

National Association of Community Legal Centres submission to the
Office of the High Commissioner for Human Rights

Public Consultation on the Human Rights of Older Persons

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1. ABOUT THE NATIONAL ASSOCIATION OF COMMUNITY LEGAL CENTRES

The National Association of Community Legal Centres is the peak national organisation representing over 200 community legal centres (CLCs) in Australia. CLCs are not-for-profit, community-based organisations that provide legal advice, casework, advocacy, information and a range of community development services to their local or special interest communities. The work of CLCs is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest.

The submission has been coordinated by the Older Persons Legal Services (OPLS) which is a network of the National Association of Community Legal Centres. OPLS undertakes social justice campaigns and advocates for the human rights of Older Persons both in Australia and internationally.

The CLCs that have contributed to this submission have specialist expertise in seniors' rights issues and elder law. This submission draws on CLCs' many years of practical experience assisting clients to navigate both the Commonwealth and state or territory systems. CLCs bring particular expertise and understanding of what the barriers are to accessing justice for older people.

The National Association of Community Legal Centres has accredited NGO status with the United Nations.

2. BACKGROUND

Similar to many countries worldwide,¹ Australia's population is aging at an unprecedented rate. Population forecasts by the Australian Bureau of Statistics predict that one quarter of Australians will be 65 years or older by 2056.² In 2007 Australia's population was 21 million people, with 13% being 65 years or older. By 2056 Australia's population is projected to increase to between 31 and 43 million people, with 23% to 25% being 65 years or older. The number of people aged 85 years or over is also likely to increase rapidly over the next 50 years, from 344,000 people in 2007 to between 1.7 million and 3.1 million people in 2056. By then, people aged 85 years or over will make up 5% to 7% of Australia's population, compared to only 1.6% in 2007.³

The diversity of this ageing population is likewise unprecedented. There will be huge disparities in wealth within the ageing population, with some older people being wholly in receipt of social security payments, while others will be non-pensioners, some of whom will have access to superannuation savings. For the first time, large numbers of people from diverse groups, such as people from culturally and linguistically diverse backgrounds, will comprise the older population.⁴

Rather than regarding this demographic shift as the trigger for an ageing "crisis", it can arguably be referred to as a manageable "transition" phase.⁵ For Australia, it is important that the challenges associated with an ageing population do not overshadow the unique opportunities that will arise as a result of such a shift. The "Australia to 2050: Future Challenges" report by the Commonwealth Government claims that as the population ages in Australia, the rate of economic growth will slow and that the ageing population will also significantly increase spending pressure in the areas of health, age-related pensions and aged care⁶.

However, it is also important to recognise the economic contribution of older people, who, for example, contribute a substantial amount of unpaid work to the economy through structured volunteering and informal caring.⁷ While older people need to be valued, irrespective of their ability to be part of the economy, ageist attitudes and some current laws do hinder the ability of older people to participate within employment and the broader civil society. By inhibiting employment opportunities, this reduces the tax contributions made by older people. Tax breaks available to non-pensioners are also more significant than those for pensioners.

Over the past decade, there have been a significant number of reports and inquiries into older people and the law in Australia.⁸ Most notably, the House of Representatives, Standing Committee on Legal and Constitutional Affairs in 2007 conducted an inquiry into Older People and the Law. The final report identified a number of key areas of concern including fraud and financial abuse, substitute decision making, family agreements, barriers to older Australian's accessing legal services, discrimination and retirement villages. Many of the recommendations have not been implemented.⁹ There has also been a systemic failure to implement recommendations from a number of state and territory level inquiries.¹⁰

3. STRUCTURE OF THIS SUBMISSION

This submission looks at the legal and policy protections available to older people in Australia against the three areas identified by the Office of the High Commissioner of Human Rights (OHCHR):

- Information on the main challenges related to promotion and protection of the human rights of older persons in Australia.
- Information on constitutions or legislation explicitly forbidding discrimination on the basis of old age, and on the existence of specific bodies which protect against age discrimination or are mandated to protect and promote the rights of older persons.
- Information on specific national legislation, national policies, strategies and plans of action adopted to ensure the equal enjoyment of rights by older persons.

