



Community Legal Centres  
Australia

## OPEN-ENDED WORKING GROUP FOR THE PURPOSE OF STRENGTHENING THE PROTECTION OF HUMAN RIGHTS OF OLDER PERSONS

12<sup>th</sup> WORKING SESSION, NEW YORK, 11-14 APRIL 2022

### NORMATIVE INPUTS ON THE RIGHT TO WORK AND ACCESS TO THE LABOR MARKET AND ACCESS TO JUSTICE

#### ABOUT COMMUNITY LEGAL CENTRES AUSTRALIA

Community Legal Centres Australia<sup>1</sup> is the national peak body for 170 community legal centres (CLCs) in Australia. Community Legal Centres Australia has ECOSOC Special Consultative Status. Community Legal Centres Australia has been engaged with the OEWGA since the 4<sup>th</sup> session. Community legal centres are not-for-profit, community-based organisations that provide legal assistance and community development services to their local or special interest communities. Many CLCs provide assistance to older persons, and some specialise in assisting older persons with older persons' rights-specific issues including elder abuse, financial exploitation, social protection including social security, aged care, and accommodation, decision-making and guardianship. Centres have formed an Older Persons Legal Services Network (OPLS) of Community Legal Centres Australia.

#### NORMATIVE AREA 1: RIGHT TO WORK AND ACCESS TO THE LABOR MARKET

##### Definition

1. How is the right to work and access to the labor market for older persons defined in the national legislation in your country? If such a definition is not available, how should it be defined considering relevant existing national, regional, and international legal frameworks?

##### *Response:*

Australia has no national human rights laws that guarantee the right to work for older persons, or for the general community. Australia does have national anti-discrimination laws that prohibit age discrimination at work including the *Age Discrimination Act 2004* and the *Fair Work Act 2009*. These laws apply generally to age discrimination and are not specific to older persons. The rate of complaint is lowest among older persons for both legislative schemes.

Normative standards will ideally ensure that the right to work is entrenched in national laws and that national laws also include schemes that protect against age discrimination in work and access to the labour market.

##### Scope of the right

2. What are the key normative elements of the right to work and access to the labor market for older persons? Please provide references to existing standards on elements such as:

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<sup>1</sup> Formerly National Association of Community Legal Centres, Australia

- (a) Prohibition of all forms of discrimination against older persons on the basis of age, alone or combined with other grounds, in all matters related to employment.
- (b) Elimination of all forms of ageism and age discrimination from the workplace and organizational cultures.
- (c) Provision of reasonable accommodation to older persons in the workplace.
- (d) Affirmative action programs to promote the hiring of older persons.
- (e) Access to career development, technical and vocational guidance programs, placements services and vocational and skills development.
- (f) Access to flexible or gradual retirement schemes and flexible working practices for older workers.
- (g) Promotion of older persons' self-employment and entrepreneurship.
- (h) Favorable, fair, and safe working conditions when undertaking formal, informal or unenumerated work.
- (i) Access to prompt remedies and redress when older persons' right to work and access to the labor market is denied.

***Response:***

Australia has no national human rights laws that enshrine the issues above. Nor does Australia have a national strategy or plan for the employment of older persons or protection of their rights at work. We refer the Working Group to the substantial work of the Australian Human Rights Commission on the issue of age discrimination:

- Australian Human Rights Commission (2015) National prevalence survey of age discrimination in the workplace: The prevalence, nature and impact of workplace age discrimination amongst the Australian population aged 50 years and older;<sup>2</sup>
- Australian Human Rights Commission (2015) Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability Issues paper: Employment discrimination against older Australians;<sup>3</sup>
- Australian Human Rights Commission (2015) Older Australians at Work Summit;<sup>4</sup>
- Australian Human Rights Commission (2016) Willing to Work National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability;<sup>5</sup>
- Australian Human Rights Commission (2016) Healthy Ageing, Willing to Work National Inquiry;<sup>6</sup>
- Australian Human Rights Commission (2016) A qualitative study of employment discrimination against older Australians;<sup>7</sup>

