Human rights and social justice: shifting client control

ADA Australia National Conference

Bill Mitchell

23-24 March 2017, Gold Coast, Australia

TOWARDS A CONVENTION ON THE RIGHTS OF OLDER PERSONS

Bill Mitchell,

Townsville Community Legal Service Inc. / National Association of Community Legal Centres

Email: principal@tcls.org.au
INTRODUCTION

The conference theme ‘Human Rights – Shifting Client Control’ embodies the intended outcomes of a Convention on the Rights of Older Persons: a paradigm shift in control for older persons, from passive welfare recipients to legitimate rights holders. Perversely, the Convention on the Rights of Persons with Disability (CRPD) took almost twenty years to reach fruition. States argued existing human rights were adequate. Some commentators now suggest, “The CRPD is the greatest barrier to the adoption of a convention.”

In essence, the convention debate has coalesced around the single, selfsame question asked of the CRPD: are rights of this group adequately protected?

Perversely, opponents propose the CRPD protects all older persons. The CRPD Committee Chair has repeatedly rebutted this proposition and called for a convention. Older persons are half of those with disability but the correlation is not automatic or axiomatic. Old age is not just impairment. Linking old age with disability feeds hostile and benevolent prejudice, stereotypes both groups, and typifies intersectional discrimination.

Civil society says a convention would address ‘elder specificities’ and legitimize the political identity of older persons. Gaps highlighted include:

- Specific protections in the area of ageism and non-discrimination;
- Areas where protections are broad in scope and lacking in specificity such as health, education, housing or access to justice;
- Rights to social security and rights of older women were they remained inconsistent across normative frameworks;

1 The UN has tended to define an older person as one who has reached age 60 years. There is no comprehensive definition of older persons available at either the international or regional level.
6 Above note 3.
• Areas that were overlooked such as the rights in the delivery of care services, and at the end of life and palliative care; and
• Intersectional and multiple discrimination affecting older persons based on gender, marital status, minority status, health status, sexual identity or orientation, citizenship or migrant status etc.

Proponents note “the CRPD offers little support to older persons who are disadvantaged by structural discrimination based upon age.” Further, the CRPD standards “do not apply in toto to the situation of all older persons.” Proponents accept protections exist, but are not tailored or comprehensive.

HelpAge International contends a convention would achieve significant outcomes:

• Establish legal standards that challenge and replace stigmatizing and dehumanizing ageist attitudes and behavior;
• Clarify how human rights apply in older age;
• Ensure states understand and are accountable for their human rights obligations to us in our older age;
• Provide a framework for policy and decision-making.

BACKGROUND

A convention is an agreement between States about particular matters. In the human rights area they are collectively called ‘instruments’ and include conventions, covenants and declarations. They are a common standard of achievements for all peoples and all nations that set out fundamental human rights to be universally protected.

The modern campaign for a convention was built over the last decade, led by a coalition of civil society, institutional actors and supportive States.

The idea dates back to the end of the Second World War, when the UN was debating the Universal Declaration of Human Rights (UDHR) with Australia’s Dr Herbert ‘Doc’ Evatt as President of the General Assembly. The debate began in 1948 with the ‘Draft Resolution on a Declaration of Old Age Rights’ at the General Assembly’s Third Session. Argentina proposed the resolution just days before the Declaration was signed in Paris. Argentina’s Juan Bramuglia pronounced “Our task is to create in the sphere of doctrine, and thereafter to

---

10 Above note 3, p.1047.
11 Above note 9, p.4.
12 http://www.helpage.org/what-we-do/rights/towards-a-convention-on-the-rights-of-older-people/
14 A/C.3/213/Rev.1. An Amendment by Peru included “should carry out in close cooperation with the International Labour Organization and such other specialized agencies as to be concerned”.

establish by positive legislation in the sphere of social security, Old Age Rights as a universally accepted formula designed ... to end human difficulties in the hardest years of man’s life.”

First Lady Eva Perón was the architect of the declaration.

The preamble declared its peronist values:

That old age rights, having the same origin and purpose as other universal social safeguards, are essential for the improvement of living conditions of the worker and for his welfare when his physical strength is at end and end and he is exposed to poverty and neglect.

Eleanor Roosevelt’s daily journal noted the proposal stressed “that if families refuse to care for aged members, then the state should force them to do so by law.” She pondered several issues with the proposal, noting “I can't help wondering just what "minimum home comforts" means. Perhaps it will be detailed later. I cannot help wondering, too, as I read this document, whether some consideration is not due young people.”

