



Law Council
OF AUSTRALIA

Office of the President

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Her Excellency Ms María del Carmen Squeff (Argentina)
Chair
Open-ended Working Group on Ageing
c/- Bureau, Department of Economic and Social Affairs (DESA)
United Nations Secretariat (29th Floor)
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By email: agein@un.org

Dear Chair

Normative Input to the Twelfth Working Session on the Right to Work and Access to Justice

The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission to the Twelfth Session of 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**).

The submission addresses the normative content of the rights of older people to the "Right to work and access to the labour market" and "Access to justice".

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

The Law Council is the national peak body for the legal profession in Australia. It acts on behalf of more than 90,000 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 has adopted a position of in-principle support for the establishment of a Convention on the Rights of Older Persons (pending the precise detail of the proposed Convention) and called on the Australian Government to take the same position.¹

The Law Council expresses support for the recent finding made by the Office of the High Commissioner for Human Rights that a 'dedicated normative instrument on the human rights of older persons' is the 'most effective way to bring about the major changes required

¹ Law Council, 'Calling on government to support a Convention on the Rights of Older Persons' (Media Release, 1 October 2020), <[link](#)>.

to the manner in which the international human rights system engages with the human rights of older person'.²

Recent global events such as the Covid-19 pandemic, and growing recognition of the global prevalence of elder abuse and ageism, have all underlined the need to better articulate the human rights of older persons, if they are to be respected, protected and fulfilled. The development of a new Convention on the subject of older persons' rights is necessary and long overdue in that context.

Please contact Mr Matthew Wood on (02) 6246 3755 or at matthew.wood@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink that reads "Tass Liveris".

Mr Tass Liveris
President

² Office of the High Commissioner for Human Rights, 'Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons' (March 2021), [206].

Right to work and access the labour market

Overview

1. Australia is a federation but does not have a national (federal) human rights charter that expressly guarantees older persons a right to work and access to justice generally.ⁱ It has partially implemented some of its international obligations into Australian law, with a particular focus on anti-discrimination laws.
2. Three Australian states and territories have statutory charters of rights that provide that every person is equal before the law and entitled to equal protection of the law without discrimination.ⁱⁱ These guarantees do not list prohibited grounds of discrimination, but provide for protection against discrimination on the basis of older age by state or territory public bodies or other entities performing public functions on behalf of a state or territory.
3. At a national level, the *Age Discrimination Act 2004* (Cth) (**AD Act**) and *Fair Work Act 2019* (Cth) (**FW Act**) make unlawful (as a civil wrong) age discrimination in workplaces and other area of public life. These laws are intended to give effect to certain international conventions.ⁱⁱⁱ 'Age discrimination' is also unlawful in the Australian states and territories in anti-discrimination laws^{iv} and some specific workplace laws.^v
4. Both Commonwealth Acts apply throughout the country and bind the Commonwealth Government and private employers.

Definitions

5. There are different definitions of 'discrimination' in Australia. The discrimination laws make it unlawful to 'discriminate' on the ground of age. In most cases, 'discrimination' is defined as either:^{vi}
 - direct discrimination – to treat a person less favourably compared with a person of a different age because of the person's age or a characteristic that generally appertains to, or is generally imputed to, a person of that age (**comparator test**); or
 - indirect discrimination – to impose a condition, requirement or practice which is not reasonable in the circumstances, and which has, or is likely to have, the effect of disadvantaging persons of the same age as the affected person.
6. Two Australian states use a 'detriment' test which prohibits discrimination if a person is treated unfavourably on the ground of age and do not require comparison with a hypothetical person of a different age.^{vii}
7. The discrimination laws do not explicitly address ageism; however, prejudice based on age-related characteristics forms part of the 'direct discrimination' definition. The discrimination laws prohibit age discrimination in several workplace contexts,^{viii} eg, offer or engagement, terms and conditions, dismissal or revocation or other detriment.^{ix}