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<sup>2</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/national-prevalence-survey-age-discrimination-workplace>

<sup>3</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/issues-paper-employment-discrimination-against-older>

<sup>4</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/older-australians-work-summit>

<sup>5</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/willing-work-national-inquiry-employment-discrimination>

<sup>6</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/willing-work-healthy-ageing-paper-2016>

<sup>7</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/qualitative-study-employment-discrimination-against-older>

- Australian HR Institute and Australian Human Rights Commission (2018) *Employing Older Workers 2018*;<sup>8</sup>
- Australian Human Rights Commission (2019) *Multigenerational workforces: a guide to the rights of older workers under the Age Discrimination Act 2004 (Ct.)*;<sup>9</sup>
- Australian HR Institute and Australian Human Rights Commission (2021) *Employing and retaining older workers*.<sup>10</sup>

The Commission's reports collectively contain recommendations about how to address ageism and age discrimination in the workforce. They also set out best practices and standard setting policies.

### **State obligations**

3. What are the measures that should be undertaken by the State to respect, protect and fulfil the right to work and access to the labor market for older persons, regarding the normative elements as provided above?

#### ***Response:***

Obviously where the state is an employer, it should take all measures to protect and fulfil the right to work and access to the labor market for older persons in its employ or within its contracting arrangements. National governments ought to be model employers of older persons. In terms of Government reach over non-state actors and non-state employers, normative standards need to compel strong and effective national laws that protect the right to work and prohibit age discrimination and ageism within the workplace or labour market.

Importantly, Australia's and many other country's age discrimination laws do not provide remedies against the broader impacts of ageism, but rather, proscribe narrow grounds of discriminatory conduct and rely on complex burdens and tests – for example 'comparator' tests. Normative standards must ensure that age discrimination laws are broadly applicable in scope and accessible for older persons.

Further, the state has an obligation to ensure that provincial schemes are consistent with the national laws. States also carry a special obligation to raise awareness about older persons' right to work free from discrimination and ageism and to investigate other national laws or policies that may present barriers for realizing older persons' right to work.

### **Special considerations**

4. What special measures and specific considerations should be considered in developing the normative content of the right of older persons to work and access to labour market, such as protection and regularization of older workers in informal sector, equal remuneration for work of equal value particularly for older women as well as recognition of unpaid work often carried out by older women?

#### ***Response:***

Normative standards must recognise the gendered nature of older women's treatment in the workplace and that the intersection of age and gender leads to significant discrimination and violations within the workplace and in access to the labour market.

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<sup>8</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/employing-older-workers-2018>

<sup>9</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/multigenerational-workforces-guide-rights-older-workers>

<sup>10</sup> <https://humanrights.gov.au/our-work/age-discrimination/publications/employing-and-retaining-older-workers-2021>

The Australian Sex Discrimination Commissioner's National Inquiry into Sexual Harassment in Australian Workplaces<sup>11</sup> noted that older women experienced harassment at a higher rate than men, older women from culturally and linguistically diverse backgrounds were particularly vulnerable, older women were vulnerable in male-dominated workplaces, and that harassment forced older women into early retirement and thereby increasing economic insecurity.

5. How should the responsibilities of non-State parties such as private sector be defined in the context of the right to work and access the labour market for older persons?

***Response:***

Human rights must apply in all areas of life, and mechanisms of implementation and enforcement must ensure that rights apply to public and private settings. By entrenching human rights in binding national laws with broad reach, older persons are guaranteed protections wherever they work or experience violations of those rights. Normative standards must recognise that employers can and will on occasion use legal and contractual arrangements to distance themselves from employment compliance obligations and thereby limit liability for loss and injury, or for guaranteeing appropriate employment standards such as rates of pay, conditions, and work injury compensation. Such arrangements must fall within the scope of protections.

**Implementation**

6. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to work and access to the labor market for older persons?