The draft included rights to assistance, accommodation, food, and clothing, care of physical and moral health, recreation, work, stability and respect. It was referred to the Economic and Social Council but the resolution languished.

India lead a second bid for recognition of older persons at the time of debates around article 9 of International Covenant and Economic, Social and Cultural Rights (ICESCR). It was rejected on the basis the old age rights should be contained in a separate, specific convention. Absurdly, India is now opposed to a convention. It is ironic this history shadows the debate. The question whether elder specificities exist is central to the dialogue and academic discourse around gaps has been prolific.

In 1982 the Vienna International Plan of Action on Ageing (VIPAA) detailed measures to safeguard the rights of older persons. It was to be “an integral component of the major international, regional and national strategies and programmes...” VIPAA was the first global ‘soft law’ response to the rights of older persons.

The General Assembly established the Principles for Older Persons in 1991, which articulated five key principles: independence, participation, care, self-fulfillment and dignity. The principles underpin much of the UN’s later work. Like VIPAA they are ‘soft law’, that is,

---

19 Statement of India to 7th Meeting of the 7th Session of the Open Ended Working Group on Ageing, http://statements.unmeetings.org/media2/7664276/india.pdf  
20 Above note 7.  
22 United Nations, Vienna International Plan of Action on Aging, 1983. It was adopted by the World Assembly on Aging held in Vienna, Austria from 26 July to 6 August 1982. See 4.2  

The year 1999 was designated the ‘International Year of Older Persons’ in recognition of ‘humanity’s demographic coming of age’. In 2002 the Madrid International Plan of Action on Ageing (MIPAA) replaced VIPAA. MIPAA offered “a bold new agenda for handling the issue of ageing in the 21st-century. It focused on three priority areas: (1) older persons and development; (2) advancing health and well-being into old age; and (3) ensuring enabling and supportive environments.” It was “to reorient the ways in which their societies perceive, interact with and care for their older citizens.” MIPAA is soft law without sanctions for non-performance.

In 2004, the Brasilia Declaration made by Economic Commission of Latin America and the Caribbean pledged to “make the necessary consultations with our Governments to promote the drafting of a convention on the rights of older persons...” In 2009, experts from around the world met in Bonn. The purpose of the meeting “was to provide the General Assembly with independent expert opinion on questions related to the rights of older persons.” It was the first meeting of its kind. Two possibilities emanated from the deliberations: (1) a special rapporteur on the rights of older persons and (2) a convention on the rights of older persons.

**RECENT HISTORY**

Recent history must start with the Open-ended Working Group on Ageing (OEWGA), which has been the principal forum for convention discourse since 2011. India says discussion has

---

25 Committee on Economic, Social and Cultural Rights, 12th and 13th Sessions, E/1996/22-.
29 Ibid.
31 Economic Commission of Latin America and the Caribbean, Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: towards a society for all ages and rights-based social protection, Brasilia Declaration, Brasilia, 4-6 December 2007.
34 Ibid.
“thrown up a variety of views,” but until recently, states have remained reductionist, polarized around a binary question: should there be a convention?

OEWGA’s First Session heard that a convention would facilitate a holistic approach to ageing and “help reframe older persons as rights holders rather than recipients of welfare and charity”. This reframing has been controversial. Pakistan summed up the opposing viewpoints at the First Session:

We are sympathetic to the views of colleagues who intend embarking on the road to crafting a Convention on the subject. However, the counter view put forward such as waiting for the 2nd Review of the MIPAA as well as the need to first identifying gaps in the process with a view to finding appropriate solutions are also important and merit our careful consideration.

Whether rights gaps exist has driven debate. It is seen as both useful and obligatory step in fulfillment of OEWGA’s mandate. States insisted the gap issue be fully ‘considered’ and ‘explored’. This has been a veritable sticky wicket for OEWGA, with many lamenting the ‘open-ended’ or never-ending nature of the debate.

Civil society’s statement to the First Session noted a new instrument and MIPAA would be complementary and “New human rights instruments are necessary to not only clarify Government responsibilities … and improve accountability, but to provide a framework for policy and decision-making.”

States began making critical statements about a convention at the Second Session. They recognized OEWGA’s central purpose was to “inform a decision about whether new measures – be that a UN convention; a Special Rapporteur; an independent expert; implementation efforts or some other mechanism – are needed.” But their language was

shifting. The language of USA’s statements went from professing openness in the Second Session to issuing cautions by the Third Session.\textsuperscript{44}

Opponents have expressed a number of arguments against a convention.

