

Available online at www.sciencedirect.com

ScienceDirect

journal homepage: www.ajgonline.org

Special Issue Article

The Human Right to Justice for Older Persons With Mental Health Conditions

William Mitchell, L.L.B., L.L.M., Hon.L.L.D.,

Andrew Byrnes, B.A. (Hons), L.L.B. (Hons), L.L.M.,

Anneliese Bergman, Penultimate Student Bachelor Laws, Bachelor Science

(Mathematics), Carmelle Peisab, M.B.B.S. (Hons), M.D., F.R.A.N.Z.C.P.

ARTICLE INFO

Article history:

Received July, 9 2021

Accepted July, 9 2021

Key Words:

Legal issues

access to justice

indigenous aging

human rights

international standards

intersectionality

ABSTRACT

This article explores the nature and extent of barriers to access to justice that older persons experience, including those with mental health conditions. It finds that access to justice—the right to fair, prompt and responsive decisions by administrative decision-makers and equal access to courts and tribunals to obtain timely and effective remedies—is not only an important right in itself but also enables the enjoyment of many other human rights. Yet older persons, particularly those with mental health conditions, face a significant “justice gap.” Ageist attitudes, laws and practices interact with other forms of bias such as mentalism, sexism, ableism, racism, homophobia, and heterosexism exacerbating older persons’ disadvantage and marginalization, particularly those with mental health conditions, and older indigenous persons. These discriminatory practices, together with the phenomena of elder abuse, all severely limit older persons’ access to timely and responsive justice. International and national standards, both general and specific to older persons, have been shown to be inadequate to respond to this justice gap. An international standard in the form of a binding legal obligation that specifically addresses older persons’ rights of access to justice is needed urgently as part of a new international treaty on the human rights of older persons. (Am J Geriatr Psychiatry 2021; ■■■:■■■–■■■)

■■■:■■■–■■■)

From the Townsville Community Law, College of Business, Law and Governance, James Cook University (WM), Townsville, Australia; Faculty of Law and Justice, University of New South Wales, Australian Human Rights Institute, Ageing Futures Institute, UNSW (AB), Sydney, Australia; Faculty Law and Faculty Science, University of Technology (AB), Sydney, Australia; and the School of Psychiatry, Faculty Medicine, and Ageing Futures Institute, University of New South Wales, Capacity Australia (CP), Sydney, Australia. Send correspondence and reprint requests to William Mitchell, L.L.B., L.L.M., Hon.L.L.D., 181 Sturt S., Townsville, Queensland 4810, Australia e-mail: bill@townsvillecommunity.law

The data were not presented in the same form as this paper. This is the first time the data have been presented in the form of an academic work. Many of the key points were presented (in slides) to the United Nations Open-ended Working Group on Ageing’s 11th Working Session between March 29 and April 1, 2021 on the substantive theme of Access to Justice.

© 2021 American Association for Geriatric Psychiatry. Published by Elsevier Inc. All rights reserved.

<https://doi.org/10.1016/j.jagp.2021.07.007>

Highlights

- What is the primary question addressed by this study? This question must be limited to one sentence.
- This article explores the nature and extent of barriers to access to justice that older persons experience, including those with mental health conditions.
- What is the main finding of this study? The finding must be limited to two sentences.
- Access to justice—the right to fair, prompt and responsive decisions by administrative decision-makers and equal access to courts and tribunals to obtain timely and effective remedies – is not only an important right in itself but also enables the enjoyment of many other human rights. Yet older persons, particularly those with mental health conditions, face a significant “justice gap.”
- What is the meaning of the finding? This must be limited to one sentence.
- International and national standards have been shown to be inadequate to respond to this justice gap mandating an international standard in the form of a binding legal obligation that specifically addresses older persons’ rights of access to justice, among other rights.

INTRODUCTION

Access to justice encompasses the right to a fair trial, including equal access to and equality before the courts and tribunals, fair, prompt, and responsive decisions by administrative decision-makers that affect one’s interests, and the ability to obtain just and timely remedies for rights violations.¹ Guaranteeing access to justice is indispensable to democratic governance and the rule of law as well as to combatting social and economic marginalization and ensuring full participation of older persons in society.² The inability to have access to fair, prompt, and responsive decision-making processes has a negative impact on older persons’ lives (including their physical and mental health).² These issues are particularly salient for older persons with mental health conditions, who are most vulnerable to denial of access to justice due to a range of discriminatory forces including ageism and “mentalism” (discrimination based on presence of mental illness).³