***Response:***

The challenges faced are wide-ranging and can be addressed through normative standards. The Australian Human Rights Commission has identified a wide range of solutions to reduce age discrimination, including:

- Social Awareness and education.
- Training including managers/ HR managers and recruitment specialists training on issues of contribution, Personal bias, Interpersonal skills, and management accountability; and worker-based training on career planning, recruitment skills, skills development.
- Dedicated support systems including advice lines, dedicated recruitment services for the older worker.
- Drivers of change that inspire change through incentive schemes, organization recognition, instilling values, management driven, mentoring, transition practices; and enforce change through quotas and penalties.

Normative standards must address solutions that are evidence-based and change cultural barriers and challenges faced by older workers. Standards should also promote the lessons of older worker's trade unions, professional and occupational associations and collective advocacy groups.

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<sup>11</sup> <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>

## NORMATIVE AREA 2: ACCESS TO JUSTICE

### Access to justice

By way of introduction of the issues, we attach an article on ‘Access to Justice for Older Australians’.<sup>12</sup> Few studies of older Australian’s access to justice have been undertaken, and we refer to and rely upon the Law Council of Australia’s Justice Project report on Older Australian’s Access to Justice.<sup>13</sup> Significant parts of this input are drawn from the Law Council’s work.

### Definition

1. What is the definition of the right of older persons to access justice in the national legislation in your country? Or how should such a right be defined, considering existing national, regional, and international legal framework?

#### *Response:*

Australia has no national laws that enshrine the right to access justice for older persons. The right should be defined broadly to encompass participation in all aspects of the legal and justice systems, including but not limited to participation as legal rights holders, complainants, litigants, witnesses, jurors, administrators, and adjudicators, and including within alternative, customary, cultural, and indigenous justice settings.

### Scope of the right

2. What are the key normative elements of the right of older persons to access justice on an equal basis with others? Please provide references to existing standards on such elements as below, as well as any additional elements:
  - (a) The guarantee of older persons’ legal capacity (legal standing and legal agency) on an equal basis with others and not denied on the basis of age.

#### *Response:*

Normative standards must address the necessary shift towards formal recognition of supported decision-making models, in favour of substitute decision-making models. Legal processes must operate on a presumption of capacity and actively support autonomy and agency.

- (b) Elimination of the influence of ageist stereotypes at any stage of judicial or non-judicial proceedings, including the award of damages or compensation.

#### *Response:*

Court and Tribunal ‘Bench books or Judicial Manuals are an effective way of ensuring judicial awareness and education in respect of older persons’ access to justice, including barriers that older persons’ face in critical areas of the court system.

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<sup>12</sup> The article appeared in *Precedent*, the journal of the Australian Lawyers Alliance, issue 154, published in October 2019 (Sydney, Australia, ISSN 1449-7719).

<sup>13</sup> <https://www.lawcouncil.asn.au/justice-project/final-report>

The calculation of compensation differs significantly throughout the world, however damages awarded to older persons generally reduce with age. This occurs in judicial and non-judicial proceedings, including settlements. Normative standards must recognise the ageism inherent in these practices and ensure that principles of equality before the law are imported into compensation awards or settlements.

(c) Access to timely legal proceedings, especially in situations of immediacy.

***Response:***

Lack of expeditious solutions to legal problems may discourage older persons from acting and pursuing matters through the formal legal system.<sup>14</sup> Due to the frequent delays and protracted nature of legal proceedings, older persons seeking to navigate the justice system must have high resilience and perseverance to initiate and proceed through the dispute resolution process. Depending on the nature of the legal problem, its impact on the older person's life and individual circumstances, some older people may make the assessment that any positive outcome or legal remedy achieved is outweighed by the anxiety, stress and costs associated with the dispute resolution process.<sup>15</sup> Normative standards must address the need for expedition and legal and justive processes should be scalable and adapted to older persons' needs

(d) Accessibility of courtrooms, legal tribunals, and other justice-related facilities to all older persons.

