

## ACCESS TO JUSTICE FOR OLDER AUSTRALIANS

By Bill Mitchell

The pervasive impacts of ageism, including the prejudiced social attitudes towards older people and their devalued social identity, create barriers to them accessing justice and diminishes their right to equal protection under the rule of law.

Older people and their needs are simultaneously hidden and distinguished by stereotyping.<sup>1</sup> They are treated differently because of their chronological age, and their specific human rights, including access to justice rights, go unaddressed.<sup>2</sup> Older persons are among the last social group without their own specific human rights instrument, and are often denied autonomy and agency as rights-bearers within law and society. The global call for appropriate rights frameworks to shift older people from objects of charity to rights-bearers is gathering momentum in Australia and offers solutions to older persons' access to justice issues.

### WHO ARE OLDER AUSTRALIANS?

The Australian Bureau of Statistics uses age 65 as a statistical marker for the beginning of older age. Despite this, the question of what defines older age has no easy answer. The concept of older age is multi-dimensional, and includes chronological (based on a birthdate), biological (related to human body ability), psychological (concerned with psycho-emotional functioning) and social-cultural age (related to social roles such as grandparents).<sup>3</sup> Additionally, global policy frameworks encourage a life course approach and a functional perspective, taking account of factors such as diversity and inequity.<sup>4</sup> There are added complexities for Aboriginal and Torres Strait Islander persons, for whom the term *elder* refers to appointed community members or representatives with cultural and other responsibilities, though not necessarily an older person by chronological age.

At Federation, older Australians constituted 4 per cent of the population. By 2011 they reached 14 per cent and by 2051 they will make up around 25 per cent.<sup>5</sup> Terminology has evolved as attitudes to ageing have shifted. Increasingly we avoid terms like *the elderly*, *elderly people* or *seniors* or language that reflects benevolent prejudice; the tendency to pity, seeing older people as friendly but incompetent.<sup>6</sup> Benevolent prejudice is superficially positive but ultimately reinforces inferiority. It positions older persons as frail, easily duped and needing protection rather than vital, active and independent.<sup>7</sup>

Older Australians are often defined by age proxies based on minimum or maximum chronological age, such as entitlement to age pension. Age proxies are common but remain arbitrary and discriminatory.<sup>8</sup> For example, entry into aged care is set at 65 except for Aboriginal or Torres Strait Islander persons, who can enter aged care at 50 – taking account of the massive gap in life expectancy of up to 10 years.<sup>9</sup> The same recognition does not afford them younger access to age pensions, superannuation or other so-called *seniors* concessions. Age proxies are also arbitrary in light of geographic determinants of health equity, such as those investigated by the Marmot Review (2010) in the UK.<sup>10</sup> Ten years on from Marmot, inequalities between local authorities persist. Life expectancy for men varied from 74 in Blackpool to 83 in Kensington and Chelsea – a nine-year gap.<sup>11</sup> These situations highlight why the use of age – a relative characteristic – is problematic in defining older persons.

### BARRIERS TO ACCESSING JUSTICE

Older Australians face a range of challenges in their interactions with the legal system.<sup>12</sup> Given that population ageing is an inescapable demographic destiny, interactions will increase in frequency and complexity.<sup>13</sup> The Australian Parliament's landmark *Older People and the Law Report (2007)* identified a raft of access to justice issues for older Australians.<sup>14</sup> It recognised that the specific characteristics of their engagement with the law warrant a tailored response.<sup>15</sup> The Parliament noted:

'... for many older people, their access to legal services is constrained by factors that are largely beyond their control. The Committee found that the existing legal system is not well equipped to meet the legal needs of older people, who often have complex needs but require low cost solutions that are targeted and delivered in a specific way.'<sup>16</sup>

Research during the 2000s on the legal needs (including legal education needs) of older Australians invoked similar themes.<sup>17</sup> Reports reinforced the importance of specialist expertise and competencies in dealing with older persons' legal issues. Many of the challenges revealed by early research remain unresolved access to justice issues.

Take the issue of autonomy. Contextually, many older persons' legal issues involve asserting autonomy, and yet denials of legal capacity prevent them from enforcing their rights. Written expressions of autonomy (for example, wills) are challenged for want of competence. Protective measures designed to underpin and support agency (for example, enduring documents) become tools of abuse. The last resort of guardianship becomes a first response. Despite centuries of jurisprudence, the law still struggles to balance the right to autonomy within legal settings. Further, barriers to accessing justice include causal loops where the inability to access legal safeguards denies later rights, remedies and protections. For example, family agreements are an effective protection from financial abuse, but they remain expensive and out of reach for many older Australians who would benefit from them.