THE JUSTICE GAP FOR OLDER PERSONS WITH MENTAL HEALTH CONDITIONS

While older persons as a group have long been faced with a justice gap, the COVID-19 pandemic has highlighted existing patterns of discrimination and has had an unprecedented effect on the functioning of

justice systems and older person’s access to justice at a time when it was critical to their lives.⁴

According to World Justice Project data, 637 million older persons face a justice gap, 187 million cannot access civil, administrative, or criminal justice and 562 million are excluded from the opportunities the law provides.⁵ While this has been acknowledged generally for older persons, the justice gap specifically for older persons with mental health disorders has not been extensively documented despite frequent interactions with the court and tribunal systems as well as vulnerabilities to rights violations such as undue influence and elder abuse.^{6,7}

BARRIERS TO ACCESSING JUSTICE

The justice gap for older persons with mental conditions manifests itself through institutional and personal barriers including:

- restricted access to specialist legal aid services due to limited funds (e.g., due to elder financial abuse or economic disadvantage) and limited knowledge and information about where to find legal help. Only a handful of “Seniors Legal Services,” “Medical-Legal Partnerships,” or “Health Justice Partnerships” between public health and law have emerged over the last decade to redress these access issues⁸

- greater reliance on family and friends in legal and related matters with potential consequences for undue influence or duress.
- disadvantage conferred by digital exclusion including social media and law online and the move to e-government service provision in many countries. Conversely, older persons may be equally disadvantaged during e-legal and e-health consultations over justice matters.⁹
- the perception (often reflecting the reality) that the law is disempowering and inaccessible, and that potential benefits of engaging with the legal system are outweighed by the stress, cost and delay in resolving the issue.
- failure of justice systems and government structures to provide support, aids and adjustments to accommodate age-related needs.
- older persons also face psychological barriers, such as disempowerment, diminished self-confidence and feelings of shame, embarrassment or stoicism.^{2,10}

Some practical clinical examples of barriers to justice that appear regularly in environments such as clinics, hospitals, and institutional facilities are:

- failure to presume capacity in older people with mental health conditions, with applications for appointment of substitute decision-makers based on diagnosis alone without an assessment of need (e.g., applications for guardianship purely based on diagnosis of dementia) and as a last resort.
- decisions by clinicians and administrators to commence or support applications for guardianship or curatorship orders where an older person does not have access to justice (e.g., access to legal advice and representation).
- decisions by clinicians and administrators to accept and deal with third party decision-makers such as health providers or other attorneys without consultation with the older person themselves about aspects of care or other important decisions that might lead to treatment, confinement or possible restrictions on the enjoyment of their human rights such as free movement, free association, privacy, family contact etc.
- the imposition of COVID-19 public health measures which may compromise older persons' human rights, where they are not asserted and

there is no access to mechanisms of justice to assess and mitigate the impact of those measures.

- access to specialist legal advice and representation in the making and review of treatment and forensic orders within mental health systems, including decisions relating to involuntary treatment and confinement.

AGEISM AND THE JUSTICE GAP

Ageism sits at the center of the justice gap. Ageism is prevalent, deeply ingrained, and more socially accepted than other forms of bias.^{11,12} The determinants of older persons' failure to access justice include a mixture of institutional, systemic, interpersonal, and self-directed ageism. Institutional ageism is widespread within all aspects of the legal and justice system (in courts, law enforcement, legal assistance, dispute resolution, the legal profession). Systemic ageism is pervasive and affects older persons as direct participants (e.g., litigants) and indirect participants (e.g., witnesses, jurors). Self-directed or internalized ageism is a common barrier, and it is often reinforced interpersonally and institutionally.

Justice systems are contaminated by ageism on many levels. Older persons are seen as having lower compensatory damages value, as less credible witnesses, as less able or impartial jurors, as less in need of legal assistance and as a lower priority for law enforcement and protective legal processes and guarantees. These are stereotypes. The consequences of these attitudes include lost autonomy and independence, violations of rights to family and privacy, to access health services, freedom from violence and abuse, and institutional neglect. This is discrimination. Fewer potential older complainants and litigants actually seek redress and take advantage of the opportunities the law provides.⁵ Legal processes are less commonly commenced and finalized, and older persons have less successful outcomes.¹⁰ This involves prejudice and discrimination.