8. Under the FW Act it is unlawful discriminate in terms and conditions offered, or to injure, dismiss or alter position because of the person's age.^x It also prohibits terms which discriminate on the grounds of age in industrial instruments.^{xi}
9. None of the Australian anti-discrimination laws require an employer to make reasonable accommodations for older persons in the workplace. In contrast, the *Disability Discrimination Act 1992* (Cth) (**DDA**) provides that a person discriminates if they do not make reasonable adjustments for a person with a disability.^{xii} This provision was intended to reflect the definition of reasonable accommodation in the Convention on the Rights of Persons with Disabilities (**CRPD**).^{xiii}
10. Common exceptions to age discrimination include:
 - 'inherent requirements'^{xiv} or 'genuine occupational qualifications'^{xv} of the position;
 - domestic duties;^{xvi}
 - health and safety reasons;^{xvii} and
 - religious bodies.^{xviii}
11. All anti-discrimination laws permit 'positive discrimination' regarding persons on the grounds of age, such as to:
 - provide a bona fide benefit, meet a need, or reduce disadvantage;^{xix}
 - afford equal opportunities or meet special needs.^{xx}
12. Only one Australian state law imposes a positive duty on employers to take reasonable and proportionate measures to eliminate age-based discrimination.^{xxi}

Redress and remedies

Avenues to redress

13. Australian laws generally^{xxii} provide a two-step process to seek remedies:^{xxiii}
 - (a) lodge a complaint^{xxiv} with a statutory body which has:
 - a. powers to conciliate a complaint;^{xxv} or
 - b. under some workplace laws, make a recommendation, express an opinion or undertake an arbitration process with the power to make binding orders;^{xxvi}
 - (b) make an application to a court^{xxvii} or referral^{xxviii} to a tribunal for binding orders such as injunction or directions to prevent, stop or remedy effects of the action, compensation for damages, or reinstatement.^{xxix}
14. The Australian Human Rights Commission (**AHRC**) does not have powers to initiate investigations in relation to age discrimination. Some state and territory statutory human rights bodies do.^{xxx}
15. The Law Council considers that this own motion power is an important component of effective protection against discrimination in cases involving widespread or systematic discrimination, as individual complaint-based legislative schemes have been largely ineffective in addressing such discrimination.

Efficacy of remedies and redress

16. While age discrimination is prevalent,^{xxxii} particularly in relation to employment,^{xxxii} few who experience age discrimination in the workplace raise it internally^{xxxiii} or externally.^{xxxiv}
17. Further, only around a third of complaints are successfully conciliated,^{xxxv} and only two per cent of all discrimination complainants seek remedies in the court after their complaint is terminated.^{xxxvi} Empirical analysis suggests most applicants who pursue claims in court are white males.^{xxxvii}
18. According to a case analysis of age discrimination matters conducted in 2020:^{xxxviii}
 - there had not been a successful age discrimination court application brought under the AD Act;
 - few matters are brought under the state and territory discrimination Acts and those are generally unsuccessful; and
 - at the federal level, more matters are brought under the FW Act than the AD Act.
19. A content analysis of court and tribunal applications seeking remedies under anti-discrimination and workplace laws identified several procedural and substantive hurdles to making a successful application, including:
 - application time limits;^{xxxix}
 - the narrow approach taken by courts to the ‘comparator’ test;^{xl}
 - the difficulty in proving ‘age’ as the cause of an adverse action;^{xli}
 - a normative acceptance of casual ageism in the workplace;^{xlii} and
 - difficulties in determining the correct jurisdiction to make a claim.^{xliii}
20. The AHRC has published two reports proposing reforms to improve the efficacy of anti-discrimination laws.^{xliv} Its proposals included:
 - the inclusion in federal law of an explicit positive duty on employers to take reasonable and proportionate measures to eliminate discrimination;^{xlv}
 - empowering the AHRC to conduct own-motion investigations, supported by enforcement mechanisms;^{xlvi}
 - enhancing access to justice, including by:
 - providing, in court matters, that parties ordinarily bear their own costs;^{xlvii} and
 - shifting the burden of proof to require a respondent to disprove that acts which are prima facie discriminatory were in fact based on a protected attribute;^{xlviii}
 - removing the hypothetical comparator test.^{xlix}

21. The Law Council has supported consideration of these reforms, which may particularly benefit older persons, by alleviating burdens on the complainant.