Firstly, they argue there is significant ambivalence towards a convention. Opponents point to the votes on resolution 67/139 where 67\% were abstentions.\textsuperscript{45} This resolution used strong, directive language to push OEWGA to investigate a convention. The resolution was a product of El Salvador and the group of friends.\textsuperscript{47} It reflected the historic approach of Latin American and the Caribbean States.\textsuperscript{48} Proponents argue abstentions do not cast a ballot, and are used for a multitude of reasons.\textsuperscript{49}

Secondly, opponents suggest greater protection could be reached through better and more efficient implementation of existing instruments and mechanisms including MIPAA.\textsuperscript{50} Japan recently suggested “it is rather more important to implement the existing frameworks with strong political will, reflecting each society’s unique situation.”\textsuperscript{51} It is common to see arguments of adequacy and protectionism bundled together. Shades of anti-globalization also colour these sorts of statements. The European Union similarly contended, “The whole spectrum [of] human rights standards and principles also cover and protect older persons, without discrimination.”\textsuperscript{52} Though the phrase ‘other status’ in human rights laws includes older persons,\textsuperscript{53} proponents argue “the historical failure to name older persons as a protected group has contributed to their relative invisibility in terms of human rights protection.”\textsuperscript{54}

States like Canada suggest employing existing processes like Universal Periodic Review, the 2030 Agenda for Sustainable Development and UN-Habitat New Urban Agenda.\textsuperscript{55} These

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{44} Compare Statement of USA to 2\textsuperscript{nd} Meeting of the 2\textsuperscript{nd} Session of the Open Ended Working Group on Ageing, 1 August 2011. https://social.un.org/ageing-working-group/documents/SDOC3781.pdf with https://social.un.org/ageing-working-group/documents/USA.pdf.
\item \textsuperscript{45} General Assembly, 67\textsuperscript{th} Session, A/67/PV.60, 20 December 2012.
\item \textsuperscript{47} Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Equatorial Guinea, Eritrea, Honduras, Mexico, Nicaragua, Mali, Cuba, Guatamala, Paraguay, Senegal, South Africa, Panama, Sri Lanka, Turkmenistan, Venezuela, Dominica, Costa Rica, Haiti, Belize, Gabon.
\item \textsuperscript{48} Including members of the Economic and Commission of Latin America and the Carribbean (ECLAC) and Organization of American States.
\item \textsuperscript{49} Article 18(3) of the Charter of the United Nations provides that “Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.” General Assembly of the United Nations Rules of Procedure at Rule 86 goes on to provide “For the purposes of these rules, the phrase "members present and voting" means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting.”.
\item \textsuperscript{51} Statement of Japan to 2\textsuperscript{nd} Meeting of the 7\textsuperscript{th} Session of the Open Ended Working Group on Ageing, 12 December 2016. http://statements.unmeetings.org/media2/7664280/japan.pdf.
\item \textsuperscript{52} Statement of EU to 2\textsuperscript{nd} Meeting of the 7\textsuperscript{th} Session of the Open Ended Working Group on Ageing, 12 December 2016. http://statements.unmeetings.org/media2/7664262/2016_12_12_11_07_12.pdf.
\item \textsuperscript{53} Office of the High Commissioner for Human Rights, Compilation of existing international legal instruments, documents and programmes that address the situation of older persons, A/AC.278/2013/CRP.1, 11 July 2013.
\item \textsuperscript{54} Above note 9, p.4.
\item \textsuperscript{55} Statement of Canada to the 1\textsuperscript{st} Meeting of the 7\textsuperscript{th} Session of the Open Ended Working Group on Ageing, 12 December 2016. http://statements.unmeetings.org/media2/7664275/canada.pdf.
\end{enumerate}
\end{footnotesize}
processes do engage older persons’ interests. Critics suggest the failure of existing processes is an example how “age-blind” States are in their human rights reporting. Proponents also suggest that it is fallacy and equivocation to suggest that a convention is unnecessary because other mechanisms exist.

The third argument is that human rights standards have continued to grow without necessity. This argument relies on the negative implications of proliferation including cost, complexity and compliance burdens. Proponents argue the cost-benefit analysis outweighs any burden; it is worth it to better protect older persons.