Legal standards and processes often entrench ageism. Decision-making, guardianship, and safeguarding regimes erode the self-determination, privacy, autonomy, independence, and dignity of older persons. Where they exist, such as in Australia, antidiscrimination laws frequently exempt or except common areas of age discrimination by providing for

The Human Right to Justice for Older Persons

exemptions or exclusions in areas such as employment beyond a mandatory retirement age or in access to insurance. Care facilities may segregate, control and dehumanize older persons.¹³ Detention facilities are ill-adjusted to older persons' rights and needs. Legal and court processes alienate older persons. Criminal laws and prosecutorial conduct ignore, negatively construct or downgrade older persons' inherent value or need for protection. Moreover, the nexus between mental disorders and offending in old age¹⁴ and the host of ethical, medical, and legal issues associated with the care and treatment of older offenders mandates specialized old age forensic psychiatry input,¹⁵ access to which is often denied. Again, all are manifestations of ageism: stereotypes, prejudice, and discrimination.

Among this broad group of injustices, key examples highlight the stark need for older persons with mental health conditions to access justice. The impact of chemical restraints in care facilities has been noted as a significant human rights¹⁶ and quality and safety issue.^{17,18} In such circumstances, the right to fair, prompt and responsive decisions by administrative decision-makers and equal access to courts and tribunals to obtain timely and effective remedies is critical to the protection of human rights.

INTERSECTIONALITY

The need of older persons with mental health conditions to access justice is heightened by other factors such as gender, indigenous status, race, socioeconomic status, health, geographic and social isolation, living and care arrangements, incarceration or detention. These are multiple jeopardies.¹⁹ Despite this increased need, access to justice may be more restricted for older persons with these intersecting factors. So, for older persons, the greater the need to access justice, the less the chance that it will be attained.

Older indigenous persons present a unique example of intersectional injustice. The factors influencing their restricted access to justice have included historic, cultural, and trauma-related issues including historical abuses such as stolen wages, institutionalization, and the impacts of colonization. Their lived experience reflects the intersection of ageism, racism, and

ableism compounded by remoteness and linguistic and cultural issues.

A PARADOX

Why do we not have a specific guarantee of access to justice for older persons, including those with mental health conditions when ageism is more pervasive than sexism and racism (1 in 2 persons hold ageist attitudes)?¹¹ As it interacts with mentalism, ageism interacts with other forms of bias, such as sexism, ableism, racism, homophobia, heterosexism, and exacerbates older persons' disadvantage. Additionally, 1 in 6 older persons are estimated to experience elder abuse across all settings including community and institutions.²⁰ Age-friendliness is obviously undermined by the absence of justice: limited accessibility (physical and affordability), limited availability and the absence of reasonable accommodations or adjustments. Almost half of self-represented litigants (litigants *pro se*) are 50 or older (~45%).²¹ Combatting ageism is a principal reason why older persons need access to justice rights, as structural ageism undermines their opportunity to participate in justice on all levels.

THE NEED FOR A BINDING INTERNATIONAL STANDARD ON ACCESS TO JUSTICE FOR OLDER PERSONS

Although there are general guarantees of access to justice in binding international human rights treaties, there is no specific international treaty that addresses older persons rights as a whole, nor is there a specific provision tailored to the denials of access to justice commonly experienced by older persons. The absence of a dedicated international normative instrument significantly limits older persons' human rights including their access to justice. United Nations human rights treaty bodies and thematic special procedures have not and cannot address older persons' access to justice in a meaningful or methodical way.²²

The now 30-year-old aspirational UN Principles for older persons provide limited recognition of access to justice and are not legally binding on States.²³ Nor has the UN development agenda assisted, even though access to justice is a driver of inclusive

development and growth. While Sustainable Development Goal 16 commits the international community to “provide access to justice for all,” neither the Goal itself nor its implementing targets and indicators specifically address older persons. Similarly, the main international policy document on older persons the Madrid International Plan of Action on Ageing (2002) recognizes access to justice only within a narrow focus: the lack of legal protection from violence and abuse.²⁴

As the UN Secretary-General stated in 2020, part of the solution to addressing the structural patterns of ageism and discrimination against older persons that were amplified by COVID-19 is a strengthened international legal framework. In other words, a new

treaty with an explicit guarantee of older persons’ access to justice. Now.

AUTHOR CONTRIBUTIONS

All authors have made contributions to the conception, drafting, editing, revision for intellectual content, and final approval of the manuscript and have agreed to be accountable for all aspects of the work.

DISCLOSURE

The authors do not have any acknowledgments or disclosures to add.

