



Law Council
OF AUSTRALIA

Office of the President

8 November 2019

Chair, Ambassador Martín García Moritán (Argentina)
Open-ended Working Group on Ageing
c/- Bureau, Department of Economic and Social Affairs (DESA)
United Nations Secretariat (29th Floor)
405 E 42nd Street
New York, NY 10017

By email: ageing-working-group@un.org

CC: Amal Abou Rafeh <rafah@un.org>

Dear Chair

Substantive Input to the Eleventh Working Session on Access to Justice

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to the United Nations General Assembly Open-Ended Working Group for the Purpose of Strengthening the Protection of the Human Rights of Older Persons (**Working Group**). This submission addresses the focus area of access to justice.

The Law Council, as the national peak body for the legal profession, acts on behalf of more than 65,000 lawyers through its Constituent Bodies – the state and territory law societies and bar associations, and Law Firms Australia, representing a number of Australia's largest global firms. The Law Council promotes the administration of justice, access to justice, and general improvement of the law – in Australia and abroad.

The Law Council is a non-governmental organisation in consultative status with the Economic and Social Council.

Please contact Dr Natasha Molt, Director of Policy on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

Arthur Moses SC
President

Background

Throughout 2017-18 the Law Council undertook the 'Justice Project': a comprehensive review of the state of access to justice in Australia for those identified as facing significant economic and other disadvantage.¹ The Justice Project focussed on 13 marginalised groups, including older Australians.² This submission summarises the key findings and priorities from the Older Persons Chapter of the Justice Project's Final Report.³

Barriers constraining older persons from accessing justice

A significant number of older persons have low awareness of their legal rights and may find it difficult to identify a legal problem in the first instance. When a legal problem is identified, a significant number of older persons undertake minimal information-seeking and when advice is sought, it is often delayed and from a non-legal adviser.⁴

This response to legal problems is a product of a range of factors, including:

- limited knowledge of where to find legal help;
- greater reliance on family and friends;
- digital exclusion;
- limited access to funds (due to elder financial abuse or economic disadvantage);
- a perception that the law is disempowering; and
- a belief that the potential benefits of engaging with the legal system are outweighed by the stress, cost and delay in resolving the issue.⁵

The Law Council considers that a well-coordinated, sufficiently resourced central referral service is required in Australia so that older people can obtain basic information about their legal rights, and access legal assistance and other support services.

Critical gaps in services which are necessary to deliver justice to older persons

Lack of specialist services and expertise

There is a lack of specialist legal services for older persons, particularly in regional, rural and remote (RRR) areas of Australia.⁶ Elder abuse issues in particular require suitably expert legal practitioners to identify the problem in the first instance and provide appropriate advice, yet there is inadequate expertise with respect to elder law issues amongst the legal profession. Greater development and dissemination of curriculum, professional development and community legal education resources with respect to elder law issues,

¹ See Law Council of Australia, 'The Justice Project' (Web Page) <<https://www.lawcouncil.asn.au/justice-project>>.

² The priority groups identified in the Justice Project are people with a disability, people experiencing economic disadvantage, LGBTQI+ people, prisoners and detainees, Aboriginal and Torres Strait Islander people, people who experience family violence, people who have been trafficked and exploited, recent arrivals to Australia, children and young people, rural, regional and remote (RRR) Australians, asylum seekers, older persons and people who are homeless.

³ Law Council of Australia, *Justice Project* (Older Persons Chapter, Final Report, August 2018) <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Older%20Persons%20%28Part%201%29.pdf>>. See also Law Council of Australia, 'The Justice Project – Older Persons' (Web Page) <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Infographics/Older%20persons%20Infographic_FINAL.pdf>.

⁴ Law Council of Australia, *Justice Project* (Older Persons Chapter, Final Report, August 2018) 15-7.

⁵ Ibid 17-22.

⁶ Ibid 23.

particularly elder abuse, is required with the aim of enhancing expertise of elder law issues across the public and private profession.⁷

Funding constraints place significant limits on the availability of free legal assistance for older persons, especially for civil law matters.⁸ This should be addressed by properly resourcing legal assistance services 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.⁹ These services should also be urgently expanded in RRR areas.¹⁰

Restricted access to legal aid

Older persons face additional difficulties accessing legal aid due to strict means tests. 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 means test for legal aid due to owning assets such as a house. However, older persons may be unable to access their assets or savings, which impedes older persons from accessing private legal services.¹¹

Legal aid means and assets tests should be relaxed and grants of aid in civil law matters expanded to more appropriately meet the needs of older persons.¹²

Laws, policies and practices which exacerbate access to justice barrier for older persons

Elder abuse laws

There is no national legal framework that deals with elder abuse, as it falls within the jurisdictions of the Australian and state/territory governments and is covered by laws that deal with ancillary matters. 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.¹³

The Council of Australian Governments published in 2019 a National Plan to address elder abuse.¹⁴ This National Plan should be underpinned by a national community awareness and education campaign on elder abuse, to promote prevention and early reporting of elder abuse. Efforts to increase awareness of this issue should be partnered with appropriate resourcing of the services which support relevant individuals, including legal assistance services.¹⁵

Self-advocacy and complaint-handling procedures

Key barriers for older persons to effectively participate in alternative dispute resolution proceedings, such as such as discrimination complaint proceedings and elder mediation and conciliation, include:

⁷ Ibid 26-7, 36.

⁸ Ibid 23-6, 36.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid 27-9, 36.

¹² Ibid 36.

¹³ Ibid 30-3.

¹⁴ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians 2019-2023* (March 2019) <<https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf>>.

¹⁵ Law Council of Australia, *Justice Project* (Older Persons Chapter, Final Report, August 2018) 3.

- lower awareness of the law and their legal rights;
- lack of support, aids and adjustments to accommodate disability- and age-related needs; and
- psychological barriers, such as disempowerment, diminished self-confidence and feelings of shame, embarrassment or stoicism.¹⁶

Appropriate and tailored measures are needed in Australia to support older persons' effective participation in alternative dispute resolution proceedings. Such measures should include robust safeguards to address power imbalances between parties and other barriers which inhibit older persons' willingness or ability to participate in proceedings.

¹⁶ Ibid 33-4, 36.