legal and other services to everyday people, especially people experiencing financial hardship, discrimination, or domestic or family violence.

CLCs Australia's members are the eight state and territory community legal sector peak bodies. CLCs Australia represents over 160 community legal centres, women's legal services, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services operating in metropolitan, regional, rural, remote, and very remote communities across Australia.

The community legal sector provides legal and related assistance to older persons, and some specialise in assisting older persons with the specific issues affecting them.

## Our engagement

CLCs Australia is a non-governmental organization in ECOSOC status with the United Nations since 2003. CLCs Australia has been actively participating in the Open-ended Working Group on Ageing (OEWGA) since the Fourth Working Session.

CLCs Australia has contributed to substantive and normative inputs, including through co-authoring the inputs of an informal, expert NGO group.<sup>2</sup> CLCs Australia has made approximately 30 interventions to OEWGA including written and oral statements.

CLCs Australia has also participated in various other processes including expert group meetings, Universal Periodic Reviews, and treaty body reviews. Our continued engagement and participation over the last decade have been resource and time intensive but is premised on our view that there is an urgent need to build a normative framework to strengthen the human rights of older persons.

## Our position

CLCs Australia has identified that the creation of a new multilateral human rights instrument (a convention) **is the most effective way** to strengthen the human rights of older persons within Australia and globally.

In our analysis, a convention would assist to address all gaps howsoever identified or described, including conceptual, normative, protection and implementation gaps.

A convention would also guarantee that older persons' unique and intersectional circumstances and the impacts of ageism are addressed.

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<sup>1</sup> Formerly known as The National Association of Community Legal Centres, Australia.

<sup>2</sup> [NGO Group Submission on Equality and non-discrimination](#); [NGO Group Submission on Freedom from violence, abuse and neglect in older age](#); [Summary of Group Submission on Freedom from violence, abuse and neglect in older age](#); [NGO Group Submission on Autonomy, independence, long-term care and palliative care](#); [NGO Group Submission on Social security and social protection, education and lifelong learning](#); [NGO Group Submission on Access to Justice](#); [NGO Group Submission on The Right of Older Persons to Work and to Access the Labour Market](#).

## Our expectations of the co-facilitation process

This submission is in respect of Open-ended Working Group on Ageing's decision 13/1 (A/AC.278/2023/2) establishing the co-facilitation process and their request for responses to the questionnaire. CLCs Australia is concerned that the OEWGA has had more than a decade to satisfy its mandates<sup>3</sup> from the General Assembly.

Accordingly, in our view the co-facilitation process is the opportunity to collate, synthesize and present a concise summary of OEWGA's work over the last decade and make findings and recommendations that obviously flow from that substantial body of work.

Our expectations of the co-facilitation process are that:

- the co-facilitators ensure that the collation, analysis, and synthesis is comprehensive;
- the co-facilitators make findings that are consistent with the inputs to and outcomes from that body of work; and
- the co-facilitators make recommendations that reflect those outcomes and that provide a way forward into and beyond the 14<sup>th</sup> Working Session.

We now deal with each of those expectations in turn.

### *Importance of comprehensive collation, analysis and synthesis*

A core issue for OEWGA is the absence of formal outcomes documents that chart the dialogue, decisions, and debate from each working session. The Chair's Report has taken an informal role by summarizing the working sessions. Given the lacuna in formal outcomes, the co-facilitators must take a comprehensive approach to considering the conclusions of reports and other material presented to OEWGA.

CLCs Australia notes that the collation of substantive and normative inputs provides an overview of the submissions in response to the guiding questions issued for each working session. These collations should be carefully considered by the co-facilitators as they represent the broadest range of inputs from Member States, UN System, Inter-Governmental Organizations, National Human Rights Institutions and Non-Governmental Organizations.

In our view, the collation, analysis, and synthesis must account for, and properly reflect analysis and findings presented to OEWGA, including:

- Reports of the Office of the High Commissioner for Human Rights (OHCHR), including its 2012 and 2021 studies and its 2022 report to the Human Rights Council;<sup>4</sup>

<sup>3</sup> "Resolution Adopted by the General Assembly on 21 December 2010 [On the Report of the Third Committee (A/65/448)] 65/182. Follow-up to the Second World Assembly on Ageing." A/RES/65/182. February 4; "Resolution Adopted by the General Assembly on 20 December 2012 [On the Report of the Third Committee (A/67/449) and Corr.1]. 67/139. Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons." A/RES/67/139. February 13; United Nations General Assembly. 2016. "Resolution Adopted by the General Assembly on 17 December 2015 [On the Report of the Third Committee (A/70/489/add.2)] 70/164. Measures to Enhance the Promotion and Protection of the Human Rights and Dignity of Older Persons." A/RES/70/164. February 22.

