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Open Ended Group on Ageing (8th Working Session, 5-7 July 2017) Input on Guiding Questions: Equality and Non Discrimination

The National Association of Community Legal Centres (NACLC) is the national peak body for 190 community legal centres (CLCs) in Australia. NACLC has ECOSOC Special Consultative Status. Community legal centres are not-for-profit, community-based organisations that provide legal assistance and community development services to their local or special interest communities. Many CLCs provide assistance to older persons and some specialise in assisting older persons with elder rights-specific issues including elder abuse, financial exploitation, social protection including social security, aged care and accommodation, decision-making and guardianship. Centres have formed an Older Persons Legal Services Network (OPLS) of NACLC. More recently, OPLS has joined with community-based elder abuse hotlines and aged care advocacy services to establish *Elder Abuse Action Australia* - a national entity to represent the views of elder abuse prevention advocates and service providers. Many CLCs are also experts in discrimination law. NACLC has engaged in working sessions of OEWGA since the 4th session. It has made a series of submissions and numerous interventions. NACLC relies upon and endorses other input documents including the joint submission from AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, and NACLC of which NACLC is a co-author.

1) Does your country's constitution and/or legislation (a) guarantee equality explicitly for older persons or people of all ages and (b) forbid discrimination explicitly on the basis of age? If so, how is the right to equality and non-discrimination defined?

While Australian laws guarantee equality explicitly for older persons and forbid discrimination on the basis of age, the guarantee and prohibitions are not absolute and are subject to a range of coverage, definitional and jurisdictional limitations. The Australian Human Rights Commission (AHRC) and Age Discrimination Commissioner (ADC) will provide detailed information about the nature and extent of Australia's national scheme of anti-discrimination legislation. National and provincial age discrimination laws exist including the Age Discrimination Act (ADA). Workplace specific laws including the Fair Work Act (FWA) also regulate age discrimination in employment in Australia. At a national level, the ADA is a stand-alone law, albeit one that sits alongside other similar laws for Sex Discrimination, Race Discrimination and Disability Discrimination. Complaint handling for all national laws is dealt with by the AHRC administering the Australian Human Rights Commission Act. The ADA prohibits discrimination on the basis of any chronological age, e.g. old age or youth. It prohibits direct and indirect discrimination. The ADA also provides that it is an offence to publish or display an advertisement (or cause or permit its publication or display) which indicates an intention to unlawfully discriminate on the basis of age.

While the suite of laws is comprehensive, they fail to actively promote equality, address systemic or intersectional discrimination and have a range of exemptions and exceptions. For example, the ADA does not allow for intersectional or multiple discrimination. A complainant must lodge complaints under each respective, applicable law, which can each have significantly different scope, application, tests and exemptions or justifications. Additionally, complaints involving harassment (like sexual harassment) or acts of racial hatred (like racial vilification) are not part of the protective scheme of the ADA. Further, the ADA only prohibits discrimination in specified areas of public life. The ADA does not prohibit discrimination on the basis of the age of a person's relative or associate like its counterpart the DDA. A consolidated scheme was considered by the Government and Parliamentary Committee but was deferred indefinitely in 2013. It has also been suggested, including by the AHRC that family violence should be a protected attribute, which might in some contexts include elder abuse.

Complaint statistics show that age discrimination complaints (for all ages) remain the lowest at 8% of all complaints. Of those complaints, 62% were about age discrimination in employment. Further, the number of complaints under the ADA has been in decline since 2011-2012 based on the AHRC's data. Within the data on age complaints it appears that only 28% relate to older persons over 65 years of age. Only 42 complaints were received nationally from older persons in 2015-16.

For more information on this submission please contact Bill Mitchell, principal@tcls.org.au

NOTE: Underlined passages are hyperlinked to source material.