4. LIST OF SUPPORTING ORGANISATIONS

Australian Pensioners & Superannuants League
Cairns Community Legal Centre
Caxton Legal Centre
COTA Australia
COTA New South Wales
COTA Queensland
COTA South Australia
COTA Victoria
COTA Western Australia
Darwin Community Legal Service
Eastern Community Legal Centre
Goldfields Community Legal Centre
Human Rights Network of the National Association of Community Legal Centres
Kingsford Legal Centre
Life Activities Clubs Victoria
Mid North Coast Community Legal Centre
National Association of Community Legal Centres Network of Older Persons Legal Services
Northern Suburbs Community Legal Centre Inc
Older People's Rights Service (WA)
Public Interest Law Clearing House (Vic)
Redfern Legal Centre

Seniors Legal and Support Service Cairns
Seniors Legal and Support Service Hervey Bay
Seniors Rights Victoria at COTA Victoria
Taylor St Community Legal Centre
The Aged-Care Rights Service
Townsville Community Legal Service
UnitingCare Elder Abuse Prevention Unit
Women's Legal Services (NSW)
Women's Law Centre of WA

5. INFORMATION ON THE MAIN CHALLENGES RELATED TO PROMOTION AND PROTECTION OF THE HUMAN RIGHTS OF OLDER PERSONS IN AUSTRALIA

5.1 Promotion

Principal challenges for promotion of the human rights of older persons arise in a number of contexts:

In Australia, the **prevalence of ageism** and ageist attitudes at the individual, community, corporate and institutional level constrict opportunities in employment and participation in private and public life – opportunities that are more readily afforded to younger people. Ageist assumptions deny older people their individuality and ability to live active, social lives; situates cognitive and physical decline as an inevitable, 'natural' outcome of the ageing process; infantilises older people; and by assuming older people cannot understand or operate new technologies, diminishes their employability and potential for digital connectedness.

Such **attitudes impact on how people interact and communicate with older people, and moreover, can shape how older people perceive themselves**. Ageist attitudes can influence how the medical and legal professions, in particular, treat older people. As stated, physical decline is assumed to be a *fait accompli*, of ageing. While Balmain Hospital's The STRONG Clinic challenges this assumption by focussing on the importance of appropriate exercises such as strength training for older people,¹¹ it is the only one of its type in Australia.¹² Within the hospital system, older people are often regarded as "bed-blockers", when a bed is occupied by an older person awaiting appropriate care arrangements to allow them to return to their home or when necessary, be placed in a suitable residential aged care facility.¹³ Rather than encouraging older people to make full use of the health system, older people are positioned as increasing the shortage of hospital beds by "overstaying". As this does not occur for younger people, this gives the impression that people are conferred with rights and opportunities when they are young, but these very same rights and opportunities are systematically stripped away as they age.

In terms of the legal system, **ageist attitudes both give rise to legal problems and manifest within the law itself**. For example, ageism is commonly regarded as one of the main contributing factors to the financial and physical abuse of some older people.¹⁴ Conversely, attitudes about older people, particularly those that regard chronological age as *the* determinant of mental capacity, inform laws. In Victoria, the law confers on VicRoads a blanket discretion to issue shorter term licences for drivers over 75 years, rather than the 10 year standard period.¹⁵ Older drivers have reported that they are automatically receiving licences of limited length, despite good driving histories.¹⁶ VicRoads may also require a person to be re-tested to determine their 'fitness to drive'.¹⁷ In other jurisdictions similar restrictions and the requirement for re-testing after a certain age apply, despite research clearly indicating that the driving demographic who are overrepresented in traffic accidents are young, male drivers.¹⁸ Such licence limitations negatively impact on the ability of older people to be independent and employed, as well as travel, care for relatives and socialise. Once again, the rights afforded to people as they age are constricted.

Media coverage also promotes ageist attitudes with alarmist headlines. The framing of such discussions, particularly stories focusing on the perceived 'drain' on resources represented by older generations and the increasing 'burden of care', encourage intergenerational division.

A **National Strategy or National Campaign** to promote and educate the community about the ageing process and the rights of older people is long overdue. Such a strategy must not just focus on rights, but also challenge ageist attitudes and provide examples of **positive ageing** that disrupt the automatic association of physical and mental decline with getting older. The peak representative body for older Australians, COTA Australia, has repeatedly recommended that the Commonwealth government implement a five-year National Positive Ageing Campaign, targeted at the broader community, rather than solely older people.¹⁹ As COTA Australia notes, "The design of such a strategy should be undertaken in close consultation with older people on the basis of 'nothing about us, without us', following similar approaches in Wales, the Republic of Ireland and across the European Union".²⁰ Such a campaign can complement existing laws, as both are necessary to enable older people to live fulfilling lives. After all:

Anti discrimination legislation is only one part of the solution. Although it may reduce the incidence of overt age discrimination it can never on its own eliminate ageism. Ageism is deeply embedded in Australian society and there will need to be positive action to change community attitudes. Such action needs to include community campaigns through the media and community organisations addressing the issues of discrimination and actively promoting more positive images of older people.²¹

There remains inconsistent treatment across local, state and federal jurisdictions of key issues to promote self-reliance and participation in public and community life. This includes age-friendly environments, affordable housing, transport, access to technology, access to justice and socio-political participation. Further there is a lack of co-ordination between federal, state and local laws protecting older persons from violence and abuse. This results in a fragmented and complex legal landscape adverse to the promotion and protections of the human rights of older persons.

There is also the challenge of reaching especially vulnerable older persons such as those who are **socially isolated, which can be exacerbated** by living a regional, rural or remote location or identifying with a marginalised or disadvantaged demographic. There exists a need to educate family and friends who provide care in an older person's home about their responsibility to provide treatment, which is not degrading and respects the older person's right to a private life. Aged Care providers must also address the complexity of balancing institutional requirements with the right to a private life in aged care settings.

5.2 Protection

The principal challenges for the protection are also multi-faceted:

The **prevalence of ageism** and ageist attitudes at the individual, corporate and institutional levels facilitates the abuse of older people, inhibits support for reform and limits the opportunities available to older people.

Attitudes and underrepresentation can lead to the **inability of older people** to participate and achieve outcomes in the public policy arena, especially given the primacy of their interests in the population demographic.

The **lack of a comprehensive constitutional and national human rights framework** have resulted in the ad hoc development of policy and laws for the protection of the rights of older persons.

The **complexity of existing laws** in many key areas of law including but not limited to Social Security, Veterans Affairs, Aged Care, Guardianship and Administration, Succession, Powers of Attorney and Health Directives, Residential Tenancy and Retirement village laws inhibit access to protections for older people.

The **interplay between federal and state laws** and inconsistent treatment of key issues across jurisdictions such as succession, guardianship, powers of attorney and health directives, and discrimination laws further limit access to existing protections.

The **lack of accessible, specialist, and competent practitioners** in private and public legal practice deny access to justice for older persons.

The **absence of specific laws**, including but not limited to elder abuse and financial exploitation deny civil redress and policing assistance for older victims of abuse and exploitation.

Ultimately, the Australian human rights framework is fragmented and complex; a patchwork of legislative, policy and institutional frameworks arising from historic approaches which are inadequate to address the human rights challenges that face people as they age.

There is a need for leadership at the United Nations and domestic level to ensure the development of policy and laws that promote and protect older person's human rights, challenge ageist attitudes and encourage positive ageing across the lifespan.

6. INFORMATION ON CONSTITUTIONS OR LEGISLATION EXPLICITLY FORBIDDING DISCRIMINATION ON THE BASIS OF OLD AGE, AND ON THE EXISTENCE OF SPECIFIC BODIES WHICH PROTECT AGAINST AGE DISCRIMINATION OR ARE MANDATED TO PROTECT AND PROMOTE THE RIGHTS OF OLDER PERSONS

6.1 Constitutional Protections

There are no constitutional protections against age discrimination.

6.2 Federal Legislation

Age discrimination is prohibited by several federal laws.²² The *Age Discrimination Act 2004* (Cth) protects individuals across Australia from discrimination on the basis of age in many parts of public life, including employment, education, accommodation and the provision of goods and services. The *Fair Work Act 2009* (Cth) provides specific protections in relation to employment.

However there are a multitude of exceptions in federal law, where an older person is not protected from discrimination. These include situations where the discrimination is carried out by a voluntary, charitable or religious body, for example where a charitable organisation offers benefits, facilities and services to members. Nor do the laws protect older persons when the discrimination is done in direct compliance with other laws, for instance those to do with taxation, Commonwealth employment programs, health, migration, citizenship, pensions, allowances and benefits.²³

The Senate Inquiry into the (then) *Age Discrimination Bill 2003* (Cth) incorporated a dissenting report that highlighted a range of concerns, including the use of a “dominant reason” test, exemptions that were too wide and unjustifiable and the absence of age specific harassment provisions.²⁴ It is widely considered that “[C]ompared to other federal anti-discrimination legislation the Age Discrimination Act contains the broadest permanent exemptions to the protections offered by the Act.”²⁵ The *Age Discrimination Act 2004* (Cth) is the weakest of its cohort of federal laws.