Recommendation

- **A new binding international instrument should require States to:**
 - **ensure that obtaining a remedy for age discrimination in employment is not made difficult or impossible by overly complex legislative requirements or over-reliance on individual complainants to address age discrimination; and**
 - **consider specific mechanisms to reduce burdens on complainants, including a positive duty on employers to take reasonable and proportionate measures to eliminate against discrimination, the inclusion of a shifting burden of proof in such cases, and empowering agencies to conduct own-motion investigations.**

Access to justice

Definition

22. Access to justice concerns the link between a person's formal right to seek justice and effective access to the legal system or legal remedies.ⁱ
23. Australia is obliged to ensure equality before the law and access to justice as part of the right to a fair hearingⁱⁱ as well as an effective remedy for breach of International Covenant on Civil and Political Rights (ICCPR) rights.ⁱⁱⁱ
24. Articles 12 and 13 of the CRPD, which deal with equality before the law and access to justice for persons with disability, provides relevant considerations for framing a right to access justice for older persons.
25. These articles require States Parties to:
- recognise that persons with disability enjoy legal capacity on an equal basis, take appropriate measures to support persons with disability to exercise their legal capacity, and ensure such measures respect the person's 'rights, will and preferences';
 - ensure effective access to justice for persons with disability on an equal basis with others including through the provision of procedural and age-appropriate accommodations to facilitate their effective role at all stages of legal proceedings.
26. The CRPD has some practical application to older persons, given around half of Australians over 65 have a disability, with prevalence increasing significantly as age increases.ⁱⁱⁱⁱ

27. However, older persons are a diverse demographic group, with different needs, experiences and intersectional identities. The legal needs of older persons are affected by factors such as stage of life, age, socio-economic circumstances, health, geographic location and cultural and linguistic background.^{liv}
28. Any older persons' convention should recognise intersectionality and the multi-layered experience of older persons.

Barriers to access to justice

29. The Law Council's 'Justice Project' identified that:^{lv}
 - many legal problems experienced by older persons are age-related;
 - older persons experiencing disadvantage are more likely to experience multiple and cumulative legal problems; and
 - the needs of older persons are expected to rise as the population ages.
30. As detailed in the Law Council's previous submission (**attached**), there are several practical barriers to access to justice for older persons and critical gaps in relevant legal services.
31. Difficulty accessing justice impairs the ability of older persons to enforce their legal rights, which predominantly arise in civil contexts, such as aged care, pension or social security issues, guardianship and enduring power of attorney, wills and guarantors for the loans of family members.^{lvi} These are all contexts which can give rise to financial elder abuse.^{lvii}
32. A key response is increased legal assistance funding, noting that two thirds of Australians over 65 live in low-income households.^{lviii} They are often cash-poor but asset-rich and often do not meet means tests for legal aid grants, which are needed for court representation, and which can secure important precedents.
33. Further, civil law grants made up less than 3 per cent of national legal aid grants in 2020-21.^{lix} However, these are the issues most pressing for older persons. Federal Government contributions to legal aid funding are steadily declining on a proportional basis.^{lx} The Law Council does not support diverting existing legal aid funds from criminal and family to civil matters – the overall pool needs to expand.
34. Given the diversity demographics of older persons, and the additional barriers faced by those experiencing intersectional disadvantage,^{lxi} it is critical legal assistance services are properly resourced to provide specialist advice to older persons.^{lxii}
35. Practical policy measures are also required to connect older persons to that specialist advice.
36. One promising measure is health-justice partnerships, through which trained health professionals connect older persons to legal assistance.^{lxiii} These have particular utility in the context of elder abuse, given health professionals are in a position to identify elder abuse and have often developed an ongoing relationship of trust.^{lxiv} The Australian Government began funding specialist services to address elder abuse, including health-justice partnerships, in 2017-18^{lxv} and recently announced an extension to that.^{lxvi}

