

2023 National Access to Justice and Pro Bono Conference

21 – 23 June 2023 | Brisbane

Access to justice for older Australians



TOWNSVILLE
COMMUNITY LAW

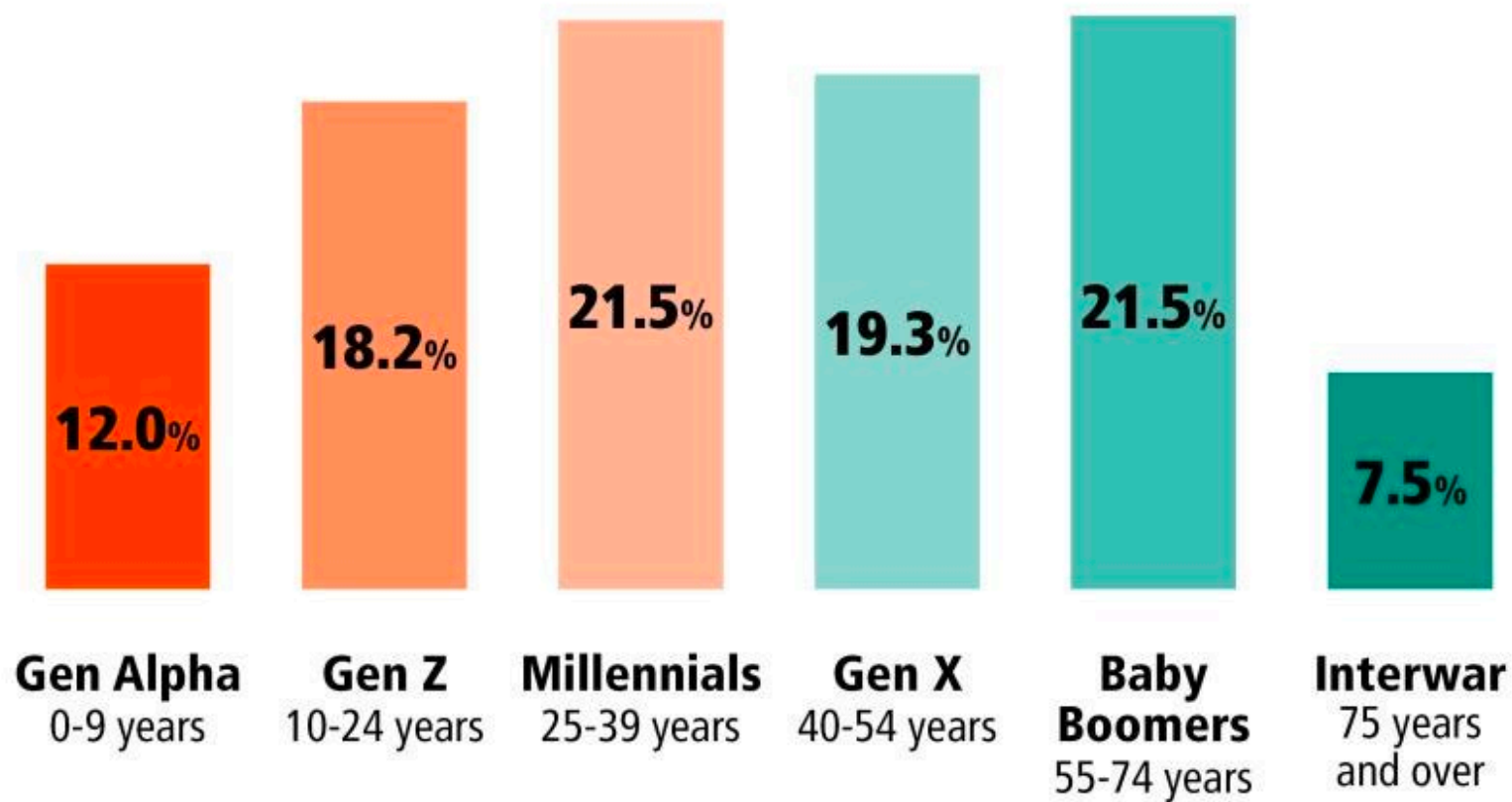
The question posed by this session

As the percentage of older Australians in the community continues to increase, what are the steps we can take to better meet the needs of this sector of our community?

- > Big picture scene setting
- > Key framing issues
- > Big picture solutions



Who are older Australians: Census 2021



People aged 65 years and over comprised 5.4% of the Aboriginal and Torres Strait Islander population compared with 17.2% of the non-Indigenous population.

So, 5.4% of 3.2%

The LCA justice project: older persons

“Older persons are a diverse demographic group, with different needs, experiences and intersectional identities. The definition of ‘older persons’ for present purposes must have regard to their diversity, including the life expectancy of different social groups. **As such, the legal needs of older persons are varied and are affected by a multiplicity of factors...**”

Law Council of Australia, The Justice Project, Final Report - Part 1: Older Persons, August 2018 at 3.

Minister Butler: Stretton Oration

“The first thing we must do is to escape from the mental trap of thinking of older people in terms of population cohorts – or worse still, in terms of aged care “beds” – and **instead start thinking about them as individual people, each unique, each determined to live as they choose.**”

The Hon. Mark Butler MP, Minister for Health and Aged Care, The Hugh Stretton Oration, 27 April 2023.

A cross-cutting right for older persons

“Access to justice is a core element of the rule of law. It is a fundamental right and an essential prerequisite for the protection and promotion of all other human rights. Therefore, **access to justice is a cross-cutting right**, in line with other principles such as equal recognition before the law.”