The impact of this on older persons is that they are not adequately protected from age discrimination, harassment and vilification in many areas of public and private life. In turn this perpetuates prevailing ageist attitudes at many levels of community and society. Where the overriding federal law allows ageism, it provides a poor role model for our community’s actions.

6.3 State and Territory Legislation

Age is included as a prohibited basis for discrimination in all of Australia’s state and territory jurisdictions.²⁶ As is the case in federal law each jurisdiction has age-specific exceptions.²⁷ These include instances of discrimination involving genuine occupational requirements, benefits and concessions, recreational tours and accommodation, clubs, sport, superannuation, provision of insurance and credit applications.

Like their federal counterparts, state and territory laws provide sub-optimal protections for older people who are subjected to ageism, age-based harassment, age-based vilification and discrimination. The low numbers of complaints (outside the work area) illustrate the limited reliance older persons place on these laws to combat ageism.

Victoria, however, does provide additional protections to older people through the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Charter outlines the basic human rights of all people in Victoria, however there is no explicit reference to the rights of older people. In a recent report, older people reported a general lack of awareness about the Charter and suggested that a campaign was required to raise awareness about its existence and usage.²⁸

6.4 Anti-discrimination Bodies

At federal and state and territory level, age discrimination legislation is overseen by specialist Boards or Commissions²⁹ and subject to final resolution by Tribunals or Courts.³⁰ However the use of these bodies by those who have experienced age discrimination is relatively infrequent. Federal age discrimination laws are under-utilised, with age discrimination enquiries to the Australian Human Rights Commission totalling less than 5 per cent (786 of 17,047) of complaints received.³¹ The number of formal complaints of age discrimination lodged with the Commission was similarly low, totalling only 7.5 per cent (196 of 2,610) of complaints.³² The majority of these complaints were about age discrimination in employment.³³ In state and territory jurisdictions the number of age discrimination complaints made is slowly increasing over time, but the number of complaints received also remains relatively small.³⁴

Bodies that oversee age discrimination laws at all levels of government acknowledge that more work needs to be done to educate, promote and inform the community about age discrimination laws.³⁵ The challenge is twofold: ensuring that the laws are strengthened to achieve equality with others areas of discrimination law; and promoting the use of the laws to resolve individual and systemic concerns.

7. INFORMATION ON SPECIFIC NATIONAL LEGISLATION, NATIONAL POLICIES, STRATEGIES AND PLANS OF ACTION ADOPTED TO ENSURE THE EQUAL ENJOYMENT OF RIGHTS BY OLDER PERSONS

7.1 Violence and Abuse

There are no federal laws particularly aimed at protecting older people from **violence and abuse**. State and territory family and domestic violence laws provide limited responses and remedies in respect of elder abuse and financial exploitation.³⁶ These laws lack any properly adapted provisions. In some instances, crimes including assaults become “aggravated” at law where they are committed against older or infirmed people.³⁷ These laws, however, remain patchwork and fail to protect older people from elder abuse in a consistent manner. The Australian Institute of Criminology undertook research in this area in the early 90s, however it is yet to return to the issues of elder abuse and exploitation.³⁸ Much of this research remains contemporaneous, especially studies seeking to identify the sources of elder abuse.³⁹

In addition to the absence of legislative protections at the federal level, a national strategy to address elder abuse is yet to be developed. States and territories have taken a lead approach, however the extent of the resources given to support these strategies differs across jurisdictions. While Queensland does not have a dedicated strategy, elder abuse has been a long-standing identified issue, resulting in the establishment of the Elder Abuse Prevention Unit in 1997, which remains tasked with educating the community and services about elder abuse, undertaking policy work, and ensuring coordinated responses exist across government agencies.⁴⁰

Other jurisdictions that have taken a lead approach include the Australian Capital Territory (ACT), New South Wales (NSW), Victoria and Tasmania. In 2007, the NSW Government introduced interagency protocols to strengthen and streamline how government agencies recognise and respond to elder abuse.⁴¹ Two years later, the ACT, Victoria and Tasmania each released a prevention policy, similarly focussed on government responses.⁴² In 2012, Victorian released a complementary, follow-up document outlining the government’s priorities and action plans to address elder abuse, particularly within a health, rather than a legalistic, framework.⁴³ Again, the patchwork nature of these approaches and the fact that a strategy or guideline has not been implemented across all jurisdictions, demonstrates that there is a role for the Federal Government to take in ensuring a dedicated, national strategy is implemented.

