



## Guiding questions for the thirteenth session

### Focus area 1: Right to health and access to health services

#### About Community Legal Centres Australia

Community Legal Centres Australia<sup>1</sup> (CLCs Australia) is the national representative voice for the community legal sector in Australia. It has ECOSOC Special Consultative Status with the United Nations. 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 related services to everyday people, especially people experiencing financial hardship, discrimination and/or some other form of disadvantage, or who are experiencing domestic or family violence. CLCA's members are the eight state and territory community legal sector peak bodies. Together, they represent about 170 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.

All CLCs assist older persons, and some specialise in assisting older persons with rights-specific issues including elder abuse, financial exploitation, social protection including social security, aged/long-term care, and accommodation, decision-making and guardianship. Centres have formed an Older Persons Legal Services Network (OPLS) of CLCs Australia. Many CLCs are also experts in discrimination law.

CLCs Australia has engaged in working sessions of OEWGA since the 4th session.

#### National legal and policy framework

Australia is a constitutional federation of six states<sup>2</sup> and two self-governing territories.<sup>3</sup>

*1. What are the legal provisions and policy frameworks in your country that guarantee the right of older persons to the enjoyment of the highest attainable standard of physical and mental health, including access to promotive, preventive, curative, rehabilitative and palliative health facilities, goods, and services?*

Australia remains in a minority of countries worldwide without a national human rights charter or statute.<sup>4</sup> Older Australians have no national constitutional or legislative guarantees to the human right to health or access to health services. Three of eight states/territories within Australia have human rights laws, and only one guarantees the right

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<sup>1</sup> Formerly the National Association of Community Legal Centres.

<sup>2</sup> Queensland, New South Wales, Victoria, Tasmania, South Australia, and Western Australia.

<sup>3</sup> Australian Capital Territory and Northern Territory.

<sup>4</sup> <https://www.hrlc.org.au/charters-of-human-rights>

to health services.<sup>5</sup> A mixture of national and state/territory laws provide for public health and funding frameworks rather than providing statements of rights.<sup>6</sup>

*2. What steps have been taken to ensure that every older person has access to affordable and good quality health care and services in older age without discrimination?*

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) has not been directly incorporated into domestic law, except for the limited example in Queensland.<sup>7</sup>

Gunn and McDonald recently noted, “Commonwealth legislation does not explicitly enshrine a positive right to health as envisaged by the Covenant. The Australian Government argues international obligations are maintained through laws funding access to health services. While the World Health Organization acknowledges that the provision of universal health coverage is the practical expression of the right to health, it is not the same as creating an actual right. An individual having access to a range of health services does not guarantee them any specific service or treatment, especially in situations of scarcity.”<sup>8</sup>

Federal discrimination laws including distinct statutes on employment, race, sex, disability, and age. Complaints that involve multiple areas of discrimination must be made separately under each statutory scheme. This differs from state/territory arrangements where single anti-discrimination statutes more easily facilitate intersectional complaints. All laws prohibit direct and indirect discrimination and apply to age generally. Exemptions are diverse and relevantly include exempt health programs, taking a person’s age into account in making a decision relating to health/medical goods or services, administration of health legislation,<sup>9</sup> and public health measures.<sup>10</sup>

*3. What data and research are available regarding older persons’ right to health and access to health care and services? Please indicate how national or sub-national data is disaggregated by sex, age and inequality dimensions, and what indicators are used to monitor the full realization of the right to health of older persons.*

Information on older Australians’ health is available in a range of statistical formats and reporting measures.<sup>11</sup> Health outcomes for older indigenous persons<sup>12</sup> and older people in

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<sup>5</sup> Human Rights Act 2019 (Qld), sec 37.

<sup>6</sup> <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-health>

<sup>7</sup> Gunn MA, McDonald FJ. *COVID-19, rationing and the right to health: Can patients bring legal actions if they are denied access to care?* Med J Aust 2020; <https://www.mja.com.au/journal/2020/covid-19-rationing-and-right-health-can-patients-bring-legal-actions-if-they-are> [preprint, 28 July 2020].

<sup>8</sup> Ibid.

<sup>9</sup> Age Discrimination Act 2004, sec 42.

<sup>10</sup> Anti-Discrimination Act 1991, sec 107.