Fourthly, the United States have raised that “Even if a proposed international instruments comes into being, it would not be binding on the members states that have not ratified it.” Some have observed the triteness of this approach given the US’ ratification history indicates that it would likely sign this convention.

Recently there has been an opening up’ of political space. Slovenia called on OEWGA to “make a step towards the identification and examination of substantive elements that require elaboration in the international legal framework to adequately address the human rights challenges of older persons.” This has assisted to move the debate forward.

Proponents of a convention argue, “… greater protection could only be reached through a specific international legal instrument encompassing all human rights of older persons.” They also assert that the rules of the General Assembly require simple majority not consensus.

Some member states lack discernible views or have simply taken a cautionary approach. China remarked to the First Session “in view of the major differences among the member states on the formulation of a new international legal instrument, a gradual process is required to ensure full consultations.”

So where does the Australian Government stand on this issue?

AUSTRALIA’S POSITION

In 2014 it was reported the Australian Government was “not convinced that the case has been made”. Their statement to OEWGA’s Sixth Session confirmed their position that “the rights and freedoms of older people are appropriately protected by existing … treaties.” The

---

56 Above note 33, p.16.
59 See http://www.bayefsky.com/docs.php/area/ratif/state/184
61 Ibid, 7/11-8/11.
Government reaffirmed this position (jointly with Iceland and Switzerland) at the Seventh Session of OEWGA:

While acknowledging there are a range of views on the promotion and protection of the rights of older people, including the proposal to develop a new binding international instrument, our countries consider that seeking new and innovative ways to mobilize the existing body of human rights protections for older persons is the best approach. This is the most efficient way to protect the rights of older persons, whilst also avoiding additional pressure on the already overstretched international human rights architecture.67

Australia’s opposition appears threefold: (1) adequacy; (2) the potential impact of innovation; and (3) resourcing, which includes: the overstretched international human rights architecture and the compliance implications for States. It may be that the actual position is they remain to be persuaded. There isn’t any real objection to the idea; rather no great impetus exists to adopt it.

Shadow Attorney General Mark Dreyfus previously indicated support for a convention though it does not appear in any formal ALP policy platform. Other parties in the federal Parliament have not made their position public.

UNITED NATIONS PROCESSES

The General Assembly, a principal organ of the UN, has driven debate around the rights of older persons. A range of other UN processes has contributed from their own respective expertise. Most are Geneva-based, one: OEWGA, is New York-based.

Open Ended Working Group On Ageing

The General Assembly established OEWGA in 2010 with the following mandate:

For the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures...68

The convention has been on OEWGA’s agenda from the beginning – seven sessions over six years.69

The issue gained greater prominence in 2012 with resolution 67/139. It asked OEWGA to propose “the main elements that should be included in an international legal instrument to promote and protect the rights and dignity of older persons, which are not currently addressed

---

67 Statement of Australia to Seventh Working Session, unpublished.
sufficiently by existing mechanisms and therefore require further international protection.”  

It shifted the mandate of OEWGA from ‘feasibility’ towards drafting ‘main elements’. It asked OEWGA “consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons, based on the holistic approach in the work carried out in the fields of social development, human rights and non-discrimination, as well as gender equality and the empowerment of women…”. Afterwards OEWGA would “present to the General Assembly, at the earliest possible date, a proposal containing, inter alia, the main elements that should be included in an international legal instrument…”

The Chair reminded States “that a resolution… is adopted through a vote does not mean that it has less value than resolutions adopted by consensus. That has been the sound practice of the United Nations since its inception…” Albania summed up the views of opponents “the membership of the United Nations is not ready to start negotiate on a new instrument on the rights of older persons. We strongly believe that the consensus is indispensable with a view of providing solid basis for any new instrument to become meaningful and effective.” Other States echoed this contention.

The Chair reflected on the response to the mandate in the fourth to sixth sessions:

... An increasing number of delegations and a unanimous and clear voice coming from civil society are requesting us to undertake the task of elaborating a convention. Can we continue turning a deaf ear to those calls? Can we ignore that part of our mandate? My response to both questions is no. A clear no, simple and without ambiguities. That is why I invite you all to start working on the text of a legal instrument.

The impact of resolution 67/139 is hard to gauge. Some view it pushed too hard, too early in the OEWGA process and forced some States to take a defensive position. To others, it was a necessary catalyst to move States to take a position, a ‘quickening’ of sorts.