The Law Council of Australia's *Justice Project* (2018) provided a recent, comprehensive accounting of the barriers to accessing justice faced by older Australians:

- ageism and age discrimination;
- financial disadvantage;
- inadequate social security, social protections and social supports;
- individual psychological barriers;
- the lack of expedition in justice systems;
- social, digital and financial exclusion;
- lack of expertise and specialist services;
- restricted access to legal assistance;
- a paucity of specialist laws and policies;
- power imbalances in modes of representation; and
- the loss of autonomy and independence.<sup>18</sup>

It seems the only progress we have made since those early reports is to further refine our understanding of the causes and types of barriers. While we have identified a range of protective legal processes, we have not yet brought them within the reach of the lion's share of older Australians.

### **NATIONAL ACTION**

Put simply, there is a dearth of formal research on the access to justice and legal needs of older Australians. The *Legal Needs of Older People in New South Wales* (2004) remains Australia's only formal study.<sup>19</sup> The Foundation reported that older persons' particular vulnerability in dealing with conflict was a major factor in the difficulties they experience in accessing legal assistance.<sup>20</sup> They noted that physical and mental incapacity, dependency on others, diminished self-confidence, anxiety about the possible consequences, and ignorance of the available services were factors that presented barriers to seeking legal assistance.<sup>21</sup> Further, older persons found it difficult to identify what they need or want to know about their legal rights.<sup>22</sup> The research points to a grave knowledge gap, likely made worse by digital disruption.

The *Australia-Wide Legal Needs Survey* (2012) found that older persons had the lowest prevalence of legal problems,<sup>23</sup> low rates of taking legal advice and legal action,<sup>24</sup> low rates of finalisation of legal problems,<sup>25</sup> and lacked knowledge and literacy of legal pathways.<sup>26</sup> We must accept that the findings of low prevalence of legal issues may simply reflect older Australians' knowledge gap. Recent work reveals that elder abuse could affect up to 12 per cent of older Australians – and this is only one of the legal issues affecting them.<sup>27</sup> The Royal Commission into Aged Care Quality and Safety is cataloguing a range of human rights abuses of older Australians.<sup>28</sup> Clearly, we are only now beginning to understand older Australians' wealth of legal issues. Disappointingly, recent access to justice research has all but ignored the ageing cohort.<sup>29</sup> It seems obvious that there is an urgent need for a contemporary national study that draws on past work but reflects our current understanding of the issues.

Reports have consistently recommended legal assistance solutions such as specialist pathways, access points and services for older persons within legal and justice systems. This requires increasing resources to existing legal assistance strategies but also creating innovative strategies that can address the gamut of older persons' human rights concerns. Why not introduce a national older persons legal service program? We already have specialist programs across a range of other interest

groups. Some areas such as elder abuse have attracted injections of funding for legal assistance;<sup>30</sup> however, targeted allocations ignore the interconnected and interrelated nature of older persons' human rights issues. Similarly, the Banking Royal Commission recognised that the 'asymmetry of knowledge and power between consumers and financial services entities' can be rebalanced by access to legal assistance.<sup>31</sup> It reported on how older persons are particularly vulnerable to various exploitative financial services practices, but it did not 'join the dots' between those practices and the phenomenon of financial abuse. The threads of all relevant structural inquiries, on banking, aged care and elder abuse can be drawn together under a human rights approach. A human rights approach is the best and most appropriate guiding framework to address the concerns of older persons.

One approach of the federal government to improve access to justice is to mandate older persons as a target group for legal assistance providers. The National Partnership Agreement on Legal Assistance (the NPA) names them as priority clients for legal aid commissions and community legal centres.<sup>32</sup> The NPA Review (2018) revealed that legal aid commissions' services to older persons was the lowest of all priority groups at 1 per cent or lower in all jurisdictions except the Northern Territory (5 per cent).<sup>33</sup> In contrast, Community Legal Centres Queensland noted that older persons represented approximately 11 per cent of CLC clients during the 2015–17 period.<sup>34</sup> This higher access rate reflects that 21 per cent of CLCs had specialist programs focused on older persons.<sup>35</sup> Given that older Australians currently make up around 16 per cent of the population, the NPA has failed to ensure that their needs are effectively prioritised. One solution is to include abuse of older persons as a priority area of law in the NPA, alongside family violence. This approach would also be consistent with the government's National Plan to Respond to the Abuse of Older Australians.