<sup>4</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR). 2012. "Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper." August 2012; United Nations Office of the High Commissioner for Human Rights (OHCHR). 2021. "Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law

- Findings of the OHCHR-convened 2022 Multistakeholder meeting on the human rights of older persons;
- Findings and recommendations of the Independent expert on the enjoyment of all human rights of older persons; and
- Findings and recommendations of other special procedures mandate holders and treaty bodies in respect of the human rights of older persons.

The collation, analysis and synthesis process must ensure that in seeking to identify “possible gaps” the concept of gaps must include limitations and deficiencies in the existing framework that involve and facilitate the limited and fragmented coverage of the human rights of older persons.

The collation, analysis and synthesis process must ensure that the identification of gaps (and how best to address them) involves identification of areas where the existing framework is deficient, but also a conceptual analysis of the reasons for the inadequacies in that framework. In our view this conceptual analysis has been clearly articulated as early as the 2009 Expert Group Meeting’s Reported findings,<sup>5</sup> and was reiterated by the later work of the OHCHR in 2012, 2021 and 2022. The conceptual shortcomings of the existing human rights framework have also been consistently noted in myriad of inputs to OEWGA over time, including by CLCs Australia.

Given this, the process must consider the best way to address the inadequacies in the current framework and not simply adopt the easiest or ‘Band-Aid’ approach that fails to address the underlying conceptual limitations and fragmentation of the present system.

### *Importance of findings reflecting the evidence base*

After genuine collation, analysis and synthesis, the co-facilitators’ findings must reflect the conclusions of the existing evidence base, including the documents, reports and inputs described above. In our view, the OHCHR 2021 Updated Study, the 2022 OHCHR report, the findings and summary of the August 2022 Multistakeholder meeting, the reports of the Independent Expert, and a legion of other sources presented to OEWGA and reviews of MIPAA provide an incontrovertible evidence base that there are significant conceptual gaps, limitations, and deficiencies in the current international framework.

Additionally, it is our longstanding stated position that the inadequacies in the international framework require major changes and novel additions to the existing framework to properly address these deficiencies. Without delving into stagnating arguments, we concede that existing mechanisms have some capacity to be inclusive of older persons’ issues, but that better engagement by existing mechanisms with the human rights of older persons will not and cannot of itself be enough to address the fundamental conceptual limitations of the existing framework.

We suggest that experience at the international and regional levels with thematic conventions show they make a unique and significant impact on the protection of those whose rights they affirm. Accordingly, a new convention is necessary to make the significant changes that are required.

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in Relation to Older Persons.” Working paper prepared by the Office of the High Commissioner for Human Rights, March 2021.

<sup>5</sup> United Nations Department of Economic and Social Affairs. 2009. Report of the Expert Group Meeting. “Rights of Older Persons”. 5–7 May 2009. <https://www.un.org/esa/socdev/documents/ageing/reportofegm.pdf>

## ***Importance of consistent recommendations***

Given that OEWGA's mandates variously include the feasibility of an instrument, the main elements and possible content of an instrument, the co-facilitators' recommendations can potentially address a wide spectrum of issues for negotiation.

OEWGA's process has garnered a significant, expert and lived-experience evidence base that a convention is the best way to strengthen the human rights of older persons, and that other measures (many of which have been suggested) will also strengthen the human rights of older persons.

The co-facilitators' recommendation should not be a binary one and can recommend the feasibility of a convention and that other measures, for example, the use of other treaty body processes, the Universal Periodic Review, and special procedures mandates can help to strengthen the human rights of older persons.

The co-facilitators' recommendation could incorporate the following:

- Analysis of briefings and responses to the questionnaire;
- Note and affirm the findings and recommendations of the OEWGA (and other documents) including evidence of gaps howsoever defined or described;
- Urge existing mechanisms, States, NGOs and NHRIs to make better use of existing norms and procedures to address the human rights of older persons including adhering to existing specific commitments such as within UPR processes;
- Request the Human Rights Council (or OEWGA) to establish a working group to commence (or continue, if a HRC WG has been established before OEWGA 14) the drafting of a new convention on the human rights of older persons as soon as possible and to complete that work at the earliest time possible; and
- Request the OEWGA to continue its work in examining ways to improve the realisation of all human rights by older persons and to explore ways to mainstream the human rights of older person through the United Nations, its system, and programs, etc.