In 2015, the General Assembly followed with resolution 70/164: ‘Measures to enhance the promotion and protection of the human rights and dignity of older persons’. It reinforced OEWGA’s existing mandates and encouraged States to present “measures to enhance the

---

70 General Assembly, 67th Session, Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons, A/RES/67/139, 13 February 2013.
71 Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Equatorial Guinea, Eritrea, Honduras, Mexico, Nicaragua, Mali, Cuba, Guatemala, Paraguay, Senegal, South Africa, Panama, Sri Lanka, Turkmenistan, Venezuela, Dominica, Costa Rica, Haiti, Belize, Gabon.
72 Above note 70, ¶1.
73 Ibid, ¶2.
74 Above note 50, p.8.
77 Above note 50.
promotion and protection of the human rights and dignity of older persons, such as best practices, lessons learned and possible content for a multilateral legal instrument, as appropriate, in order to enable it to fulfill its existing mandate…” It diverged from resolution 67/139’s ‘main elements’ by asking for ‘possible content’. It may have influenced debate more than resolution 67/139 and has been used more recently to focus States on the work needed to take OEWGA forward.

OEWGA has been “largely focused on understanding the current situation of the human rights of older persons around the world, including existing frameworks by exploring areas of non-implementation of older persons’ rights.” OEWGA and the OHCHR have undertaken comprehensive thematic analysis of the issues including protection of elder specificities. The analysis identified substantive and normative gaps in human rights protections for older persons.

2030 Agenda for Sustainable Development

The first resolution of the 70th General Assembly was ‘transforming our world: the 2030 Agenda for Sustainable Development.’ This outcomes document “is a plan of action for people, planet and prosperity.” The goals came into effect on 1 January 2016 and guide decisions over the next fifteen years. Older persons and ageing are in twelve of the seventeen goals. Like human rights, the “Sustainable Development Goals and targets are integrated and indivisible, global in nature and universally applicable…” The goals relationship with a convention is yet to be debated. Civil society suggests a convention will help achieve the goals in the same way it would assist to achieve MIPAA’s goals. The OHCHR has suggested that having an international standard on the rights of older persons would advance implementation and accountability of the 2030 agenda.

---

78 General Assembly, 70th Session, Measures to enhance the promotion and protection of the human rights and dignity of older persons, A/RES/70/164, 22 February 2016, ¶11.
79 Above note 9, p.3.
82 General Assembly, 70th Session, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015.
83 Ibid.
84 Ibid.
85 See Goals 1, 2, 3, 4, 5, 6, 8, 10, 11, 13, 16, 17. See http://unsdsn.org/2016/05/06/older-persons-2030-agenda-for-sustainable-development/.
86 Above note 78, ¶51.
**World Health Organization**

The World Health Organization (WHO) supports a human rights-based approach to health and ageing. It has reinforced the importance and interconnectedness of health and human rights. It urged States to “move towards the full realization of the right to health and other related human rights of older people.”\(^89\) Key areas of action include building age friendly environments through three approaches: (1) combatting ageism, (2) enabling autonomy and (3) healthy ageing policies.\(^90\) WHO’s Global Strategy focuses on evidence-based action to maximize functional ability up to 2020.\(^91\) This in turn will support the ‘Decade of Healthy Ageing 2020 to 2030’.\(^92\) Alongside the 2030 Agenda, this frames large parts of the UN’s prospective work on ageing.

**Human Rights Council**

The Human Rights Council (HRC) is responsible for promoting and protecting human rights. In 2013 the Council engaged the Office of the High Commissioner for Human Rights (OHCHR) to facilitate public consultations on the human rights of older persons.\(^93\) The consultations were conducted with very broadly. Several Australian submissions were received.\(^94\) The report concluded:

> ... A number of human rights issues particularly relevant to older persons have not been given sufficient attention either in the wording of existing human rights instruments or in the practice of human rights bodies and mechanisms. These include, age discrimination, access by older persons to work, adequate health services and social protection, protection from abuse, violence and neglect, and long-term care.\(^95\)

In 2010 the Council convened the Social Forum on the rights of older persons. The outcomes included recommending establishing the mandate of an Independent Expert.

