

10 March 2020

Our ref:VK-Elder-HR

Confidential

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
Attn: Mike Clayton

By email: [REDACTED]

Dear Ms Nicoll,

Proposed Convention on the Rights of Older Persons

Thank you for the opportunity to provide comments regarding a proposed convention on the rights of older persons. The Queensland Law Society (QLS) appreciates being consulted on this important proposal.

This response has been compiled with assistance by the QLS Elder Law Committee and the QLS Human Rights Law Committee, whose members have substantial expertise in the issues associated with the proposed convention.

QLS supports the introduction of an international convention on the rights of older persons.

Currently, there is no binding international instrument established for the protection of older people. Whilst other conventions address the rights of various groups which may overlap, such as migrants, women, or people with disability, older people require specific protection and recognition due to their unique and complex demographics and vulnerabilities. Not all older people have characteristics which would see their inclusion under these other conventions. There are a significant proportion of older Australians without any form of disability or minority protection who are being exploited and abused, and who do not have adequate recognition or protection of their human rights.

Examples of the vulnerability of this group were recently highlighted by multiple witnesses during the Royal Commission into Aged Care Quality and Safety. However, aged care is only one setting in which older people are routinely discriminated against. Systemic abuses are seen in other institutional settings, including:

- a) hospitals, where capacity is inappropriately assessed, or discharge plans are geared towards an avoidance of returning an older person to their home;
- b) financial and physical abuse by family members which has at times been overlooked and misunderstood by associated institutions such as banks and the police, as well as insufficient criminal offences to appropriately capture the abuses;
- c) a perceived loss of value and depreciating recognition in the workforce; and

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- d) the manipulation and misuse of guardianship laws to create a desired outcome, rather than one that recognises and respects the older person's human rights and value.

A convention has the effect of improving visibility and recognition of a vulnerable group's rights, and can be used to champion the cause of creating and strengthening rights based legislation.

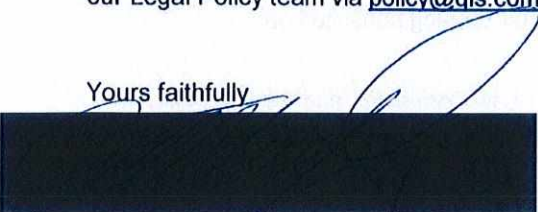
There is significant evidence which demonstrates that existing international instruments do not comprehensively protect older persons, leaving unacceptable gaps in areas such as health, education, housing, workplace discrimination, access to justice, social security and rights of older women.

A thorough deliberation of these issues is set out in Mr Bill Mitchell's paper, '*Towards a convention on the rights of older persons*'. QLS strongly endorses the conclusions reached in this paper, and the sentiment that "...a convention would address 'elder specificities' and legitimize the political identify of older persons."¹

A copy of Mr Mitchell's paper is **enclosed**.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President

[Enclosure].

¹ Bill Mitchell, '*Towards a Convention on the Rights of Older Persons*', ADA Australia National Conference, 23-24 March 2017, Gold Coast, Australia, 1 [5].

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
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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.¹ Shifting older persons from invisibility to visibility, from ageism to dignity and respect.

In 2014 the United Nations’ Open-ended Working Group on Ageing (OEWGA) revealed a simple conclusion that many already knew: “... a multiplicity of instances of the violations of human rights of older persons exist everywhere... We must now decide on how to translate this commitment into a more adequate framework for international protection.”² However, a new human rights instrument rarely follows a simple conclusion. 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.”³

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.⁴ Older persons are half of those with disability but the correlation is not automatic or axiomatic.⁵ Old age is not just impairment.⁶ 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’⁷ and legitimize the political identity of older persons.⁸ 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.

² Report of the Open-ended Working Group on Ageing, 5th Working Session, 15 August 2014, A/AC.278/2014/2, p.9.

³ Paul Harpur, Old Age Is Not Just Impairment: The CRPD and the Need for a Convention on Older Persons, 37 U. Pa. J. Int’l L. 1027 (2016), 1032.