***Response:***

Normative standards should compel all institutions within legal and justice systems to be age-friendly, including the built environment, which should contain any necessary accommodations, aids and technologies that maximise access to justice for older persons. Normative standards must ensure that institutional use of technology does not disadvantage older persons.

(e) Access to legal services, including legal assistance, legal aid, counselling, and hotlines, on an equal basis with others.

***Response:***

Normative standards must address the following:

- Application of legal aid and assistance means and assets tests and ensure expanded grants of aid in family, criminal and civil law matters to meet the needs of older persons more appropriately.
- Legal assistance services should be properly resourced to provide specialist advice and support for older persons, including tailored support for sub-groups of older persons, such as Aboriginal and Torres Strait Islander people, culturally and linguistically diverse groups, LGBTI+ and older women experiencing or at risk of homelessness.
- Specialist legal assistance services for older persons need to be provided equitably including in regional, rural, and remote areas.

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<sup>14</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 162. See also Sarah Ellison et al, *Access to Justice and Legal Needs*, xv – xvii.

<sup>15</sup> Sarah Ellison et al, *Access to Justice and Legal Needs*, 256;.

- Governments should establish well-coordinated, sufficiently resourced central referral services that older people can access to obtain basic information about their legal rights, where to obtain legal assistance and other support services, and available mechanisms to uphold their rights.
  - The services to which older people are being referred must similarly be adequately resourced to ensure that they can effectively respond to the anticipated increase in demand for services resulting from referrals.
- (f) Access to alternative, non-judicial pathways to justice, including, but not limited to, one-stop community justice centers, paralegal support, ombuds procedures or specialist commissioners.

**Response:**

In certain circumstances, a ‘restorative justice’ approach may be suitable to resolve elder abuse and older person’s legal issues, as it aims to restore social relationships by involving the victim and other members of the family or community as active participants in the process.<sup>16</sup> Mediation at an earlier stage of a dispute may enable conflicts to be managed constructively and family or other relationships can be preserved. However, mediation may not be appropriate where a clear power imbalance exists between parties or where the older person may have reduced cognitive capacity or is at risk of undue influence.<sup>17</sup>

Additionally, psychological barriers may not necessarily be overcome through mediation. Older persons may not wish to acknowledge a legal problem due to shame, fear or stoicism, and would rather tolerate the problem silently than make a complaint. It is therefore important that mediators have specialist training and expertise in the field of elder mediation, and any mediation program is complemented with an extensive program of elder mediation education.<sup>18</sup> Accordingly:

- Governments should develop appropriate and tailored measures to support older persons’ effective participation in alternative dispute resolution proceedings, such as discrimination complaint proceedings, elder mediation, and conciliation.
  - This should include robust safeguards to address significant power imbalances between parties and/or other barriers which inhibit older persons’ willingness or ability to participate in proceedings, such as a reluctance to self-advocate.
- (g) Access to reasonable accommodation in all legal and administrative proceedings at any stage to facilitate older persons’ effective role as direct or indirect participants in justice proceedings.

**Response:**

*Age-Health*

Pleasence et al noted that ill-health can have ‘cumulative, intergenerational and spiralling adverse effects and reduce capabilities’.<sup>19</sup> As such, older people with disability may have a reduced capacity to utilise self-help

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<sup>16</sup> Abbi Hobbs and Andrew Alonzi, ‘Mediation and family group conferences in adult safeguarding’ (2013) 15(2) *The Journal of Adult Protection* 70.

<sup>17</sup> Law Society of New South Wales, *When a Client’s Capacity is in Doubt: A Practical Guide for Solicitors* (2009). See also Douglas Knowlton and Tara Lea Mulhauser, ‘Mediation in the presence of domestic violence: is it the light at the end of the tunnel or is a train on the track’ (1994) 70 *North Dakota Law Review* 255.

<sup>18</sup> Australian Dispute Resolution Advisory Council Inc., Submission to the Dispute Resolution Branch, Queensland Department of Justice and Attorney-General, *Supported Elder Mediation Project*, 6 December 2016, 11.