State and Territory (provincial) laws tend to be broad-based anti-discrimination laws where age is one of a number of protected attributes. Exemptions applied in provincial schemes are similar but not entirely consistent and are targeted to particular areas. They include special or positive measures such as age based benefits, but also allow specific age exceptions as well as general exemptions. Like their national counterpart, provincial anti-discrimination commissions had low numbers of complaints. In Queensland, age discrimination complaints (for all ages) were 4.5%. In New South Wales enquiries about age discrimination (for all ages) was 5%. In Victoria enquiries about age discrimination comprised 4.9% (for all ages). In Western Australia enquiries pertaining to age discrimination accounted for 5.4% (complaints amounted to 5.9%, of these complainants 4.3% were over the age of 65). In South Australia complaints on the grounds of age discrimination totaled 9%. In Tasmania, complaints relating to age discrimination comprised 11.3%. In the Northern Territory, 45 complaints were made in relation to age discrimination, amounting to 7.3% of the total. In the Australian Capital Territory, the percentage of complaints with respect to age discrimination was 2%.

2) Does your country produce information about discrimination against older persons in the following or other areas? If so, what are the main findings?

Yes, the AHRC will provide examples of its work.

3) Is there information available about inequality of opportunities or outcomes experienced by older persons in the following areas?

- **Availability of, access to and quality of health care services**
- **Financial services**

Yes. Older persons in Australia experience health and social inequality. A measure of health inequality is the gap in life expectancy for Aboriginal and Torres Strait Islander persons. Australian life expectancy averages more than 82 years (fourth longest lived in the world), however Aboriginal and Torres Strait Islander people still face a significant gap in life expectancy and live lives that are 10 years shorter (near one hundred and fourth in the world).

Legislative protections for older persons are inconsistent across jurisdictions. Australia should review and enact model, uniform national laws protecting older persons from abuse, neglect and exploitation and ensuring older people are involved in decisions about their health and care.

With respect to financial services, there is concern about the ability of older people to access financial services given the decline in traditional banking services and a shift to self-service and electronic and online facilities and the associated risk of financial exclusion.

4) Are there any areas where differential treatment based on old age is explicitly justified?

Yes, numerous examples exist in the national and provincial schemes as listed above. In the ADA, employment does not include voluntary work or domestic duties performed in private households. Additionally, the ADA provides an exception where a person cannot perform the inherent requirements of the particular position because of their age. Positive discrimination is also exempted. In the ADA, exemptions exist for a wide range of circumstances including: youth wages, terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered, charities, religious and voluntary bodies, exempted health programs, acts done in direct compliance with certain federal and state and territory laws, court orders and industrial awards and agreements, exempted employment programs, immigration and citizenship.

Some commentators have argued that access to the ADA is impeded by regulatory and definitional complexity. Australian NGO National Seniors has described discrimination in employment as the Elephant in the Room. They argue that “There is a painful gap between laws against age discrimination, and the practice of age discrimination.” Australia has a comparatively low workforce participation rate of older Australians compared with other OECD countries. For example, people aged 55 years and over make up approximately a quarter of the population, but only 16% of the total workforce. In November 2015, 73.8% of Australians aged 55–59 years were participating in the workforce, with 56.5% of 60–64 year olds and 12.7% of those 65 years and over in the workforce. The right to work for older Australians remains essential in the face of an ageing population, an increase in Age Pension eligibility age¹ and greater longevity. The Australian Human Rights Commission’s *Willing to Work Inquiry Report* confirmed widespread age discrimination in employment. The Report found that older people face longer periods of unemployment, averaging 68 weeks, 27% of people over the age of 50 reported experiencing age discrimination at work, and that a third of those who had experienced age discrimination gave up looking for work. Mature age workers remain more vulnerable to under-employment and long periods of involuntary unemployment, making up about one third of long term Newstart Allowance recipients.

¹ The 2014/15 Australian Budget measure (still Government policy but not yet legislated) to extend the age pension eligibility age to 70 years increases the prospect of poverty in retirement.