While a national, dedicated elder abuse prevention hotline does not exist; some states and territories have established a central contact number. Queensland⁴⁴ and Victoria⁴⁵ were two of the first states to establish a dedicated telephone hotline providing information, support and referrals for any individual experiencing elder abuse. Tasmania subsequently launched a hotline in 2012,⁴⁶ while a hotline and resource unit was announced for New South Wales in 2012.⁴⁷

7.2 Social protection

The federal Government argues that **social protection** for older Australians is based around a three-pillar system: social security age pension, compulsory superannuation and voluntary superannuation.⁴⁸ Relevant laws include the *Social Security Act 1991* and the *Veterans’ Entitlements Act 1986*. The adequacy of the Age Pension has been a key political controversy for some time, culminating in the ‘Harmer Pension Review Report’ in 2009.⁴⁹ The rate of the Age Pension was raised in September 2012 as part of the Government’s ‘Secure and Sustainable Pensions Package’ in the 2009-2010 Federal Budget.⁵⁰ While the age pension is currently indexed twice per year in accordance with increases in the cost of living, up to 34.9% of older people aged over 64 years remain at risk of poverty in Australia.⁵¹ Some peak bodies have called for the age pension to be further increased.⁵² It is also notable that the age at which an older person qualifies for an Age Pension is climbing. Age Pension age for men is currently 65 years and for women 64.5 years (rising to 65 years on 1 July 2013). The general qualifying age for the Age Pension will increase from 65 in 2017 to 67 by 2023.⁵³

Given the scarcity of employment opportunities for people aged 60 years plus and the documented barriers to employment such as workers compensation age limit cut-offs,⁵⁴ older people who cannot find employment *and* do not yet qualify for the Age Pension, are further mired in poverty due to inadequacy of the unemployment benefit, the Newstart Allowance. At the time of writing, a recipient of the Age Pension who is single receives \$712 fortnightly,⁵⁵ while a Newstart recipient is paid considerably less at \$492.60 fortnightly.⁵⁶

Further, the Age Pension is indexed at a higher rate than the Newstart Allowance, and recipients receive a Pensioner Concession Card, which entitles them to pay less for prescription medicines under the Pharmaceutical Benefits Scheme as well as render them eligible for reduced property and water rates, energy and telephone bills, public transport fares and vehicle registration. An older person who is receiving the Newstart Allowance might be granted a Pensioner Concession Card, but only after they have been on the payment for nine months.⁵⁷ Adding further complexity to this, there is no consistent system of concessions for older persons. Each state and territory has its own scheme.

Unless the Newstart Allowance is increased, it will decrease further relative to other social security payments. The Organisation for Economic Co-operation and Development (OECD) estimates that by 2040, the Newstart Allowance will be less than half the amount of the Age Pension.⁵⁸ Pressure by peak welfare groups has been placed on the Government to increase the Newstart Allowance,⁵⁹ following the OECD report and recommendations contained in the 'Australia's Future Tax System' report (known as the 'Henry Tax Review').⁶⁰ As part of the 2012-2013 Federal Budget, an Income Support Bonus was announced for Newstart Allowance recipients of \$210 for single people per year, to be paid after 20 March 2013.⁶¹ With this amount equating to a \$4 on average increase per week, peak welfare groups continue to lobby for the rate of the Newstart Allowance to be raised to at least \$50 per week to meet the cost of living.⁶²

7.3 Housing

Accommodation is generally regulated by generally state and territory laws. These laws cover residential tenancies,⁶³ retirement villages,⁶⁴ residential parks⁶⁵ and public housing.⁶⁶ Public housing is the subject of a Commonwealth/State agreement.⁶⁷ Many older people are experiencing housing stress due to the lack of affordable housing stock, particularly women due to a complex range of factors from increased child-rearing responsibilities through to low incomes, forced early retirement, divorce and less superannuation.⁶⁸ In 2006, 7,400 people aged 64-years-old and above were reported as homeless, an increase of 23% since 2001.⁶⁹ Both the availability and suitability of public housing stock is a critical issue for older people who are frail and/or disabled and require accessible premises.⁷⁰

7.4 Legal Capacity

There are no federal laws relating to legal capacity or mental health. In respect of legal capacity, each state and territory has its own distinct laws relating to systems of substituted decision making.⁷¹ Each state and territory also has its own mental health laws.⁷² This nationally inconsistent regime for dealing with legal capacity, mental health and substituted decision-making is a critical area for law reform.