Recommendation

- **A new binding instrument enshrining the rights of older persons should include provisions requiring that States take measures to ensure that:**
 - **the justice system addresses the barriers to justice faced by older persons, taking into account the different needs, experiences and intersectional identities of older persons;**
 - **adequate legal aid and legal assistance services be made available to older persons to ensure they have access in practice to justice in all court, tribunal, administrative or other proceedings; and**
 - **these measures include ensuring that health services provide appropriate connections to legal assistance services for older persons in cases of elder abuse or other instances.**

Guarantee of legal capacity on an equal basis with others

37. While the access to justice obligations in articles 12 and 13 of the CRPD have been given effect in various Acts which engage rights of people with disabilities,^{lxvii} their application to older persons with disability is, generally, less consistent.
38. For example, the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) gives effect to Australia's obligations under the CRPD^{lxviii} and provides a role for a disability advocate, who acts at the direction of the person with disability, reflecting expressed will, preferences and rights of a person with disability. However, the NDIS Act only applies to a person aged under the age of 65.^{lxix}
39. In 2014, the Australian Law Reform Commission (**ALRC**) examined Commonwealth laws that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, given the obligations in the CRPD.^{lxx}
40. The ALRC recommended Australian laws concerning individual decision-making should be guided by National Decision Making Principles, which include the equal right to make decisions; decision-making support; and wills, preferences and rights decision-making principles (also referred to as supported decision-making).
41. The ALRC later recommended, noting the relationship between loss of capacity and elder abuse,^{lxxi} that National Decision Making Principles be embedded in laws which authorise decisions for older persons, including aged care laws (providing for care decisions and the use of restrictive practices),^{lxxii} and enduring documents.^{lxxiii}
42. Only a few Australian laws which provide for representative decision-making have adopted supported decision-making.^{lxxiv}
43. The Royal Commission into Aged Care Quality and Safety supported the ALRC's recommendation that supported decision-making principles^{lxxv} be enshrined within

aged care laws^{lxxvi} and recommended a new rights-based Aged Care Act.^{lxxvii} The Charter of Aged Care Rights under the present *Aged Care Act 2007* (Cth) incorporates an older person's right to an "aged care advocate", although does not require provision for a supported decision-making approach.^{lxxviii}

44. A stand-alone convention on older persons would provide a framework to underpin a new Aged Care Act and other laws which engage the rights of older persons.

Recommendation

- **A new binding instrument enshrining the rights of older persons should contain a guarantee of equal recognition of older persons before the law and of their right to have and exercise their legal capacity, in terms that are no less demanding than the provisions of the CRPD.**

ⁱ The Law Council's position is that guarantees of human rights should be included in the Commonwealth Constitution, and pending that, a federal Human Rights Act to give effect to Australia's international human rights obligations. See: Law Council, *Federal Human Rights Charter*, Policy Position (November 2020). The right to work and related work rights is protected in the Australian Capital Territory (*Human Rights Act 2004* (ACT), s 27B).

ⁱⁱ *Human Rights Act 2004* (ACT), *Charter of Human Rights & Responsibilities Act 2006* (Vic) and *Human Rights Act 2019* (Qld).

ⁱⁱⁱ Under the AD Act, see subsection 11(7) of the AD Act. Specifically:

- Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958;
- International Covenant on Civil and Political Rights (entry into force 23 March 1976, except Article 41 which came into force generally on 28 March 1979; entry into force for Australia 13 January 1980), except Article 41 which came into force for Australia on 28 January 1993) (**ICCPR**);
- the International Covenant on Economic, Social and Cultural Rights (Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**);
- the Convention on the Rights of the Child (entry into force 2 September 1990; entry into force for Australia 16 January 1991); or
- relate to matters external to Australia or of international concern.