⁴ A/AC.278/2011/4, 9. See the Chair’s summary of the 1st Session of the Open-ended Working Group on Ageing at <https://social.un.org/ageing-working-group/documents/chairmans%20-%205%20May.pdf>. See also the presentation at OEWGA7. See <https://social.un.org/ageing-working-group/documents/Al-%20Suwaidi%20OEWG%20on%20Ageing.pdf>.

⁵ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0>.

⁶ Above note 3.

⁷ Frederic Megret ‘The human rights of older persons: a growing challenge’ (2011) 11 *Human Rights Law Review*, pp. 37–66.

⁸ Israel Doron, et al ‘The Debate Around the Need for an International Convention on the Rights of Older Persons’ (2010) 50(5) *The Gerontologist*, 586-593.

- 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.⁹

Proponents note “the CRPD offers little support to older persons who are disadvantaged by structural discrimination based upon age.”¹⁰ Further, the CRPD standards “do not apply *in toto* to the situation of all older persons.”¹¹ 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.¹²

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,¹⁴ 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.¹⁵ 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

⁹ Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, August 2012, p.4.

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 The Global Alliance on the Rights of Older Persons (GAROP) has founding members: International Network for the Prevention of Elder Abuse (INPEA) – www.inpea.net, International Longevity Centre (ILC) Global Alliance – www.ilc-alliance.org, International Federation on Ageing (IFA) – www.ifa-fiv.org, International Association of Homes and Services for the Ageing (IAHSA) – www.iahsa.net, International Association of Gerontology and Geriatrics (IAGG) – www.iagg.info, HelpAge International – www.helpage.org, AGE Platform Europe – www.age-platform.eu, Age UK – www.ageuk.org.uk, AARP.

¹⁵ 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."¹⁶ 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 an 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."¹⁷

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 led 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.¹⁸ Absurdly, India is now opposed to a convention.¹⁹ It is ironic this history shadows the debate. The question whether elder specificities exist is central to the dialogue²⁰ and academic discourse around gaps has been prolific.²¹

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..."²² 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.²³ The principles underpin much of the UN's later work. Like VIPAA they are 'soft law', that is,

¹⁶ A/C.3/362.

¹⁷ See <http://www.encyclopedia.com/politics/news-wires-white-papers-and-books/my-day-9#n3>.

¹⁸ Paul De Hert et al 'Specific Human Rights for Older Persons' (2011) Issue 4 *European Human Rights Law Review*, 400.

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.

²¹ See Diego Rodriguez-Pinzon et al 'The International Human Rights Status of Elderly Persons' (2003) 18 *American University International Law Review*, 915-951; Israel Doron 'From national to international elder law' (2005) 1 *The Journal of Aging, Law and Policy*, 43-67; K L Tang et al 'Global social justice for older people: The case for an international convention on the rights of older people' (2006) 36(7) *British Journal of Social Work*, 1135; Above note 8, 586-593.

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 ¶ 2.

²³ General Assembly, 74th Session, *Implementation of the International Plan of Action on Ageing and related activities* A/RES/46/91, 16 December 1991.

normative provisions contained in non-binding texts.²⁴ In 1995 the Committee on Economic, Social and Cultural Rights adopted ‘General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons’.²⁵ It focused on the provision of ‘welfare’ to older persons.

The year 1999 was designated the ‘International Year of Older Persons’ in recognition of ‘humanity’s demographic coming of age’.²⁶ In 2002 the Madrid International Plan of Action on Ageing (MIPAA) replaced VIPAA.²⁷ 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.”²⁸ It was “to reorient the ways in which their societies perceive, interact with and care for their older citizens.”²⁹ MIPAA is soft law without sanctions for non-performance.³⁰

In 2004, the Brasilia Declaration³¹ 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...”³² 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.”³³ It was the first meeting of its kind.³⁴ 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.³⁵

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

²⁴ Shelton, Dinah, ed. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.