<sup>19</sup> Pascoe Pleasence et al, *Reshaping Legal Assistance Services*, 130.

strategies and are often more reliant on others for assistance and support.<sup>20</sup> Without support, aids and adjustments to accommodate disability or age-related needs, such as impaired mobility, difficulty remembering appointments, diminished self-confidence, sensory impairment, poor communication skills and dependency on others for transport, care and support, these impairments, in interaction with social and environmental factors, constrain older people including those with disability accessing legal assistance and associated support services.

To overcome these challenges, it is essential that older persons are supported by professional advisers, health workers or other support workers to provide clear instructions and to gather the relevant material. It is also important to have expert staff that can assist in progressing matters on behalf of older people in a cost-effective manner.

### *Psychological Barriers*

Psychological barriers such as individual disempowerment, diminished self-confidence, feelings of shame, embarrassment or stoicism and concerns about retribution from abusers or others can foster reluctance amongst older people to access the justice system.<sup>23</sup> Psychological barriers and ‘the complex dynamics of family relationships’ contribute to high levels of underreporting of elder abuse and widespread reluctance to resolve elder abuse disputes using formal dispute resolution mechanisms. Uncertainty as to who to approach for assistance to make a complaint and difficulties in gathering sufficient evidence to make a complaint, can further increase reluctance to report abuse or discrimination.<sup>25</sup>

- (h) Adequate and appropriate training to all those working in the administration of justice and law enforcement, including the judiciary, police, and prison staff, on the rights of older persons.

### ***Response:***

Greater development and dissemination of curriculum, professional development and community legal education resources that focus on elder law issues, particularly elder abuse, with the aim of enhancing community understanding and expertise of elder law issues across the public and private profession. Community Legal Education should include strategies to empower older persons.

- (i) Accommodation of the needs of older prisoners, including necessary physical adaptations, protection against violence and extortion, appropriate educational and vocational opportunities, and support with reintegration into the community.

### ***Response:***

Significant research into the human rights of older prisoners can be found in Geary,<sup>26</sup> Trotter and Baidawi.<sup>27</sup> The rising number and proportion of older prisoners presents significant implications for planning, policy, and service delivery across the correctional system. Older prisoners are characterised by different issues compared to the overall prisoner population, and present unique challenges across several domains, including physical and mental

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<sup>20</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 162; Sarah Ellison et al, *Access to Justice and Legal Needs*, xv – xvii;

<sup>23</sup> See, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 162

<sup>25</sup> Sarah Ellison et al, *Access to Justice and Legal Needs*, xxix, 284. .

<sup>26</sup> <https://dro.deakin.edu.au/eserv/DU:30069508/geary-olderprisoners-2015A.pdf>

<sup>27</sup> Trotter, & Baidawi, S. (2015). Older prisoners : challenges for inmates and prison management. *Australian & New Zealand Journal of Criminology*, 48(2), 200–218. <https://doi.org/10.1177/0004865814530731>



health needs, costs associated with incarceration, vulnerability to victimisation, functioning within the prison environment, program delivery and release planning.<sup>28</sup>

Key issues identified for older prisoners include difficulties presented by the prison environment, suitability of prison programs (including prison work, prison education and training), social functioning (including contact with family and friends, social functioning within the prison environment, sense of safety, and self-reported victimisation in prison).<sup>29</sup>

The Law Council of Australia's Justice project Report on Prisoners and Detainees<sup>30</sup> notes access to justice issues include that the capability of prisoners to use technology can be limited by two compounding factors. First, prisons have commonly been acknowledged as 'technological dead zones' and that many prisoners, particularly older and long-term prisoners, may be 'technically illiterate'.<sup>31</sup>

- (j) Equal access of older prisoners to services, including physical, mental, and cognitive health, dental, hygiene and hospice services, and social and other support services available to the general population; and

***Response:***

For some older prisoners, modifications, and specialised accommodation (e.g., disability compliant cells and facilities) are necessary to meet their physical needs. These results provide further support to the considerable body of international evidence suggesting that prison environments are unable to consistently cater for the needs of older prisoners with disabilities.<sup>32</sup>

- (k) Access to prompt remedies and redress when older persons' right to access justice is denied.