Under the FW Act, see paragraph 3(a). These obligations are acknowledged to include those contained in ICESCR, *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation* (Geneva, 25 June 1958) [1974] ATS 12, and *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982) [1994] ATS 4 – see Explanatory Memorandum, Fair Work Bill 2008 (Cth), [2251].

^{iv} *Age Discrimination Act 2004* (Cth) (**AD Act**); Division 2 of Part 4G of the *Anti-Discrimination Act 1977* (NSW) (**NSW Discrimination Act**); paragraph 6(a) and Divisions 1 and 2 of Part 4 of the *Equal Opportunity Act 2010* (Vic) (**Vic Discrimination Act**); paragraph 7(f) and Division 2 of Part 4 of the *Anti-Discrimination Act 1991* (Qld) (**Qld Discrimination Act**); Division 2 of Part IVB of the *Equal Opportunity Act 1984* (WA) (**WA Discrimination Act**); Divisions 1 and 2 of Part 5A of the *Equal Opportunity Act 1984* (SA) (**SA Discrimination Act**); paragraphs 16(b) and 22(1)(a) of the *Anti-Discrimination Act 1998* (Tas) (**Tas Discrimination Act**); paragraph 7(1)(b) and Division 3.1 of Part 3 of the *Discrimination Act 1991* (ACT) (**ACT Discrimination Act**); and paragraph 19(1)(b) and Division 3 of Part 4 of the *Anti-Discrimination Act 1992* (NT) (**NT Discrimination Act**).

^v Subsection 351(1) of the *Fair Work Act 2019* (Cth) (**FW Act**). Most State industrial laws provide that discrimination under State anti-discrimination laws may be an 'industrial matter' or age discrimination specifically, regarding which a workplace dispute may arise which comes within the purview of the relevant regulator to resolve: paragraph 6(2)(f) of the *Industrial Relations Act 1996* (NSW), section 7 and items 12 and 25 of Schedule 1 to the *Industrial Relations Act 1999* (Qld), paragraph (c) of the definition of 'industrial matter' in subsection 4(1) and section 7 of the *Fair Work Act 1994* (SA), paragraph (b) of the definition of 'industrial matter' in subsection 7(1) and subsection 23(1) of the *Industrial Relations Act 1979* (WA). The exception is the

Industrial Relations Act 1984 (Tas). The only reference to age discrimination in that Act is to provide that age is not a valid basis for termination of employment: paragraph 30(4)(d).

^{vi} The definition in [5] is taken from sections 14 and 15 of the AD Act. Most state and territory laws have substantively similar tests, albeit drafted differently: see section 49ZYA of the NSW Discrimination Act; sections 9-11 of the Qld Discrimination Act; sections 14-15 of the Tas Discrimination Act; section 20 of the NT Discrimination Act. The WA Discrimination Act and SA Discrimination Act do not define 'discriminate'.

^{vii} Section 8 of the ACT Discrimination Act and section 7 of the Vic Discrimination Act.

^{viii} These include some or all of: employers; principals of commission agents and contractors; partnerships; entities empowered to authorise a person to perform a profession or occupation; registered associations; and employment agencies. See sections 18-24 of the AD Act; sections 49ZYB-49ZYH of the NSW Discrimination Act; Division 3.1 of Part 3 of the ACT Discrimination Act; Divisions 1 and 2 of Part 4 of the Vic Discrimination Act; Subdivision 1 of Division 2 of Part 4 of the Qld Discrimination Act; Division 2 of Part IIAA of the SA Discrimination Act; Divisions 2 and 3 of Part 5A of the SA Act; paragraph 22(1)(a) and definition of 'employment' in section 3 of the Tas Act; and sections 31-34 of the NT Discrimination Act.

^{ix} Ibid.

^x Section 342 and subsection 351(1) of the FW Act.

^{xi} Ibid – in a modern award: section 153; and enterprise agreement: section 195.