<sup>11</sup> <https://www.aihw.gov.au/reports-data/population-groups/older-people/overview>

<sup>12</sup> <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/aboriginal-and-torres-strait-islander-people>

rural, remote, and very remote areas<sup>13</sup> are characterised by shorter lives, higher death rates, higher levels of disease and injury, and poorer health outcomes compared with people living in metropolitan areas.<sup>14</sup>

Van Gaans' and Dent's Review<sup>15</sup> identified health access issues for older Australians,<sup>16</sup> highlighting the contribution of factors to health service accessibility varied according to an older person's geographical locale, their accessibility to transport and their level of multi-morbidity and cultural background.<sup>17</sup> They noted three important dimensions to ageing-in-place, the home the older person resides in, the community the person interacts within and the services and support that are available to them, should shape current and future health service models.<sup>18</sup>

*4. What steps have been taken to provide appropriate training for legislators, policymakers, health, and care personnel on the right to health of older persons?*

Significant national inquiries have recommended the need for immediate improvement of training across all aspects of health and care of older Australians. This is accepted by Government but is not yet implemented.<sup>19</sup>

## Progressive realization and the use of maximum available resources

*5. What steps have been taken to align macroeconomic policies and measures with international human rights law, to use maximum available resources for the realization of older persons' right to health, such as through expanding fiscal space, adopting targeted measures and international cooperation?*

The normative and regulatory framework for the health and long-term care of older Australians is in a state of flux. Reform measures are currently in new, draft, transitional or anticipated form.<sup>20</sup> These measures are purported to embed a human rights framework within health and care arrangements for older persons.

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<sup>13</sup> <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/regional-remote-communities>

<sup>14</sup> Ibid.

<sup>15</sup> The Review was conducted against Penchansky and Thomas' five dimensions of accessibility: availability, accessibility, accommodation, affordability, and acceptability: See Penchansky R, Thomas JW. *The concept of access: definition and relationship to consumer satisfaction*. Med Care. 1981;19(2):127–40.

<sup>16</sup> Van Gaans, D., Dent, E. *Issues of accessibility to health services by older Australians: a review*. Public Health Rev 39, 20 (2018). <https://doi.org/10.1186/s40985-018-0097-4>

<sup>17</sup> Ibid, p.14.

<sup>18</sup> Ibid.

<sup>19</sup> In respect of the aged care system: <https://www.health.gov.au/resources/publications/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety>; see <https://www.health.gov.au/resources/publications/aged-care-workforce-action-plan-2022-2025>; <https://www.health.gov.au/topics/aged-care/providing-aged-care-services/working-in-aged-care/improving-workforce-skills-and-qualifications>.

<sup>20</sup> <https://www.health.gov.au/our-work/aged-care-reforms>.

In respect of long-term care, the Australian Government plan<sup>21</sup> includes new aged care laws, including a new ‘consumer-focused’ Aged Care Act. The new Act is intended to commence from 1 July 2023, subject to parliamentary processes.<sup>22</sup> Importantly, the Government’s description of ‘consumer-focused’ reforms devalues the recent Royal Commission’s recommended ‘rights focus’.<sup>23</sup> The Government also promises the delivery of high-quality health care for older Australians, noting development of an integrated long-term strategy will require more detailed consideration by all governments.<sup>24</sup> Despite reforms so far, older Australians have diverse health care needs that are not matched by rights guarantees.<sup>25</sup>

## Equality and non-discrimination

*6. What are the challenges faced by older persons in their enjoyment of the right to health, including the impact of intersectional discrimination and inequality based on age, gender, disability, and other grounds?*

Older Australians lack the ability to make intersectional complaints under the federal system. Individual complaints can be made under relevant federal laws, but their historical passage means the various laws have different provisions and tests, different formulations of discrimination, and different bases for exemption.<sup>26</sup> Where a state/territory discrimination system applies, intersectional complaints can be made based on multiple attributes and characteristics – for example, age, race, disability, sex, sexuality, gender identity.

*7. What measures have been taken to eliminate ageism and discrimination based on age, including discriminatory laws, policies, practices, social norms, and stereotypes that perpetuate health inequalities among older persons and prevent older persons from enjoying their right to health?*

Australia has no national plan to combat ageism, including within health systems or in respect of the right to health or access to health services. This is a nationally recognized gap that would be guided by a Convention on the Rights of Older Persons.

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<sup>21</sup> <https://www.health.gov.au/resources/publications/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety>.