## **Our response to the questions**

### ***Older Australians***

National census data provides a picture of older Australians. One in six (16%) Australians are over 65, and just over half (53%) are women. Australia has growing numbers of older indigenous peoples, with over 47,000 aged 65 years and over. Over a third (37%) of older Australians were born overseas. One in six older (18%) Australians speaks a language other than English at home.

Australia's population projections show that approximately one quarter will be aged 65 or more by 2060. Projections are that around 40 per cent of the projected increase in Australian Government expenditure from 2022–23 to 2062–63 will be due to demographic ageing.

## *Australia as an example of the need for a convention*

Australia's human rights landscape for older persons is an excellent example of a stable, modern democracy that would benefit greatly from a new convention. The need for a convention is evidenced by a 'presence-absence paradigm' or a 'human rights vacuum'. It is accepted that the normative pressure or influence of human rights instruments is exerted sideways into other parallel UN human rights processes, and downwards into regional and domestic settings through the development of regional agreements and domestic laws and policies.

Downward pressure from specialist treaties and treaty bodies results in specific cohorts having specific human rights guarantees through entrenchment in domestic settings. It manifests in law, policy, programmes and eventually changed community expectations and attitudes. The benefits of downward pressure are obvious in Australian domestic law.<sup>6</sup> This has included laws, policies and programmes protecting and promoting the human rights of children, women, and persons with disabilities through downward pressure from human rights instruments and processes to which Australia is signatory.

However, the corollary of this is equally true; the absence of specific treaties is revealed by the absence of normative obligation, pressure, influence, and outcomes – especially a lack of protection within domestic law and policy.<sup>7</sup> Within Australia this absence has been striking for older persons.

A recent Royal Commission on aged care<sup>8</sup> quality and safety noted there is “no international consensus on a common set of human rights and principles that should underpin aged care, we have identified those which we think are necessary elements of a human rights-based aged care system, best adapted to the Australian context.”<sup>9</sup> In the context of anticipated national legislative protections for older Australians' human rights, our view is that the likely legislative model, including the human rights values, principles and mechanisms adopted, will not reflect international best practice.

In another recent example, the Australian Human Rights Commission's (AHRC) proposed model national human rights law<sup>10</sup> includes a 'participation duty':

*The participation duty would require public authorities to ensure the participation of First Nations peoples, children, and persons with disability in relation to policies and decisions that directly or disproportionately affect their rights. This duty addresses a fundamental problem in the development of federal policies and decisions — inadequate engagement with the very people to whom those decisions directly apply. The duty will apply differently to each of the above groups, as defined by the relevant international instruments. However, the same underlying requirement applies — when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions.*<sup>11</sup>

<sup>6</sup> At national, state, and local levels.

<sup>7</sup> William John Mitchell (2022): Making the case for a convention on the human rights of older persons, Australian Journal of Human Rights, DOI:10.1080/1323238X.2021.2009634

<sup>8</sup> Aged care is essentially the same as long term care and includes care within institutional and home settings.

<sup>9</sup> Commonwealth of Australia. 2021. “Royal Commission into Aged Care Quality and Safety. Final Report: Care Dignity and Respect.” Volume 3A: The New System.

<sup>10</sup> Australia has no national human rights laws, rather only has national anti-discrimination laws.

<sup>11</sup> <https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-australias-human-rights-framework>, p.50.



The absence of a convention means that there was no imperative to create such a duty for older persons, despite their obvious need alongside the other examples given. The resulting absence of specific inclusion is strong evidence of the need for a convention.

This normative vacuum for older Australians effectively manifests in all areas examined by the OEWGA and is noted in more detail in our inputs to guiding questions over the last decade.

## Thematic areas

**For each of the topics that have been considered by the Open-ended Working Group since its eighth session, please state possible gaps your Government/organization has identified in the normative framework and practical implementation for the protection of the human rights of older persons.**

Given we have previously made substantial submissions on each of the thematic topics we do not intend to repeat those submissions. Our submissions to OEWGA are hyperlinked in the footnotes.