7.5 Aged Care

Federal laws such as the *Aged Care Act 1997* (Cth) provide the regulatory and continuous quality improvement framework through which aged care services are funded. Services must meet accreditation standards focussed on optimising resident health and personal care, promotion of personal and civil rights and the providing a safe physical environment.

The Australian Productivity Commission's 2011 report, 'Caring for Older Australians'⁷³ noted, "[o]ver one million older Australians receive aged care services. The range and quality of these services have improved over past decades, but more needs to be done."⁷⁴ Future challenges include the increasing numbers and expectations of older people, a relative fall in the number of informal carers, and the need for more workers. By 2050, over 3.5 million Australians are

expected to use aged care services each year.⁷⁵ Key weaknesses of the system are that it is difficult to navigate. Services are limited, as is consumer choice. Quality is variable. Coverage of needs, pricing, subsidies and user co-contributions are inconsistent or inequitable. Workforce shortages are exacerbated by low wages and some workers have insufficient skills.⁷⁶

In 2012, the AHRC published 'Respect and Choice - A human rights approach for ageing and health', which addresses many important issues in this area.⁷⁷ The Commission noted "[t]he aged care reform package can be strengthened by incorporating a human rights approach to the delivery of services for older Australians. The aim would be to promote people-centred decision-making and real change in organisational culture."⁷⁸

To an extent, this is occurring, but needs to be strengthened further. The 'Living Longer, Living Better' aged care reform package, introduced in 2012, is a decade-long plan that seeks to support older people to 'age in place' at home, in part by giving older people greater choice and control over home care packages.⁷⁹ Consumer-directed care, which allows the consumer to choose the type of care and service provider, will be trialled in residential aged care settings.⁸⁰

7.6 Disability

Consumer-directed care is also a central component of the Australian Government's proposed National Disability Insurance Scheme (NDIS), which will provide long-term support to people with a permanent disability. However, older people 65-years-old and above will be ineligible to access to the scheme due to their age. As COTA Australia noted in their submission on the scheme's draft legislation, the NDIS makes a distinction between disability acquired as part of the aging process and disability acquired at any other time during an individual's life.⁸¹ This arbitrary distinction will mean older people cannot access much needed services and funding. It typifies the widespread disconnect between the health, disability and aged care systems.

7.7 Access to justice

Access to justice issues for older people in Australia are multiple and were well summarised by the AHRC in their submission to a 2006 Federal Parliament Inquiry, they include:

- Technological barriers, particularly for telephone and web based services
- A lack of awareness regarding where to obtain legal information and assistance
- A lack of appropriately-communicated legal information
- The high cost of legal services
- A lack of interest by some legal practitioners in older clients
- Potential conflicts of interest when legal practitioners for older people are arranged by family members
- Difficulties in accessing legal aid, including restrictive eligibility tests
- Lack of availability of legal aid for civil disputes
- Lack of specialised legal services for older people, particularly in rural, regional and remote areas
- Lack of resources in community legal centres to tailor their services to the needs of older people.⁸²

While specialist legal services for older people exist across the states and territories,⁸³ these are insufficient for an ageing population. The above barriers render the legal system inequitable and mean older people cannot adequately understand or enforce their rights. The outcomes achieved by OPLS members validates the need for increased funds for community legal services for older people. The Senate Report recommended "the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres."⁸⁴

7.8 National Human Rights Action Plan

In the absence of a constitutionally entrenched Bill of Rights or a federally legislated Bill of Rights, the Commonwealth government developed a National Human Rights Action Plan in 2012. While older people are mentioned in the Action Plan, the focus is primarily on aged care under the

Living Longer Living Better reforms, with actions also relating to elder abuse, financial security and freedom from age discrimination under existing laws. The Action Plan does state the Commonwealth government will continue to participate in the Open-Ended Working Group, and will explore the feasibility and necessity of further instruments and measures.⁸⁵

7.9 Health Care and Palliative Care

Health care for older people is one of the major challenges faced by Australia. This includes home care, community care and hospital care. The real challenge to health care for older people is summarised by the Intergenerational Report:

*As the population ages, more people will fall into the older age groups that are the most frequent users of the public health system. Combined with population growth, this will play an important role in increasing future health costs. From 2009–10 to 2049–50, real health spending on those aged over 65 years is expected to increase around seven-fold. Over the same period, real health spending on those over 85 years is expected to increase around twelve-fold.*⁸⁶

A key health care concern for older people is ensuring appropriate end of life care is available, and having the option to die in the familiar surroundings of home. Despite the majority of people expressing a desire to die at home, only 16% do – the remainder die in hospitals and aged care facilities.⁸⁷ Annually, there are up to 72,000 people with palliative care requirements in Australia.⁸⁸

The Australian Government funds palliative care, but service delivery is the responsibility of the states and territories. While ‘The National Palliative Care Strategy’ is meant to guide service delivery,⁸⁹ the quality and availability of care differs across jurisdictions.⁹⁰ As Palliative Care Australia, stated in their submission to the 2012 Senate inquiry, “Palliative care in Australia is nothing short of a lottery, predominately determined by your location, but also affected by your diagnosis, the education of your health professional, cultural background, and your age”.⁹¹ Recommendations addressing these concerns were made in the Senate’s final report.⁹²

Similarly, Allen and Kahn recently indicated that:

*There are many barriers which limit the effective provision of palliative care to those in need. Four salient themes were identified overall: communication between organisations and professionals; inadequate education of health care professionals; lack of knowledge surrounding palliative care; and insufficient pain management. Significant knowledge deficits were highlighted amongst GPs and aged care facility carers regarding palliative care. Future health promotion projects could focus on education within aged care facilities and general practice. Addressing these barriers is an integral step in furthering the effective provision of palliative care in Australia.*⁹³

As a result of potential reductions in to the level of funding made available to the states and territories through the National Health Reform Agreement and the conclusion of a partnership between the Australian Government and the various jurisdictions, people with palliative care needs will be negatively impacted. Palliative Care Australia reports that beds will be reduced, services such as palliative care outpatient clients will close or downsize and trained primary and allied health staff will be lost. It is anticipated this will result in more people dying in hospital, rather than being supported in their homes. Hence, the options available to older people during the final stage of life will be limited, much like their ability to exercise self-determination.

7.10 Differences in the ageing experience

The intersectional needs of older people who are Aboriginal and/or Torres Strait Islander, from a culturally linguistically diverse background (CALD) and/or identify as gay, lesbian, bisexual, transgender or intersex (LGBTI) need to be recognised and responded to by government and service providers. As part of the ‘Living Longer, Living Better’ aged care reform package, national strategies have been developed for both CALD and LGBTI older people, recognising the need for appropriate, respectful and discriminatory-free services.⁹⁴ A national ageing strategy does not

exist for older Aboriginal and Torres Strait Islander peoples, but ‘people from Aboriginal and Torres Strait Islander communities’ are recognised in the *Aged Care Act 1997* (Cth) as a “special needs group”, as are CALD older people.⁹⁵ LGBTI people are listed as a “special needs group” in the *Allocation Principles 1997* (Cth) made under the Act.⁹⁶

For older Aboriginal and/or Torres Strait Islander peoples, the differences in the ageing experience need to be framed against lived experiences marked by prejudice, discrimination and successive government policies from dispossession through to assimilation. It is important that the definition of ‘older’ is broad enough to include Aboriginal and/or Torres Strait Islander peoples. Due to the 17-year life experience gap, 50 years is often considered ‘older’ for Aboriginal and/or Torres Strait Islander peoples, particularly in the context of government-provided services, such as Home and Community Care.⁹⁷ Currently, the life expectancy for men is 59 years, while for women it is 65 years. In comparison, the life expectancy for non-Aboriginal and Torres Strait Islander peoples is 78 years for men and 83 years for females.⁹⁸

While the experiences of older Aboriginal and/or Torres Strait Islander people cannot be homogenised, and it needs to be recognised that older people live in metropolitan, regional, rural and remote areas, a number of issues and needs have been identified in the literature.⁹⁹ Such barriers to care experienced by older Aboriginal and/or Torres Strait Islander peoples are a fear of institutionalisation within aged care facilities arising from the Stolen Generations, when children were forcibly removed from their families and communities; and the need for service providers to be aware of these social, economic and historical factors that contribute to ill-health and shortened life expectancy. Identified needs include the need to build the capacity for Aboriginal-identified aged care providers to deliver services, and the need for aged care providers to assess whether services are delivered in a culturally safe manner, for example, by recognising the importance of retaining involvement with culture and kinship relationships.