Australia does not have a national guarantee of the right of access to justice or the guarantee of remedies for human rights violations.

**State obligations**

3. What mechanisms or measures are necessary to ensure the enjoyment and to monitor implementation of the right of older persons to access justice, including State obligations to respect, promote, protect, and fulfill the right?

See response to question 5.

**Special considerations**

4. What special considerations or specific issues should be included in the right of older persons to access justice, including procedural and age-appropriate accommodations as well as responsibilities of non-State actors?

***Response:***

*Normative standards must address the diverse legal needs of older persons.*

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<sup>28</sup> Ibid, page 202.

<sup>29</sup> See Trotter, & Baidawi generally.

<sup>30</sup> <https://www.lawcouncil.asn.au/justice-project/final-report>

<sup>31</sup> Ibid 112.

<sup>32</sup> Ibid, page 215.

The legal needs of older persons are diverse and are affected by a multiplicity of factors, such as an older person's stage of life, age, socio-economic circumstances, health, geographic location, and cultural and linguistic background. Many legal problems experienced by older persons are age-related and 'reflect the complex legal needs of ageing', such as losing a partner or spouse, grandparenting issues, age discrimination, issues associated with retirement housing, pension or social security issues, guardianship and enduring power of attorney, wills and being guarantors for loans taken out by family members.<sup>33</sup> Older persons experiencing disadvantage are more likely to experience multiple types of legal problems and cumulative legal problems.<sup>34</sup>

Issues that require specific attention in normative standards include:

- Violence, abuse, and neglect
- Ageism and discrimination
- Issues associated with their consumer treatment
- Issues associated with grandparenting and kinship caring
- Issues associated with older person specific accommodation
- Legal issues associated with disaster, emergencies, and conflict

*Normative standards must address the diversity of older persons and their life course experiences*

Older persons are not a homogenous group, and their legal needs vary considerably depending on where they fall within this age group as well as the existence of other factors which may increase legal need, such as economic deprivation, ill health, disability, racial, ethnic, and cultural background, homelessness, and geographic isolation. Other factors such as strong family or community support, secure accommodation, stable income, and good health may decrease the risk of legal problems.<sup>35</sup>

Normative standards must recognise the different needs, experiences, and intersectional identities of older persons. Standards must ensure that responses to the legal needs of older persons are effective, which can only occur if the needs of specific segments of the older population are understood and responses to these are purpose-built. For instance, tailored responses are required for older persons who are Aboriginal and Torres Strait Islander, from a culturally and linguistically diverse background, live in rural or remote areas or identify as LGBTI+.<sup>38</sup> Older women were also identified as another specific segment of the older population that require tailored responses. A significant number of older persons experience intersecting and cumulative disadvantage, most commonly financial hardship, social isolation, and disability.

*Normative standards must address how older persons respond to legal issues*

Research shows that older persons often undertake minimal information-seeking and, when advice is sought, it tends to be delayed due to a range of factors, including:

- reluctance to think about death and impairment.
- lower literacy levels.
- lower confidence in enforcing their rights and approaching official agencies.
- previous negative experiences with the law.
- perception that the law is disempowering and unable to solve their problems.

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<sup>33</sup> Ibid 150.

<sup>34</sup> Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey Legal Need in Australia* (2012) xxiii,16 ('*LAW Survey*').

<sup>35</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people, and the law* (2007) 2.

<sup>38</sup> Ibid.