### Equality and non-discrimination

We provided inputs to the 8<sup>th</sup> and 9<sup>th</sup> Working Sessions.<sup>12</sup> We note that Australia has no strategic national laws, policies or programs aimed at eradicating ageism as recommended by the World Health Organisation.<sup>13</sup> Additionally, complaints under Australia's *Age Discrimination Act* (for all ages including older age) are the lowest number under any of Australia's national discrimination law, despite it being the among most recently enacted.<sup>14</sup>

It is also the case that unlike all of Australia's other national discrimination laws, the *Age Discrimination Act* was not enacted with the guidance of an applicable human rights treaty. It was essentially created within the normative vacuum. Intersectional complaints are made complex by the thematic nature of Australia's national discrimination laws where complaints must be made under separate laws, which do not have consistent language, terminology, or legal tests.<sup>15</sup>

**Older Australian women** experienced poverty in at a higher rate than men. Their retirement incomes are 24% lower than men.<sup>16</sup> Older women experience violence and abuse at a higher rate especially sexual and psychological abuse and neglect.<sup>17</sup> Older women face an escalating rate of homelessness (over 30% between 2011-2016) putting them among the fastest growing cohorts in Australian society.<sup>18</sup>

**Australia's LGBTI communities** include older Australians who identify as lesbian, gay, bisexual, transgender, intersex or otherwise diverse in gender, sex, or sexuality. We note that they require human rights protections to ensure they do not experience violence and abuse or discrimination as they age and, particularly if they enter care and other institutional settings.

<sup>12</sup> See above note 2 and [Equality and Non-discrimination for 8th Session](#).

<sup>13</sup> <https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>.

<sup>14</sup> [https://humanrights.gov.au/sites/default/files/ahrc\\_ar\\_2021-2022\\_complaint\\_stats\\_0.pdf](https://humanrights.gov.au/sites/default/files/ahrc_ar_2021-2022_complaint_stats_0.pdf)

<sup>15</sup> Australia has national discrimination laws that include *Racial Discrimination Act 1975* (RDA), *Sex Discrimination Act 1984* (SDA), *Australian Human Rights Commission Act 1986* (AHRCA), *Disability Discrimination Act 1992* (DDA), *Age Discrimination Act 2004* (ADA).

<sup>16</sup> <https://www.womeninsuper.com.au/content/the-facts-about-women-and-super/gjumz>

<sup>17</sup> <https://aifs.gov.au/research/research-snapshots/national-elder-abuse-prevalence-study-summary-report#this>

<sup>18</sup> <https://humanrights.gov.au/our-work/age-discrimination/projects/risk-homelessness-older-women>



Their experience and specific human rights needs are not addressed by national laws and policies. The Royal Commission into Aged Care Quality and Safety recognised that older LGBTI persons may have varied life experiences and face challenges accessing aged care services that meet their particular needs.<sup>19</sup>

**Aboriginal and Torres Strait Islander people** are not one group, but rather comprise hundreds of groups that have their own distinct set of languages, histories, and cultural traditions. Older indigenous Australians have specific human rights issues and experience a significant gap in life expectancy (~9-10 years) when compared with non-indigenous Australians.<sup>20</sup> Older indigenous Australians' specific human rights issues have not been given adequate attention, and the Australian government has not taken active steps to consult with indigenous elders about the type and extent of their human rights needs. Their issues include right to the adequate standard of living,<sup>21</sup> the right to culturally safe health services, long term care and social protections.

### Violence, neglect and abuse

We provided inputs to the 8<sup>th</sup> and 9<sup>th</sup> Working Sessions.<sup>22</sup> Australia's recent elder abuse prevalence study found that 15% of older Australians experience elder abuse, with the most common type being psychological abuse (~12%) followed by neglect (~3%).<sup>23</sup> Importantly, this study only included community dwelling older Australians over 65 without impaired decision-making capacity. By comparison older Australians in long term care are reported to experience elder abuse at higher rates than the rest of the population (neglect at ~31% and emotional abuse at ~23%).<sup>24</sup> Despite this Australia's National Plan to Respond to Abuse of Older Australians (Elder Abuse) is funded at less than 1% of that provided in respect of National Plan to End Violence Against Women and Children.<sup>25</sup>

### Long-term care and palliative care

We provided input to the 9<sup>th</sup> and 10<sup>th</sup> Working Sessions.<sup>26</sup> Older Australians living in aged care<sup>27</sup> and those who receive care at home, experience a wide range of human rights violations, which often centre on the removal of their independence and autonomy through decision-making processes, placement within institutional settings, and a lack of protections and safeguards from violence, abuse, and neglect. National reports cataloguing these abuses are plentiful and yet limited steps have been taken to entrench human rights within national laws to provide meaningful protection of their specific human rights needs.