UN Open-ended Working Group on Ageing, Twelfth Session, Substantive inputs in the form of normative content for the development of a possible international standard on the focus areas “right to work and access to the labour market” and “access to justice” * Working document submitted by the Office of the High Commissioner for Human Rights (OHCHR), 25 March 2022

Central framing issues

- > Older persons are a **diverse demographic group**
- > Age is a **social construct** and 'old age' is a **relative concept**
- > Older persons exist within a **normative gap** and a **justice gap**
- > The **legal needs** of older persons are still **relatively unknown**
- > Access to justice processes are embedded with **ageism**: systemic, interpersonal and self-directed
- > The importance of **life course** and **intersectional** approaches
- > Obvious **barriers** to accessing justice including **age discrimination**

Social constructions

- > 'Old', 'Older age' or 'older persons' are **socially constructed** concepts
- > There are **no fixed, objective biological or chronological determinants** of when a person enters 'older age': it depends on the **cultural values and practices** of the communities to which they belong
- > 'Older age' is **defined differently for different purposes**; even when chronological age is a threshold criterion, different ages are used, for example for age pension eligibility for a State pension, for concessions, or for reviewing a person's capacity to drive

Social constructions

- > The concepts of 'old age' and 'elder' status have **varied over time**, within and among cultures
- > Individuals' psychological age (how old they feel) **may differ** from their chronological age or from where others view them on the ageing spectrum, and different groups in society may answer the question of 'who is old' in diverse ways and in comparison with their own age
- > Individuals' **health and functional ability** varies significantly

The normative gap

- > The **absence** of a dedicated international human rights treaty significantly limits older persons' access to justice
- > UN human rights treaty bodies and thematic special procedures **don't address** older persons' access to justice
- > The UN Principles for Older Persons are **limited and non-binding**
- > The **COVID-19 pandemic** has impacted older person's access to justice at a time when it was critical to their lives



The justice gap

“The group of individuals who do not meet eligibility criteria for publicly funded legal services yet lack the resources to afford a private lawyer’s assistance for all or part of their legal matter, make up the ‘missing middle’. Particular sectors of the community may be more likely to fall within the missing middle. **These include older persons ...**”

Law Council of Australia, Addressing the legal needs of the missing middle, Position Paper, November 2021

The justice gap

Why does this matter?

- > Access to justice is a **fundamentally important** freestanding right
- > Access to justice **protects and promotes** other human rights
- > Justice problems **negatively impact** older persons' lives
- > Older persons **lack legal identity** and **suffer further exclusion**



Justice gap examples

Older persons don't have equity of access or recognition:

- > Equal Treatment Benchbooks **don't include older age**
- > Access to formal legal aid systems is **poor** (~1% of all grants of aid)
- > Older complaints under federal anti-discrimination laws are **lowest of all groups** (~3% of all complaints)
- > **Absence** of specific criminal laws against elder abuse
- > Half of all long-term care residents experience restrictive practices **without effective regulation or redress**

Older First Nations persons

Specific access to justice needs:

- > **Factors recognised** have included historic, cultural and trauma-related issues including historical abuses such as stolen wages and institutionalisation and the impacts of colonisation
- > Their lived experience reflects the **intersection** of ageism, racism, and ableism compounded by remoteness and linguistic and cultural issues
- > The importance of **lore and customary law**
- > The need to honour and support their **role as community elders** and **leaders of self-determination**

Older person's legal needs

- > **No empirical research** on older persons' legal needs in Australia
- > Very little overseas or within United Nations system
- > Related research exists:
 - ∅ Parliamentary Inquiries
 - ∅ Access to Justice: articles and reports
 - ∅ Human Rights: articles and reports
 - ∅ Settings, e.g. Institutional care

Ageism

- > **Stereotypes** are how we **think**
- > **Prejudice** are how we **feel**
- > **Discrimination** are how we **act**

Towards others and ourselves **based on age**

Prevalence = **1 in 2** worldwide are ageist (WHO)

Institutional, interpersonal or self-directed

- > **Institutional ageism** **refers** to the laws, rules, social norms, policies and practices of institutions that unfairly restrict opportunities and systematically disadvantage individuals because of their age.
- > **Interpersonal ageism** **arises** in interactions between two or more individuals
- > **Self-directed ageism** **occurs** when ageism is internalised and turned against oneself.

Ageism examples

- > **Stereotypes:** lower compensatory value, less credible witnesses, less able jurors, less needy of legal assistance and a lower priority for law enforcement and protective legal processes and guarantees
- > **Discrimination:** lost autonomy and independence, violations of rights to family and privacy, free movement, health services, freedom from violence, abuse and institutional neglect
- > **Prejudice:** low numbers of complainants/litigants, legal processes less commonly commenced and finalised, less successful outcomes or simply fail to obtain the opportunities the law provides

Importance of life course and intersectionality

- > Older persons' need to access justice is **heightened by other intersecting factors** such as life expectancy, gender, indigenous status, race, socio economic status, health inequalities, geographic and social isolation, living and care arrangements, incarceration or detention.
- > Despite increased need, access to justice is more restricted for older persons with these intersecting factors
- > So, for older persons, the **greater their need to access justice, the less chance it will be guaranteed**

Big picture solutions

- > **Rights**: national and international normative frameworks
- > **Recognition**: invisibility to visibility - charity objects to rights-bearers

Leading to:

- ∅ **Relevance**: Specialisation and specific issues
- ∅ **Respect**: Awareness raising and education, including intergenerational
- ∅ **Resources**: Funding, specialist programs, mainstreaming ageing issues
- ∅ **Remedies**: Available, adapted, accessible, tailored and nuanced
- ∅ **Reparations**: Specific wrongs and violations