In the report “The Ageing Experience of Australians from Migrant Backgrounds”, National Seniors Australia identified a number of ageing issues for the CALD community.¹⁰⁰ In 2006, those born in non-English speaking or CALD countries were 19% of the over 50 population.¹⁰¹ The report found that ethnicity, cultural factors and migration experiences may have some influence on well being and ageing experience.¹⁰² In addition to aged and health care systems, family and ethnic community supports were identified as important factors for health, economic and social well being of CALD older people.¹⁰³ Overall, it was found that more research was needed in this area. They said: “[B]ehind the well-worn phrase of ‘an ageing Australia’ lies a wealth of complexity. Just as ageing is a unique journey for all of us as individuals, so too is the ageing experience of people from immigrant backgrounds. So far, research into these differences has been fairly limited.”¹⁰⁴

Older people who identify as LGBTI have experienced prejudice, discrimination, interventions and sanctions from government, legal, medical and religious institutions throughout their lives. Much research has been undertaken on how elder abuse is sometimes a continuation of these histories.¹⁰⁵ For example, nursing staff refusing to provide care on account of a person’s sex, sexuality or gender diversity, avoiding physical contact and making assumptions about HIV status. For some LGBTI older people, this can give rise to self-neglect, meaning the individual is reluctant to engage services and reveal their identity for fear of discrimination.

The dedicated, LGBTI national strategy seeks to ensure LGBTI-identifying people experience ageing in an inclusive manner. For example, the first goal is ensuring LGBTI older people experience equitable access to appropriate ageing and aged care services.¹⁰⁶ The realisation of this goal remains threatened by the fact that religious organisations that receive government funding to provide aged care services are exempt from discrimination laws.¹⁰⁷ Such organisations, as a consequence, can discriminate against accepting someone who identifies as LGBTI as a resident. Considering religious organisations run a significant number of aged care facilities, this means older people who are LGBTI continue to face discrimination as they age. While the exemption remained in the *Exposure Draft of the Human Rights Anti-Discrimination Bill*

2012 (Cth),¹⁰⁸ which seeks to consolidate the five existing pieces of discrimination legislation, the recent Senate Inquiry recommended that the exemption be removed.¹⁰⁹ Lobby groups during the Senate Inquiry into the consolidation have advocated removing the exemption, in the lead up to the Bill being debated in the Australian Parliament.¹¹⁰

7.11 Policy Frameworks

States and territories have targeted policy frameworks.¹¹¹ These policy frameworks suffer from a lack of national leadership and coordination.

8. CONCLUSION

With the number of people over 60 in the rise both in Australia and overseas, it is imperative that the rights of older people are explicitly recognised in international law. Although the core international human rights treaties cover all people, including older persons, it is apparent that some rights that are well-respected when people are young are not well protected in their older age.¹¹² It is also acknowledged that while laws can protect human rights, challenging ageist attitudes needs to remain in focus, as ageist attitudes can and do give rise to legal problems, such as elder abuse and workers compensation laws that disadvantage older people from participating in employment and volunteering opportunities.

Both domestically and internationally there has been a groundswell of support among NGOs and NHRIs for a Convention on the Rights of Older Persons. Susan Ryan AO, the Australian Age Discrimination Commissioner recently said:

*A new convention would strengthen the position of civil society and policy makers to achieve reforms in those many countries where older people have no protection of their basic rights. In these places, the basics of food, housing, income, and health care are not available to older people and the consequent suffering is terrible. My view of Australia as a good international citizen, able to offer leadership in improving the lives of older people, has led me to propose Australia's support for the convention.*¹¹³

While Australia's support for a Convention would be demonstrative of being a "good international citizen", such an instrument would also protect the human rights of older citizens in this country. As discussed throughout this submission, there are significant gaps in Australian laws and policies regarding older people's rights, particularly in respect of violence and abuse, social security, housing, legal capacity, aged care, access to justice and health care. These gaps are often particularly pronounced for diverse groups like Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds, people with disabilities and LGBTI people, not withstanding socioeconomic differences within the ageing population.

NACLC supports the drafting of a Convention on the Rights of Older Persons to ensure that all people are able to lead dignified, secure and participatory lives, regardless of their age.

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Townsville Community Legal Service project "Seniors Creating Change" at a shopping centre in Charters Towers