Australia's anti-discrimination laws have not provided tangible access to justice solutions. Ageism and age discrimination are still widespread and regularly experienced, and negative stereotypes permeate all aspects of our society.<sup>36</sup> The federal Age Commissioner's Report on rights at retirement identified 14 areas where older Australians need legal assistance.<sup>37</sup> Federal age discrimination complaints are low at 8 per cent.<sup>38</sup> Complaints made by older persons comprised only 28 per cent of those – a total of 49 complaints in 2017–18, just 2.4 per cent of all complaints to the Australian Human Rights Commission that year.<sup>39</sup> Australia's human rights legislation in all jurisdictions (ACT, Victoria and Qld) provides access to justice rights, yet they appear to have had little impact on older persons' access to justice issues.<sup>40</sup> By contrast, in Europe, human rights laws have been used to promote age-friendly legal systems.<sup>41</sup>

An essential solution is to recognise and protect older Australians' right to autonomy. The right to autonomy is central to accessing justice. A national Charter of Human Rights should include a stand-alone right to autonomy. Efforts to reflect the centrality of autonomy have been made in recent instruments such as the new *Aged Care Charter of Rights*;<sup>42</sup> but, ultimately, the rights are unenforceable in a traditional legal sense. The Charter right to 'have a person of my choice, including an aged care advocate, support me or speak on my behalf'<sup>43</sup> is rendered meaningless without the ability to access representation or enforce the right. Suffice to say enforceable human rights are a better proposition than consumer rights for older Australians in aged care.

## GLOBAL SOLUTIONS

The United Nations noted that 'a multiplicity of instances of the violations of human rights of older persons exist everywhere'.<sup>44</sup> Within this context, civil society's call for a unique human rights framework for older persons is central to its global campaign.<sup>45</sup> The call includes rights to access to justice. Global policy and program exemplars offer solutions to improve older persons' access to justice. Access to justice is included in the United Nations' Agenda 2030's 17 sustainable development goals to ensure that no one is left behind (Goal 16).<sup>46</sup> While Australia's commitment under this goal hasn't drilled down to the issue of older persons' access to justice, it leaves the issue open for agitation.

Australia also has a standing commitment from its last (Second Cycle) Universal Periodic Review:

'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. Australia committed to including a dedicated section on the rights of "older Australians" in all relevant human rights treaty and universal periodic review reports. Australia will seek to have the rights of older persons reflected in United Nations resolutions and encourage existing Special Rapporteurs to consider the application of their mandate to older persons in close collaboration with the Special Rapporteur on the enjoyment of all human rights by older persons.'<sup>47</sup>

So far Australia's commitment has amounted to little, and the issue of access to justice is ripe for Australia's Third Cycle Review in November 2020 at the Human Rights Council's 37<sup>th</sup> Session. Access to justice is also an identified normative gap in the debate about a convention on the rights of older persons in the UN's Open-ended Working Group on Ageing. The Group will consider the substantive issue of older persons' access to justice in the first half of 2020. The UN's previous work on access to justice emphasises the right of equal access to justice for all, including members of vulnerable groups, and reaffirmed the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all.<sup>48</sup> Article 13 of the Convention on the Rights of Persons with Disability provides us with an existing global example of access to justice rights. However, if Australia's commitment to that article is a yardstick we still have a significant way to go.<sup>49</sup>

The World Health Organisation (WHO) has noted the close relationship between human rights and healthy ageing. The WHO's strategy for a decade of action on healthy ageing includes a global campaign to combat ageism.<sup>50</sup> The strategy reinforces the importance of age-friendly cities, communities and services.<sup>51</sup> Three age-friendly domains are linked to access to justice:

- Domain 5: Respect and Social Inclusion;
- Domain 7: Communication and Information; and
- Domain 8: Community and Health Services.

Some Australian communities have taken the step of implementing an age-friendly strategy.<sup>52</sup> A comprehensive adoption of this policy framework would help to drive access to justice improvements for older Australians.

Finally, an interesting new development is the International Older Persons Human Rights Index (IOPHRI).<sup>53</sup> The IOPHRI is a tool for comparing older persons' national human rights law and legislation across countries.<sup>54</sup> Australia received a score of 14 out of 30 across the index's five 'dimensions'.<sup>55</sup> Australia's score under the 'Empowerment Dimension', which includes Legal Aid, was zero out of a possible three.<sup>56</sup> National laws that guarantee access to justice for older persons would improve Australia's rating.

## CONCLUSIONS

Miller wisely said, '[i]f you design for the young you exclude the old, but if you design for the old you include everyone.'<sup>57</sup> This is true for legal systems – they do exclude the old and need a design overhaul. In particular, legal assistance as an aspect of access to justice needs reimagining. Access to justice is only one aspect of a broader human rights debate. Older Australians will benefit from the resurgence of interest in elder abuse, but they need the broader protections only a human rights framework can bring. The needs of older Australians are the needs of all Australians at some stage in their lives. The Global Alliance on the Rights of Older Persons' catch-cry, 'our voices our rights', must be heeded.<sup>58</sup>

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