^{xii} *Disability Discrimination Act 1992* (Cth), ss 5(2), 6(2).

^{xiii} Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009, 35 and 41-7. ^{xiv} Paragraphs 153(2)(a), 195(2)(a) and 351(2)(b) of the FW Act; subsections 18(4), 19(3), 20(2), 21(4), 22(2) and 24(2) of the AD Act.

^{xv} Section 57A of the ACT Discrimination Act; section 49ZXJ of the NSW Discrimination Act; section 25 of the Qld Discrimination Act; paragraph 36(a) of the Tas Discrimination Act, subsection 26(3) of the Vic Discrimination Act, section 35 of the NT Discrimination Act; and section 66ZQ of the WA Discrimination Act.

^{xvi} Subsection 18(4) of the AD Act; Sections 24 and 25 of the ACT Discrimination Act, subsection 49ZYB(3) of the NSW Discrimination Act, sections 26-27 of the Qld Discrimination Act, subsection 85F(1) of the SA Discrimination Act, section 24 of the Vic Discrimination Act.

^{xvii} Subsections 82F(3) and 85H(3) of the SA Discrimination Act; section 66ZM of the WA Discrimination Act; and section 107 of the Qld Discrimination Act.

^{xviii} Section 35 of the AD Act, paragraphs 153(2)(b), 195(2)(b) and 351(2)(c) of the FW Act, section 32 of ACT Discrimination Act, section 56 NSW Discrimination Act, section 51 of the NT Discrimination Act, section 109 of the Qld Discrimination Act, section 82 of the Vic Discrimination Act, and section 72 of the WA Discrimination Act.

^{xix} Section 33 of the AD Act.

^{xx} Section 27 ACT Discrimination Act, section 21 of the NSW Discrimination Act, section 57 of the NT Discrimination Act, section 105 of the Qld Discrimination Act, sections 25 and 26 of the Tas Discrimination Act, sections 12 and 28 of Vic Discrimination Act.

^{xxi} Or other kinds of discrimination. Only the *Equal Opportunity Act 2010* (Vic) includes such an obligation: section 15.

^{xxii} The exception is the *Equal Opportunity Act 2010* (Vic), which permits applications to be made straight to a tribunal: see section 122.

^{xxiii} Processes under state and territory workplace Acts were not considered for the purpose of this submission.

^{xxiv} Section 46P of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**); sections 365 and 372 of the FW Act; paragraph 42(1)(c) of the Human Rights Commission Act (ACT) (**ACT HRC Act**); Subdivisions 1 and 2 of Division 2 of Part 9 of the NSW Discrimination Act; Subdivisions 1-3 of Division 1 of Part 1 of Chapter 7 of the Qld Discrimination Act; Division 1A of Part 6 of the Tas Discrimination Act, 113 of the Vic Discrimination Act, Division 1 of Part 6 of the NT Discrimination Act; and section 83 of the WA Discrimination Act; section 93 of the SA Discrimination Act.

^{xxv} Section 46PF of the AHRC Act; Division 4.3 of the ACT HRC Act; section 91A of the NSW Discrimination Act; section 115 of the Vic Discrimination Act; Division 3 of Part 1 of Chapter 7 of the Qld Discrimination Act; section 91 of the WA Act; section 95 of the SA Discrimination Act; section 74 of the Tas Act; Division 3 of Part 6 of the NT Discrimination Act; section 368 and 595 of the FW Act.

^{xxvi} Sections 369 and 595 of the FW Act.

^{xxvii} Subsection 46PO(1) of the AHRC Act; section 370 of the FW Act (dismissal only).

^{xxviii} Either at the choice of the complainant: section 93A of the NSW Discrimination Act; section 164A and section 166 of the Qld Discrimination Act; section 91 of the WA Discrimination Act; because the statutory body is obliged to refer it: section 53A of the ACT HRC Act; section 93C of the NSW Discrimination Act; section 93 of the WA Discrimination Act; section 95B of the SA Discrimination Act; section 78 of the Tas Discrimination Act; or because the statutory body chooses to refer it: section 86 of the NT Discrimination Act.