References

1. United Nations and the Rule of Law. Access to justice Available at: www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ Accessed May 1, 2021.
2. United Nations, Open-ended Working Group on Ageing, Eleventh session New York, 29 March–1 April 2021, substantive inputs on the focus area “Access to justice” Working document submitted by the Office of the High Commissioner for Human Rights, UN Doc A/AC.278/2021/CRP.4, 8 March 2021, p.2. Accessed May 1, 2021.
3. Peisah C, de Mendonça Lima C, Verbeek H, Rabheru K. IPA and WPA-SOAP joint statement on the rights of older persons with mental health conditions and psychosocial disabilities. *Int Psychogeriatr*. 2021 May 12:1-5. doi: 10.1017/S1041610221000454. Epub ahead of print. PMID: 33977896.
4. United Nations, Policy brief: the impact of COVID-19 on older persons, May 2020, p.4; independent expert on the enjoyment of all human rights by older persons, impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, UN Doc A/75/205, 2020, pp.17-18.
5. World Justice Project: *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World*. 2019
6. Cooper C, Livingston G: *Mental health/psychiatric issues in elder abuse and neglect*. *Clin Geriatr Med* 2014; 30(4):839–850
7. Peisah C, Finkel S, Shulman K, et al: *The wills of older persons: risk factors for undue influence*. *Int Psychogeriatr* 2009; 21(1):7–15
8. National Centre for Medical Legal Partnership *The role of medical-legal partnerships for socially vulnerable older adults* Available at: <https://medical-legalpartnership.org/mlp-resources/older-adults-fact-sheet/> Accessed May 1 2021
9. Sorinmade O, Kossoff L, Peisah C. (2020) *Telehealth and Capacity Assessment* IPA Bulletin 2020.
10. Parliament of the Commonwealth of Australia: House of Representatives Standing Committee on Legal and Constitutional Affairs, undated, ‘Government Response to House of Representatives Standing Committee on Legal and Constitutional Affairs, Older People and the Law. Canberra: Law Council of Australia, 2018 ‘The Justice Project, Final Report Part 1: Older Persons’, Canberra
11. World Health Organization: *Global Report on Ageism*. Geneva Licence: CC BY-NC-SA 3.0 IGO
12. Doron I, Numhauser-Henning, A, Spanier, B, et al: *Ageism and anti-ageism in the legal system: a review of key themes in Ayalon, L, Tesch-Römer C. (eds.), Contemporary Perspectives on Ageism, International Perspectives on Aging 19, e*. Accessed May 1, 2021.
13. Steele L, Swaffer K, Carr R, et al: *Ending confinement and segregation: barriers to realising human rights in the everyday lives of people living with dementia in residential aged care*. *Australian J Human Rights* 2020;doi:10.1080/1323238X.2020.1773671
14. Reutens S, Nielssen O, Large M: *Homicides by older offenders in New South Wales between 1993 and 2010*. *Australas Psychiatry* 2015; 23(5):493–495
15. Tampi RR, Young J, Balachandran S, et al: *Ethical, legal and forensic issues in geriatric psychiatry*. *Curr Psychiatry Rep* 2018; 20(1):1
16. Human Rights Watch: *“Fading Away” How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*. ISBN: 978-1-6231-37717 https://www.hrw.org/sites/default/files/report_pdf/australia1019_web.pdf Accessed June 29, 2021
17. Commonwealth of Australia. 2021. *Royal commission into aged care quality and safety. Final report: care dignity and 3A the new system*. Available at: https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf Accessed June 29, 2021.
18. Human Rights Watch: *“They Want Docile” How Nursing Homes in the United States Overmedicate People With Dementia*. ISBN: 978-1-623-135720 https://www.hrw.org/sites/default/files/report_pdf/us_nursinghomes0218_web.pdf Accessed 29 June 2021
19. Peisah C, O’Neill N, Brodaty H: *Mental health and human rights in the elderly*. In: Dudley M, Derrick Silove D, Gale F, eds. *Mental Health and Human Rights*, Oxford University Press, 2011
20. Yon Y, Mikton CR, Gassoumis ZD, et al: *Elder abuse prevalence in community settings: a systematic review and meta-analysis*. *Lancet Glob Health* 2017; 5(2):e147–e156

The Human Right to Justice for Older Persons

21. Julie Macfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants Final Report 2013, pp. 26-27
22. United Nations, 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 Working paper prepared by the Office of the High Commissioner for Human Rights 2021, p. 4, Summary of Conclusions 3-4
23. UN General Assembly resolution 46/91, United Nations Principles for Older Persons, (16 December 1991) A/RES/46/91 available from undocs.org/A/RES/46/91
24. [United Nations: Political Declaration and Madrid International Plan of Action on Ageing](#), New York. Paragraph 108