- dislike and/or mistrust of the legal and court system; and
- fear that lawyers may act against their interests.<sup>40</sup>

The low propensity to seek legal assistance may also be a consequence of funding restrictions affecting legal assistance bodies, which have meant very minimal resources can be allocated to civil law assistance, namely areas of predominant legal need for older persons. Research in Australia has revealed that in most jurisdictions, older persons have lower levels of finalising legal problems.<sup>41</sup> These low-resolution rates correlate with older people being either less likely to seek help in response to legal problems or not provided with adequate support and assistance to act, suggesting that legal needs remain unmet for many older persons.<sup>42</sup>

## Implementation

5. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to access justice for older persons?

### *Response:*

#### *Normative standards must address digital exclusion*

For some older persons, the shift to online services and communication has made it more difficult to find sources of legal information and access legal assistance.<sup>43</sup> The ability to effectively access and utilise online services and legal information relies on the existence of several factors, such as home access to internet, the physical ability to use online devices, internet and technological know-how, and willingness and/or capacity to learn how to use the internet as a source of information. Research indicates that ‘age is a significant factor in digital literacy and online engagement’.<sup>44</sup> Older persons are the slowest demographic group to adopt online technology and are least likely to engage in online information seeking for legal problems.<sup>45</sup> The Australian Digital Inclusion Index ranked older persons, especially older women, as the ‘most digitally excluded age group’, with digital exclusion increasing with age.<sup>46</sup>

However, the digital exclusion of older persons can be ameliorated through the provision of support and education to enhance older persons’ capability to utilise technology to access legal information and assistance. Similarly, online access should be ‘as user friendly and assistive as possible for people who have limited digital experience’, and should complement rather than replace ‘face-to-face, phone and paper-based communications’.<sup>47</sup>

#### *Normative Standards must address critical gaps in services*

Research and Justice Project stakeholders have indicated that there is a lack of specialist legal services for older persons, particularly in RRR areas, and inadequate expertise with respect to elder law issues, particularly amongst private practitioners.<sup>48</sup>

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<sup>40</sup> Ibid 25-6.

<sup>41</sup> Christine Coumarelos et al, *LAW Survey*, xxiii.

<sup>42</sup> Susannah Sage-Jacobson, ‘Access to Justice for Older People’, 151.

<sup>43</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 162; Sarah Ellison et al, *Access to Justice and Legal Needs*, xv-xvii, 41.

<sup>44</sup> Council on the Ageing, *Submission No 114*.

<sup>45</sup> Catrina Denvir, Nigel Balmer and Pascoe Pleasence, ‘Portal or pot hole? Exploring how older people use the “information superhighway” for advice relating to problems with a legal dimension’ (2014) 34 *Ageing & Society* 670 (‘Portal or pot hole?’).

<sup>46</sup> Council on the Ageing, *Submission No 114*.

<sup>47</sup> Ibid.

<sup>48</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 160.

*Normative standards must address economic disadvantage and poverty*

A substantial proportion of older persons experience some level of economic deprivation and rely heavily on social security payments. This is a clear barrier to accessing justice. Low income and/or restricted access to funds creates a financial barrier to accessing private legal services.

*Normative standards must address equitable access to legal aid*

Despite being reliant on a pension or other government benefit as their main form of income, a significant number of older people fail to meet the legal aid means test for ongoing advice and representation due to owning assets such as a house.<sup>49</sup>

*Normative standards must address laws, policies and practices which exacerbate access to justice barriers for older persons*

In the area of elder abuse, the complexity of the legal system and the disparate elder abuse framework, combined with other systemic and personal barriers, also make some older people reluctant to report abuse and engage with the legal system in the first instance.

In the area of discrimination, complaint-handling procedures require complainants to self-represent. However, some older people are reluctant to assume the level of power and entitlement necessary for self-advocacy. When combined with lower awareness of the law and their legal rights, older people can be at a considerable disadvantage in discrimination proceedings.

In respect of deprivation of liberty and the use of restrictive practices in long term care settings – the need for comprehensive frameworks regulations settings that involve deprivations of liberty’ must be addressed.

**22 February 2022**

**Community Legal Centres Australia**

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<sup>49</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 171.