Australia's aged care laws are currently in transition towards reformed laws that are intended to provide increased human rights protections.<sup>28</sup> This process appears well intended but there

<sup>19</sup> <https://agedcare.royalcommission.gov.au/publications/final-report>

<sup>20</sup> <https://ctgreport.niaa.gov.au/life-expectancy>

<sup>21</sup> <https://www.hrlc.org.au/news/2023/7/12/age-pension-ruling>

<sup>22</sup> See above note 2.

<sup>23</sup> <https://aifs.gov.au/research/research-reports/national-elder-abuse-prevalence-study-final-report#this>

<sup>24</sup> <https://agedcare.royalcommission.gov.au/news-and-media/elder-abuse-australian-aged-care-facilities>

<sup>25</sup> Based on indicative amounts noted by Parliament of Australia on Plans against elder abuse and violence against women and children.

<sup>26</sup> See above note 2.

<sup>27</sup> Also called long term care. See <https://www.aihw.gov.au/reports/older-people/older-australians/contents/aged-care>

<sup>28</sup> Under the Convention on the Rights of Persons with Disabilities and the International Covenant on Economic, Social and Cultural Rights: See

exists a range of concerns about the final form of the scheme. Issues of concern include: the form, scope, extent and enforceability of human rights protections, limitations on remedies for violations including constraining provisions on legal liability and compensation.

Additionally, the move to deinstitutionalisation is not at the forefront of Australia's consideration of its long-term care system even though imperatives exist.<sup>29</sup> Institutional care is still a default position for many older Australians. Despite comprehensive recommendations for reform,<sup>30</sup> restrictive practises continue to be used, and remain methods of behaviour control and convenience for some providers.

The use of law enforcement to respond to serious incidents within aged care settings has come under scrutiny with the recent death of an older woman who was tasered by the police in an aged care home.<sup>31</sup>

Additionally, provincial coronial laws fail to address older person's deaths. It is apparent that the older a person is, the less chance a coroner will investigate the causes of death or consider systemic or structural factors. This is despite considerable evidence calling for reform of coronial systems to ensure better understanding of how system failures lead to older persons' deaths.<sup>32</sup>

### Autonomy and independence

We provided input to the 9<sup>th</sup> and 10<sup>th</sup> Working Sessions.<sup>33</sup> In Australia, supported decision making is not yet implemented as the dominant paradigm and national and provincial laws still reinforce antiquated models of substituted decision making and plenary guardianship. Systems responsible for supervision of decision-making models are de-prioritized by governments, are under-resourced, and often lack strict compliance with international normative standards and guidelines and resort (wittingly or not) to historic, paternalistic, medicalized, ageist and ableist approaches.

Despite recommendations for reform,<sup>34</sup> the regulation of enduring legal documents still requires model, uniform laws that promote human rights and provide adequate safeguards.<sup>35</sup> The current aged care reform process seeks to address this issue but appears to be resulting in an overly complex system, made more complicated by the lack of nationally led, uniform, model laws at provincial level.

While the guarantees in the Convention on the Rights of Persons with Disabilities have been addressed in some ways through measures such as the National Disability Insurance Scheme

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[https://agedcareengagement.health.gov.au/images/agedcareact/aca/consultation\\_paper.pdf](https://agedcareengagement.health.gov.au/images/agedcareact/aca/consultation_paper.pdf) and <https://www.health.gov.au/sites/default/files/2023-04/a-new-model-for-regulating-aged-care-consultation-paper-2-details-of-the-proposed-new-model.pdf>

<sup>29</sup> See <https://www.ohchr.org/en/documents/legal-standards-and-guidelines/crpd5-guidelines-deinstitutionalization-including>

<sup>30</sup> <https://disability.royalcommission.gov.au/publications/restrictive-practices-pathway-elimination>

<sup>31</sup> <https://www.theguardian.com/australia-news/2023/may/24/95-year-old-woman-tasered-age-discrimination-commissioner-review-nsw-police-deployment-to-aged-care-homes>

<sup>32</sup> Bill Mitchell, 'Identifying Institutional Elder Abuse in Australia through Coronial and Other Death Review Processes' (2018) 18 *Macquarie Law Journal* 35, 44; Laura Grenfell, Anita Mackay, Julie Debeljak, (2022) 'Human Rights Accountability for Systems of Ill-Treatment in Residential Aged Care' Monash University. Journal contribution. <https://doi.org/10.26180/20341488.v3>