^{xxix} In Federal Court proceedings, a court may make any orders it sees fit: subsection 46PO(4) of the AHRC Act and section 545 of the FW Act. In state and territory proceedings, the court is confined in the orders it may make: section 53E of the ACT HRC Act; section 108 of the NSW Discrimination Act; 125 of the Vic

Discrimination Act; section 209 of the Qld Discrimination Act; section 127 of the WA Discrimination Act; section 96 of the SA Discrimination Act; section 89 of the Tas Discrimination Act; section 88 of the NT Act.

^{xxx} Section 48 of the ACT HRC Act; section 129 of the Vic Discrimination Act.

^{xxxi} The Australian Human Rights Commission's (AHRC) *National prevalence survey of age discrimination in the workplace* (2015) (**National Prevalence Survey**) found that 27 per cent of older persons who participated in the survey had experience age discrimination in the previous two years.

^{xxxii} In 2019-20, the AHRC reported that 47 per cent of age discrimination complaints related to employment. AHRC, *2019-20 complaint statistics*, 2.

^{xxxiii} The National Prevalence Survey found that 14 per cent of persons who had experienced age discrimination in the workplace raised it internally.

^{xxxiv} The National Prevalence Survey found that 5 per cent of persons who had experienced age discrimination in the workplace raised it with an external organisation.

^{xxxv} In 2019-20, the AHRC reported that 30 per cent of age discrimination complaints were resolved through conciliation – see AHRC, *2019-20 complaint statistics*, 29.

^{xxxvi} *Ibid*, 3.

^{xxxvii} Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Journal*, 28-30.

^{xxxviii} *Ibid*, 2.

^{xxxix} Under the FW Act – *ibid*, 16.

^{xl} *Ibid*, 17-20.

^{xli} *Ibid*, 20-26.

^{xlii} *Ibid*, 30-31.

^{xliii} *Ibid*, 27 and 34.

^{xliv} AHRC, *Willing to Work – National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016) (**Willing to Work**) and AHRC, *Free and Equal – A reform agenda for Australia's discrimination laws*, (2021) (**Free and Equal**).

^{xlv} *Willing to Work*, 333-334; *Free and Equal*, 333.

^{xlvi} *Free and Equal*, 334-336.

^{xlvii} *Willing to Work*, 337-338. *Free and Equal*, 337

^{xlviii} *Free and Equal*, 337. Under the AD Act, the applicant bears the burden of proof in allegations of direct discrimination and the employer bears the burden of proving that a condition, requirement or practice which disadvantages a person on the grounds of age was reasonable: see section 14 and 15(2). This is generally the position under the state and territory Acts, except the ACT HRC Act, which provides that in all types of discrimination a rebuttable presumption that discrimination has occurred if the complainant establishes prima facie facts: section 53CA. Under the FW Act, if the applicant proves the action occurred, it is presumed it is for the reason of the person's age unless proven otherwise: section 361. In some State discrimination laws, the respondent must prove an exception: subsections 12(6) and 13(2) of the Vic Discrimination Act; section 104 of the NSW Discrimination Act; section 206 of the Qld Discrimination Act; section 123 of the WA Discrimination Act; section 101 of the Tas Discrimination Act; subsection 91(2) of the NT Act.

^{xlix} *Willing to Work*, 336; *Free and Equal*, 339.

^l Law Council, *The Justice Project Final Report – Introduction and Overview*, August 2018, 48, <[link](#)>.

^{li} Article 14 of the ICCPR.

^{lii} *Ibid*, article 2(3).

^{liii} Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers, Australia: Summary of Findings* (2018), <[link](#)>.

^{liv} Law Council, *The Justice Project Final Report – Older Persons*, August 2018, 3, <[link](#)>.

^{lv} *Ibid*.