<sup>22</sup> Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety, May 2021, Page 1.

<sup>23</sup> Final Report of the Royal Commission into Aged Care Quality and Safety, Volume 1: Care, Dignity and Respect, Summary and Recommendations, 2021, pp.79-80, Recommendations 1-3; [https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-1\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-1_0.pdf)

<sup>24</sup> Ibid, Page 4.

<sup>25</sup> <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/health-aged-care-service-use/health-care-gps-specialists>

<sup>26</sup> Racial Discrimination Act 1975; Australian Human Rights Commission Act 1986; Sex Discrimination Act 1984; Disability Discrimination Act 1992; Age Discrimination Act 2004; Fair Work Act 2009.

8. *What measures have been taken to ensure that older persons are able to exercise their legal capacity on an equal basis with others, including making an informed consent, decisions and choices about their treatment and care?*

The three jurisdictions with human rights laws provide specific rights to recognition and equality before the law. This has led to different approaches and outcomes in those jurisdictions. The situation in Australia remains fragmented and inconsistent.<sup>27</sup>

All states and territories have statutes regulating the making and use of powers of attorney and health directives. Four jurisdictions combine appointment of personal and health on the same form while the others use separate forms for appointment. This creates eight jurisdictions with different types of statutory protections. There are recommendations to make such laws national and uniform.<sup>28</sup>

All Australian jurisdictions have statutory schemes for adult guardianship and financial administration. The schemes vary considerably though each has a Tribunal that is empowered to appoint a guardian and or a financial administrator for a person with impaired decision-making capacity. All jurisdictions have appointed statutory officers that operate as public guardians, administrators, or trustees. Orders for guardianship or administration can include health decision-making.

In addition to the common law, each state/territory has guardianship and/or medical treatment legislation about capacity and consent. This legislation varies across jurisdictions and can be complex. In some jurisdictions, there are multiple definitions of capacity, and which one applies depends on the context e.g., whether a person can make decisions about medical treatment decision-making, or if they need to have a guardian appointed.<sup>29</sup> This has happened because some states and territories have more than one piece of legislation that applies, and some of those laws were passed by parliaments at different times.<sup>30</sup>

## Accountability

9. *What judicial and non-judicial mechanisms are in place for older persons to complain and seek redress for the denial of their right to health?*

Remedies for denial of the right differ depending on national and state/territory arrangements and governing legislation.

Australia has no specific judicial or non-judicial mechanisms that guarantee enforcement of the right to health beyond one jurisdiction with the right to health services, which allows for complaint to a commission-based conciliation process. Commonwealth and state/territory anti-discrimination schemes can consider age-based discrimination in health services.

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<sup>27</sup> Bernadette McSherry and Lisa Waddington (2017) *Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia*, Australian Journal of Human Rights, 23:1, 109-129, DOI: [10.1080/1323238X.2017.1314808](https://doi.org/10.1080/1323238X.2017.1314808)

<sup>28</sup> Australian Law Reform Commission, Elder Abuse, A National legal Response, June 2017, Chapter 5.

<sup>29</sup> <https://end-of-life.qut.edu.au/capacity>

<sup>30</sup> Ibid.

Federal and provincial ombudsman exist for health-related complaints. This includes Commonwealth Ombudsman with private industry oversight, and state/territory schemes, many of which have specialist health/disability focus.

*10. What mechanisms are in place to ensure the effective and meaningful participation of older persons living in different geographic areas of the country in the planning, design, implementation and evaluation of health laws, policies, programmes, and services that affect them?*

National and state/territory consultative processes exist, however older Australians have no enforceable human right to participate. Some developments such as the Aged Care Quality and Safety Advisory Council,<sup>31</sup> the National Aged Care Advisory Council<sup>32</sup> and the Age Care Council of Elders<sup>33</sup> have shown purposeful improvement but essentially remain beyond the engagement of individual older Australians.

The three Australian states/territories with human rights laws guarantee the right to take part in public life and the conduct of public affairs albeit with limitations.

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<sup>31</sup> The Aged Care Quality and Safety Advisory Council (Advisory Council) is established under Section 37 of the Aged Care Quality and Safety Commission Act 2018.

<sup>32</sup> <https://www.health.gov.au/committees-and-groups/national-aged-care-advisory-council?language=en>

<sup>33</sup> <https://www.health.gov.au/committees-and-groups/aged-care-council-of-elders>