<sup>33</sup> See above note 2 and [OEWGA Tenth Working Session NGO Inputs](#)

<sup>34</sup> <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>

<sup>35</sup> <https://www.ag.gov.au/rights-and-protections/consultations/national-register-enduring-powers-attorney>

(the NDIS),<sup>36</sup> the scheme mostly excludes those older than 65 years<sup>37</sup> and does not apply to those without a disability. The recent Royal Commission into Aged Care Quality and Safety has recommended a similar scheme to the NDIS for older Australians.<sup>38</sup>

### Social Security (including Social Protection Floors)

We provided input to the 10<sup>th</sup> Working Session.<sup>39</sup> A key Australian contextual example is that Age Pension schemes do not account for disparities in life expectancy, and therefore discriminate against those with lower life expectancies. For example, the pension age in Australia is set at between 65 and 67 years of age (depending on year of birth) and life expectancy for indigenous Australians is 10.6 years lower than that of the non-Indigenous population for males (69.1 years compared with 79.7) and 9.5 years for females (73.7 compared with 83.1).<sup>40</sup>

The discriminatory impacts of this age proxy were recently tested in the Federal Court of Australia which found despite the ongoing gap in life expectancy, Australia's racial discrimination laws were not a legal basis for indigenous persons' earlier access to the age pension.<sup>41</sup>

Australia's superannuation retirement income laws follow a similar prescribed age proxy approach, which does not allow for reasonable adjustments. It is notable that the age pension and superannuation age proxies are inconsistent with adjustments made to other federal policy age proxies such as entry into the aged care scheme, which provides lower age proxies (from 50 years) for indigenous persons.<sup>42</sup>

A convention would provide a legal basis for making reasonable adjustments to areas of eligibility based on issues such as indigeneity, life expectancy or other intersectional factors.

### Education, training, lifelong learning and capacity-building

We provided input to the 10<sup>th</sup> Working Session.<sup>43</sup> Australia does not have a national human rights framework that guarantees the right to education, lifelong learning, and capacity building.

### Right to Work and Access to the Labour Market

We provided input to the 11<sup>th</sup> and 12<sup>th</sup> Working Sessions.<sup>44</sup> Australia does not have a national human rights framework that guarantees the right to work or access the labour market. Older workers are often subjected to age-based discrimination.<sup>45</sup> In 2023, the AHRC noted findings that, "suggest that any reluctance on the part of HR professionals to employ older workers does not align with their experience of employing them."<sup>46</sup>

<sup>36</sup> <https://www.ndis.gov.au/>.

<sup>37</sup> <https://www.ndis.gov.au/applying-access-ndis/am-i-eligible>.

<sup>38</sup> <https://www.royalcommission.gov.au/system/files/2021-03/final-report-recommendations.pdf>

<sup>39</sup> [https://social.un.org/ageing-working-group/documents/ninth/Joint\\_Discussion\\_paper.pdf](https://social.un.org/ageing-working-group/documents/ninth/Joint_Discussion_paper.pdf)

<sup>40</sup> <https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy>

<sup>41</sup> *Fisher v Commonwealth of Australia (No 2)* [2023] FCAFC 181

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0181>

<sup>42</sup> <https://www.aihw.gov.au/reports/australias-welfare/aged-care-for-indigenous-australians>

<sup>43</sup> See above note 1.

<sup>44</sup> See above note 1 and CLCS AUSTRALIA Input on the [Right to Work and Access to Justice for 11th Session](#) and [Right to Work and Access to Justice for 12th Session](#)

<sup>45</sup> <https://humanrights.gov.au/our-work/age-discrimination/projects/age-discrimination-employment>

<sup>46</sup> <https://www.ahri.com.au/wp-content/uploads/230427-Employing-Older-Workers-Report.pdf>

## Access to justice

We provided input to the 11<sup>th</sup> and 12<sup>th</sup> Working Sessions.<sup>47</sup> We also presented as a panellist on this issue.<sup>48</sup> Australia does not have a national human rights framework that guarantees the right to access to justice. We note that the right to a fair trial by jury is protected by the Australian Constitution.<sup>49</sup> The Law Council of Australia found significant barriers to older persons' access to justice, including a paucity of research on older persons' legal needs.<sup>50</sup> Furthermore, the potential for age-friendly justice has rarely been explored.<sup>51</sup> Overall expenditure on older persons' access to justice has not been quantified in Australia but analysis reveals it is among the lowest, if not the lowest, of any cohort.<sup>52</sup>

## Contribution of Older Persons to Sustainable Development

We provided input to the 12<sup>th</sup> and 13<sup>th</sup> Working Sessions.<sup>53</sup> Australia does not have a national human rights framework that guarantees the right to contribute to sustainable development.