^{lvi} See Law Council, *The Justice Project Final Report – Older Persons*, August 2018, 9, <[link](#)>.

^{lvii} Australian Law Reform Commission (ALRC), *Elder Abuse – A National Legal Response* – ALRC Report 131 (2017), [1.10], [1.34], [1.41], [2.42], [2.51]-[2.53].

^{lviii} ABS, *Disability, Ageing and Carers, Australia: Summary of Findings* (2018),

^{lix} National Legal Aid, *National Legal Aid Statistics Report 2020-21*, <[link](#)>.

^{lx} The Commonwealth's contribution to legal aid funding, proportionate to the states and territories, has dropped from around 55 per cent in 1997, to 42 per cent in 2011-12, to 30 per cent budgeted in 2021-22: see Law Council, *The Justice Project Final Report – Legal Services*, August 2018, 9, <[link](#)> and National Legal Aid, *Income and Expenses Tables for 2011-21 to 2021-22*, <[link](#)>.

^{lxi} Law Council, *The Justice Project Final Report – Older Persons*, August 2018, 3, <[link](#)>.

^{lxii} *Ibid*.

^{lxiii} See, for example, Justice Connect Seniors Law, cohealth, La Trobe University and Victorian Legal Services Board and Commissioner, 'Working Together, a health justice partnership to address elder abuse, first year report (2017), <[link](#)>.

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- ^{lxiv} See Law Council, *The Justice Project Final Report – Older Persons*, August 2018, 8, 26 and 27, <[link](#)>; Law Council, *The Justice Project Final Report – Legal Services*, August 2018, 24, <[link](#)>; and Justice Connect Seniors Law, cohealth, La Trobe University and Victorian Legal Services Board and Commissioner, ‘Working Together, a health justice partnership to address elder abuse, two year interim report’, <[link](#)>.
- ^{lxv} Australian Government, ‘Budget Measures Budget Paper No. 2 2018-19’, <[link](#)>, 76.
- ^{lxvi} Senator the Hon Michaelia Cash, ‘Funding to protect the rights of older Australians’, (Media Release, 20 December 2021), <[link](#)>.
- ^{lxvii} Including, as discussed above, the *Disability Discrimination Act 1992* (Cth), which provides that a person discriminates if they do not make reasonable adjustments for a person with a disability – a provision inserted to be consistent with Australia’s obligations under the CRPD – see explanatory memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009*, 35 and 41-7. The Law Council acknowledges that there has been concern that the Federal Court decision of *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 limits to effectiveness of the reasonable adjustment provisions of the DDA. The AHRC has proposed amendments in response, with its preferred option being to create a stand-alone duty to make reasonable adjustments: *A Reform Agenda for Federal Discrimination Laws* (December 2021) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>, 292.
- ^{lxviii} Paragraph 3(1)(a) of *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**).
- ^{lxix} *Ibid*, section 22.
- ^{lxx} ALRC, *Equality, Capacity and Disability in Commonwealth Laws* – ALRC Report 124 (2013), 5.
- ^{lxxi} *Ibid*, [2.112].
- ^{lxxii} *Ibid*, Recommendation 4-12.
- ^{lxxiii} *Ibid*, [5.22]-[5.23].
- ^{lxxiv} ALRC, *Elder Abuse – A National Legal Response* – ALRC Report 131 (2017), [5.23] and Australian Government Solicitor, *Research Report – Report on the key elements of the legislative framework affecting people with disability* (December 2020), [16]-[27].
- ^{lxxv} A term which reflects the will, preferences and rights decision-making principles.
- ^{lxxvi} Royal Commission into Aged Care Quality and Safety – *Final Report: Care, Dignity and Respect – Volume 3A* (2021), 9-10.
- ^{lxxvii} *Ibid*, 14.
- ^{lxxviii} *User Rights Principles 2014* (Cth), Schedule 1, s 2.11. Also see Australian Government Department of Health, *National Aged Care Advocacy Framework*, 2018.



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.