**Office of the High Commissioner for Human Rights**

The OHCHR works to promote and protect the human rights that are guaranteed under the Universal Declaration of Human Rights. The office is headed by the High Commissioner, who co-ordinates human rights activities throughout the UN System and supervises the Human Rights Council in Geneva. The OHCHR has publicly supported a convention, which it recommends should focus on ageism.\(^96\) The OHCHR has undertaken a compilation of existing laws\(^97\) and an Analytical Paper\(^98\) that suggested “there is a demonstrable inadequacy

---

90 Ibid, p.218.
92 Ibid.
94 Australian Center Cardiovascular and Chronic Care, Australia National Association of Community Legal Centres – PILCH, Australian Age Discrimination Commission.
97 A/AC.278/2013/CRP.1. ‘Compilation of existing international legal instruments, documents and programmes that address the situation of older persons’
of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons.”

**Independent Expert**

The idea of a special procedure has been promoted since OEWGA began. States argued a special procedure could “begin work quite quickly to bring about improvements in the lives of older persons.” Thematic mandates are “front line protections actors” who “bring all States under scrutiny.” They are also attractive as quick and cost-effective measure. Funding arrangements for special procedures mandate holders are usually “thinly resourced” and they suffer from chronic underfunding and understaffing.

In 2014, the HRC appointed Rosa Kornfeld-Matte as Independent Expert on the Enjoyment of all Human Rights by Older Persons. Her initial 3-year term culminated in a comprehensive report to the HRC in September 2016. She compiled four country reports— Costa Rica, Mauritius, Slovenia and Austria and three thematic reports including on autonomy and care. Her mandate is complementary to OEWGA and is focused on the implementation of national, regional and international standards. It isn’t directly within the Expert’s mandate to investigate a convention. Her mandate was recently extended for a further three years and she has just this month announced a visit to Namibia.

There have been critiques of the choice of special procedure. The nomination of an Independent Expert is considered a weaker signal than that of a Special Rapporteur, given it is more ‘advisory mechanism’ than a ‘scrutiny mechanism’.

Her comprehensive report noted “For years the debate on ageing turned around identifying gaps in the international framework of the human rights of older persons…Addressing these gaps and improving implementation at the global level, is the way forward.” She pointed to a hierarchy of concerns:

99 Ibid, p.3.
105 Above note 102.
109 Ibid.
110 Above note 102.
The most frequently mentioned rights were, in the order of frequency, the rights to: social protection, care, an adequate standard of living, equality and non-discrimination, dignity and integrity, in particular elder abuse, participation, education, independence and autonomy, work, accessibility, housing, transport, culture, access to justice, and rights in risk and emergency situations.\(^{113}\)

She reinforced “crucial issues such as legal capacity, quality of care, long-term care, palliative care, assistance to victims of violence and abuse, the right to an adequate standard of living, particularly housing.”\(^{114}\) This accords with the elder specificities commonly cited by others. The Independent Expert also emphasized that MIPAA “…is not a human rights instrument and it addresses ageing issues mainly from a developmental perspective. It has not been designed to comprehensively address existing protection gaps and is therefore not sufficient to ensure the full enjoyment of their human rights by older persons.”\(^{115}\) So while her mandate does not include an instrument, her comments appear to reflect support for one.

**Universal Periodic Review**

The Universal Periodic Review involves a periodic review of the human rights records of all 193 States. It only reviews existing obligations unless voluntary commitments are made. Australia’s Second Review included an important voluntary commitment:

> Australia committed to promoting and protecting the rights of older people internationally by modeling and advocating better use of existing United Nations human rights reporting mechanisms. Australia committed to including a dedicated section on the rights of “older Australians” in all relevant human rights treaty and universal periodic review reports. Australia will seek to have the rights of older persons reflected in United Nations resolutions and encourage existing Special Rapporteurs to consider the application of their mandate to older persons in close collaboration with the Special Rapporteur on the enjoyment of all human rights by older persons.\(^{117}\)

This position reflects Australia’s recent statements in OEWGA. It is seen as a step forward and will be tested in Australia’s Fifth Reporting cycle under ICESCR. The OEWGA Chair has encouraged States to look at using existing processes and a number of States have committed to do so.\(^{118}\)

**DRAFTING MODELS**

There are a number of exercises since the 1948 Declaration of Old Age Rights.\(^{119}\) Civil Society has been contributing ‘main elements’ and ‘content’ to the debate for some time. The Draft Declaration on the Rights of Older Persons was released in 2008.\(^{120}\) Australian

---


114 Ibid.

115 Ibid.


118 Chair’s summary of the key points of the discussions at the seventh session of the Open-ended Working Group on Ageing established for the purpose of strengthening the protection of the human rights of older persons.