## Economic security

We provided input to the 12<sup>th</sup> and 13<sup>th</sup> Working Sessions.<sup>54</sup> Further, we refer to and rely on the article<sup>55</sup> annexed to our submission in this regard. Australia does not have a national human rights framework that guarantees the right to economic security. In our submission, we posed that the right to economic security ought to include economic rights that directly improve older person's economic security (e.g., the right to adequate standard of living, housing, and social security) but also, and importantly, context (e.g., pandemic, disaster, climate change, rurality) and intersections (e.g., disability and indigeneity) that address the multidimensional nature of poverty and the drivers of economic insecurity.<sup>56</sup>

## Right to Health and Access to Health Services

We provided input to the 13<sup>th</sup> Working Session.<sup>57</sup> Australia does not have a national human rights framework that guarantees the right to health and access to health services. In our input, we noted that Australia is a signatory to the ICESCR, and all Australian jurisdictions have anti-discrimination laws, which prevent discrimination when accessing health services (a negative right to health). A positive expression of the right to health (an obligation to provide access)

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<sup>47</sup> Ibid.

<sup>48</sup> Mitchell Access to Justice for Older Persons OEWSGA Panel Presentation; see also Mitchell W, Byrnes A, Bergman A, Peisah C. The Human Right to Justice for Older Persons With Mental Health Conditions. *Am J Geriatr Psychiatry*. 2021 Oct;29(10):1027-1032. doi: 10.1016/j.jagp.2021.07.007. Epub 2021 Jul 29. PMID: 34389221.

<sup>49</sup> Section 80.

<sup>50</sup> <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Older%20Persons%20%28Part%201%29.pdf>; see also Sage-Jacobson, S. (2015). Access to justice for older people in Australia. *Law in Context*, 33(2), 142–159.

<sup>51</sup> William Mitchell. 'Access to Justice and Legal Assistance in an Age-Friendly World', in Gardiner, C.M., & Webb, E.O. (Eds.). (2022). *The Age-friendly Lens* (1st ed.). Routledge. <https://doi.org/10.4324/9781003038658>

<sup>52</sup> Ibid.

<sup>53</sup> Sustainable Development and Economic Security for 12th Session; Sustainable Development and Economic Security for 13th Session.

<sup>54</sup> Ibid.

<sup>55</sup> William Mitchell, *Older Persons' Right to Economic Security, Pandora's Box 2022 –Poverty and the Law in Australia*, The Justice and the Law Society, The University of Queensland, 2022. Excerpt pp 144-168.

<sup>56</sup> Ibid, p.168.

<sup>57</sup> Right to Health and Access to Health Services for 13th Session

has not been directly incorporated into domestic law, except for the limited example in one provincial jurisdiction.

### Social Inclusion

We provided input to the 13<sup>th</sup> Working Session.<sup>58</sup> Australia does not have a national human rights framework that guarantees the right to social inclusion. Like in many countries, social isolation of older persons is a significant issue without a comprehensive response. Older persons may experience loneliness and isolation at a higher rate;<sup>59</sup> further, social structures disempower older cognitively impaired people, leading to or exacerbating social exclusion.<sup>60</sup>

For older cohorts, loneliness has been found to be a predictor of functional decline and premature death,<sup>61</sup> with loneliness carrying risks to cardiovascular health among people aged over 50.<sup>62</sup> Further, a recent Australian Parliamentary report<sup>63</sup> noted the experience of older Australians during COVID-19 was exacerbated by physical distancing measures, digital exclusion resulting in social isolation, fear and anxiety of contracting COVID-19 due to higher level risk of fatality from the disease and avoiding accessing necessary healthcare due to online models of service delivery.<sup>64</sup>

### Accessibility, infrastructure and habitat (transport, housing and access)

We have not yet provided input statements on this issue. Australia does not have a national human rights framework that guarantees the right to Accessibility, infrastructure, and habitat (transport, housing and access). National age discrimination laws exist but are subject to the limitations described above.

### Participation in the public life and in decision-making processes

We have not yet provided input statements on this issue. Australia does not have a national human rights framework that guarantees the right to participation in public life and in decision-making processes. National age discrimination laws exist but are subject to the limitations described above. We note that the right to vote is protected by the Australian Constitution.<sup>65</sup> The right to free expression in respect of political communications has a limited form of implied protection under the Australian Constitution.

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<sup>58</sup> [Social Inclusion for 13<sup>th</sup> Session](#)

<sup>59</sup> Relationships Australia, *Is Australia experiencing an epidemic of loneliness? Findings from 16 waves of the household income and labour dynamics of Australia survey*, working paper, 2018.

<sup>60</sup> Burholt V, Windle G, Morgan DJ; CFAS Wales team. A Social Model of Loneliness: The Roles of Disability, Social Resources, and Cognitive Impairment. *Gerontologist*. 2017 Nov 10;57(6):1020-1030. doi: 10.1093/geront/gnw125. PMID: 27831482; PMCID: PMC5881780.

<sup>61</sup> Perissinotto CM, Stijacic Cenzer I, Covinsky KE. Loneliness in older persons: a predictor of functional decline and death. *Arch Intern Med*. 2012 Jul 23;172(14):1078-83. doi: 10.1001/archinternmed.2012.1993. PMID: 22710744; PMCID: PMC4383762.

<sup>62</sup> See, eg, Valtorta NK, Kanaan M, Gilbody S, Hanratty B. Loneliness, social isolation and risk of cardiovascular disease in the English Longitudinal Study of Ageing. *Eur J Prev Cardiol*. 2018 Sep;25(13):1387-1396. doi: 10.1177/2047487318792696. Epub 2018 Aug 2. PMID: 30068233.

<sup>63</sup> Parliament of Queensland, *Inquiry into social isolation and loneliness in Queensland*, Report No. 14, 57th Parliament Community Support and Services Committee, December 2021

<sup>64</sup> Thomas, J., Barraket, J., Parkinson, S., Wilson, C., Holcombe-James, I., Kennedy, J., Mannell, K., Brydon, A. (2021). *Australian Digital Inclusion Index: 2021*. Melbourne: RMIT, Swinburne University of Technology, and Telstra.

<sup>65</sup> Section 41.

## Options on how best to address the gaps

**Please state how your Government/organization has engaged with international and regional human rights mechanisms (for example: universal periodic review (UPR) treaty bodies, special procedures, regional mechanisms), specifically with regard to older persons. (500 words)**

In its second cycle Universal Periodic Review (UPR), Australia committed to promoting and protecting the rights of older people internationally by modelling and advocating better use of existing United Nations human rights reporting mechanisms, including a dedicated section on the rights of older Australians in all relevant human rights treaty and universal periodic review reports and in United Nations resolutions and to encourage existing Special Rapporteurs to consider the application A/HRC/31/14 30 of their mandate to older persons in close collaboration with the Special Rapporteur on the enjoyment of all human rights by older persons.<sup>66</sup>

**Have those engagements resulted in positive impact in strengthening the protection of the human rights of older persons? Please elaborate. (500 words)**

In our view, the Australian Government's commitment to the human rights of older persons has been given very limited prioritization. Despite civil society reminding Australia of its commitment, it has had little impact on Australia's reporting to date.<sup>67</sup> This situation is gradually improving, and Australia's Sixth Report under the International Covenant on Economic, Social and Cultural Rights is expected to include more analysis of older persons' human rights issues.

Notwithstanding the potential for improvement, it is our position that approaches such as UPR modelling cannot and will not strengthen older persons' human rights. The lack of a convention means that at best older person's human rights might seek to be promoted and protected through systems that lack specificity, relevance, currency, and focus – systems have continually failed older persons.

**What other options can be considered to strengthen the protection of older persons? Please elaborate. (500 words)**

We refer to our stated position and expected recommendations.

**If applicable, what is your assessment on the protection of the human rights of older persons according to regional and international instruments? (500 words)**

The UNESCAP region does not have any regional human rights instruments in place. The UNESCAP Consultations for the Fourth Review and Appraisal of the Madrid International Plan of Action on Ageing revealed strong support for a convention. This was included in the Report of the Secretary General on the Fourth review and appraisal of the Madrid International Plan of Action on Ageing, 2002<sup>68</sup>

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<sup>66</sup> United Nations Human Rights Council. 2016. "Report of the Working Group on the Universal Periodic Review Australia." A/HRC/31/14. January 13 2016. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>

<sup>67</sup> <https://www.hrlc.org.au/universal-periodic-review>.

<sup>68</sup> E/CN.5/2023/6.