120 Co-authored by Yale Law School and the International Longevity Centre.
community legal centres\textsuperscript{121} and American Elder Law professors\textsuperscript{122} introduced documents in 2014. Key civil society members Help Age International\textsuperscript{123} and Age Platform Europe\textsuperscript{124} have tendered documents with OEWGA. The drafts are all stylistically different. Context, terminology and continental lexicon differ. For example, ‘social security’ is a generic term that means different things to different member states.\textsuperscript{125}

Regional organizations have prepared normative standards for ratification. These include the Organization of American States\textsuperscript{126} and the African Union.\textsuperscript{127} The OAS Convention is a comprehensive statement of rights that combines civil and political, and economic, social and cultural and solidarity rights.

The African Union Protocol is premised on article 18(4) of the African Charter that “Older Persons … have the right to special measures of protection in keeping with their physical or moral needs”. It is a manifestation of MIPAA and the African Union Policy Framework and Plan of Action on Ageing (2002). It is less extensive than the OAS Convention but has some distinctive features including making the UN Principles for Older Persons binding in national laws.\textsuperscript{128}

It also has characteristics grounded in the African experience such as providing protection from abuse and harmful traditional practices\textsuperscript{129} and providing a right to support for the care of orphans and vulnerable children.\textsuperscript{130} HIV, poverty and conflict have altered family structures so older Africans are caring for young children. More than 7.5 million so-called ‘AIDS orphans’ are cared for by a grandparent. It articulates duties of older persons to mentor and pass on knowledge and experience to the younger generations; to foster and facilitate inter-generational dialogue and solidarity within their families and communities; and to play a role in mediation and conflict resolution.\textsuperscript{131}


\textsuperscript{122} ‘Chicago Declaration on the Rights of Older Persons’(2014) prepared by John Marshall Law School.


\textsuperscript{125} Despite its appearance in art 22 of the Universal Declaration of Human Rights, and definition in the 1952 Social Security (Minimum Standards) Convention (nr. 102), the concept defies clear universal understanding. Rather, other terms such as ‘welfare measures’, ‘social services’, ‘social protections’, ‘social insurance’ and ‘income security’ are used.

\textsuperscript{126} Inter-American Convention on Protecting the Human Rights of Older Persons

\textsuperscript{127} African Union Protocol to the African Charter on Human and People’s Rights on the Rights of Older Persons in Africa.

\textsuperscript{128} Article 3, African Union Draft Protocol to the African Charter on Human and People’s Rights on the Rights of Older Persons in Africa

\textsuperscript{129} Article 10.

\textsuperscript{130} Article 13.

\textsuperscript{131} Article 20.
Neither document is yet widely ratified. Other regional standards that describe older persons’ rights include the Council of Europe’s, the European Social Charter, the EU Charter of Fundamental Rights and the 1999 Kuwait Declaration on the Rights of Elderly - An Islamic Perspective.

THE WAY FORWARD

OEWGA convened its Seventh Session in December 2016. The meeting had the benefit of the Independent Expert’s comprehensive report. There was considerable debate on the possible content of an instrument. The United Kingdom laid a path to move forward:

The UK is open to considering further standard setting to address the issues faced by older persons, but we firmly believe that any discussions regarding the form and status of any such standards must be underpinned by comprehensive consideration of the substantive issues to be discussed. In order to identify the appropriate solutions we must fully understand the problems. And we must also understand the complexities, because while some of these problems may be suitable for addressing through the prism of rights, others may not be.

This and other like-minded statements moved OEWGA on from never ending gap discussion and bickering over the binary question. The Chair chartered a new course:

In that sense, I would like to propose the Working Group to continue this substantive discussion within these clusters and to focus the deliberations of the next session on two of those focus areas. To that end, the Bureau will hold consultations with the Member States in order to select two of the following three clusters to be the focus areas for the discussions during the eight session of the Working Group: (a) equality and non-discrimination; (b) neglect; violence and abuse; and (c) autonomy and independence.

Some countries like China still contended that on the “formulation of a new legal instrument, gradual process is required to ensure full consultations.” The same statement they made to the First Session.

Considerable work has already been done to articulate these issues including in civil society statements, regional documents and academic and human rights commentary.

---


133 Kuwait Declaration on the Rights of Elderly – an Islamic Perspective, product of the 1999, 12th Medical Juristic Symposium on the Rights of Elderly from an Islamic Perspective

http://www.islamset.com/healnews/aged/kuwait_draft.html


139 See for example, the Council of Europe’s Recommendation on the Promotion of Human Rights of Older
The Chair identified continuing work to include “active debate during the inter sessional period, in order to arrive to the next session of the Working Group with concrete proposals and comments in order to enrich the discussion of these focus areas.” The chair also reinforced the importance of regional dialogue.

HelpAge International summarised four outcomes from the Seventh Session of OEWGA:

1. Older persons voices were heard;
2. Ageism was a key theme;
3. Right of attendance of National human rights institutions; and
4. The opening up of political space.

Each of these outcomes was significant in furthering the cause for a convention.

OEWGA’s decision to formalise the participation of Global Alliance of National Human Rights Institution-accredited national human rights institutions in its proceedings is significant. It was first General Assembly subsidiary body to formalise such participation. Starting with the Eighth Session, Status accredited NHRI in full compliance with the Paris Principles will be invited to participate in, and contribute with their human rights expertise, to OEWGA. Many NHRI support a convention. The Australian Human Rights Commission supports a convention that “would enhance and expand existing protections for older people in Australia, and provide a common approach that articulates the rights of older people.” GANHRI has a similar position reiterated at the Seventh Session of OEWGA.

CONCLUSIONS

A variety of UN processes are moving towards a convention – some have already endorsed one. OEWGA is mandated to identify how to strengthen the promotion and protection of the human rights of older persons, to articulate “main elements” and “possible content for a multilateral legal instrument” and report back to the General Assembly.

OEWGA and others have already identified rights gaps as a precursor to ‘feasibility of further instruments’. Many that disagree with the gap analysis appear to be simply running

Persons covers these in clauses I, II and III.

140 See for example N.R. Koffeman LL.M. (The right to) personal autonomy in the case law of the European Court of Human Rights, Leiden, June 2010.
141 Ibid.
142 Ibid.
143 http://www.helpage.org/blogs/jemma-stovell-22620/4-key-outcomes-from-the-seventh-openended-working-group-on-ageing-1030/.
147 Above note 70.
148 Above note 78.
interference. There is a growing awareness that the human rights issues of older persons are distinct and need special attention and this need will increase as our population ages. Soft law is of critical importance in the further realization of welfare of older persons but does not have a human rights focus, is non-binding in nature and does not substitute legally binding standards.\footnote{\textsuperscript{149}}

The question most commonly asked of a convention is what difference would it make? Existing normative standards provide answers. The impacts and outcomes of the existing human rights instruments provide a substantial evidence base.\footnote{\textsuperscript{150}} Drawing parallels with the focus issues chosen by OEWGA, we find common ground in the CRPD at articles 3, 5, 12 and 16\footnote{\textsuperscript{151}} and in General Comment on article 12.\footnote{\textsuperscript{152}} The CRPD introduced important normative standards such as the right to independent living, legal capacity, participation in decision-making and the concept of reasonable accommodation or universal design.\footnote{\textsuperscript{153}}

HelpAge International suggests, “A new convention would be transformative. It would establish norms and standards promoting dignity, equality, autonomy and self-fulfillment in older age to replace the deeply stigmatizing and dehumanizing ageist attitudes and behavior that currently dominate the way we at every level in society respond to older age and older people.”\footnote{\textsuperscript{154}} The OHCHR suggested a convention would have “the greatest geographic reach and prominence providing the necessary coherence to an otherwise fragmented landscape of legal standards.”\footnote{\textsuperscript{155}}

The binary argument do we or don’t we have a convention will be overtaken by the pending process. The Eighth Session of OEWGA is looking like a drafting exercise. The three focus areas have already undergone significant gap analysis and all three were found wanting something more than existing processes offer. States need to engage in substantive discussion about focus areas and see where that leads.

In 2015 Doron likened the journey to a convention to the voyage to Ithaka from Cavafy’s poem.\footnote{\textsuperscript{156}} Though we are still on the journey to the mythical isle, hopefully land is now in sight.

\textit{***}

\begin{footnotesize}
149 Above note 9, p.35.
151 Article 3 (general principles including autonomy, independence), article 5 (Equality and Non-discrimination), article 12 (Equality before the law) and article 16 (Freedom from exploitation, violence and abuse).
152 CRPD/C/GC/1 .
153 Above note 9, p.35.
155 Above note 9, p.35.
\end{footnotesize}