²⁵ Committee on Economic, Social and Cultural Rights, 12th and 13th Sessions, E/1996/22- .

²⁶ General Assembly, 68th Plenary Meeting, *Implementation of the International Plan of Action on Aging and related activities*, A/RES/45/106, 14 December 1990.

²⁷ General Assembly, 57th Session, *Follow-up to the Second World Assembly on Ageing*, A/RES/57/167, 16 January 2003.

²⁸ <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html>

²⁹ Ibid.

³⁰ United Nations Department of Economic and Social Affairs Division for Social Policy and Development Programme on Ageing, *Report of the Expert Group Meeting Rights of Older Persons*, Convened in preparation for the report of the Secretary-General to the 64th session of the General Assembly, 5-7 May 2009, Bonn, Germany, p.15.

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.

³² Ibid, ¶26.

³³ United Nations Department of Economic and Social Affairs Division for Social Policy and Development Programme on Ageing, “Report of the Expert Group Meeting “Rights of Older Persons”, Convened in preparation for the report of the Secretary-General to the 64th session of the General Assembly, 5-7 May 2009, Bonn, Germany, p.1.

³⁴ Ibid.

³⁵ Ibid, p.17.

“thrown up a variety of views,”³⁶ 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”.³⁷ 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.*³⁸

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’⁴⁰ and ‘explored’.⁴¹ 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.”⁴²

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.”⁴³ But their language was

³⁶ Statement of India to the 2nd Session of the Open-ended Working Group on Ageing. See <https://social.un.org/ageing-working-group/documents/statement%20India%20secondsession.pdf>.

³⁷ Open ended Working Group on Ageing, Chair’s Summary: Open-ended working group on Ageing for the purpose of strengthening the protection of the human rights of older persons, General Assembly resolution 65/182, 1st Session, 18-21 April 2011. See <https://social.un.org/ageing-working-group/documents/chairmans%20-%205%20May.pdf>.

³⁸ Statement by Pakistan to the Concluding Session of the 1st Session of the Open-ended Working Group on Ageing, 21 April 2011. See <https://social.un.org/ageing-working-group/documents/Statement%20by%20Pakistan%20on%2021%20April%202011.pdf>.

⁴⁰ Statement by China to the 3rd Session of the Open-ended Working Group on Ageing, 21 August 2102. See <https://social.un.org/ageing-working-group/documents/ChineseDelegationStatement.pdf>.

⁴¹ Statement by USA to the 3rd Session of the Open-ended Working Group on Ageing, 21 August 2012. See <https://social.un.org/ageing-working-group/documents/USA.pdf>.

⁴² Statement submitted by AARP, Global Action on Aging, HelpAge International, International Association of Gerontology and Geriatrics, International Federation on Ageing and the International Network for the Prevention of Elder Abuse, non-governmental organizations in consultative status with the Economic and Social Council to 1st Session of Open-ended Working Group on Ageing. See <https://social.un.org/ageing-working-group/documents/OEWG.pdf>.

⁴³ Statement of USA to 2nd Meeting of the 2nd Session of the Open Ended Working Group on Ageing, 1 August 2011. <https://social.un.org/ageing-working-group/documents/SDOC3781.pdf>.

shifting. The language of USA's statements went from professing openness in the Second Session to issuing cautions by the Third Session.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.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.⁴⁷ It reflected the historic approach of Latin American and the Caribbean States.⁴⁸ Proponents argue abstentions do not cast a ballot, and are used for a multitude of reasons.⁴⁹

Secondly, opponents suggest greater protection could be reached through better and more efficient implementation of existing instruments and mechanisms including MIPAA.⁵⁰ Japan recently suggested "it is rather more important to implement the existing frameworks with strong political will, reflecting each society's unique situation."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."⁵² Though the phrase 'other status' in human rights laws includes older persons,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."⁵⁴

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

⁴⁴ Compare Statement of USA to 2nd Meeting of the 2nd 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>.

⁴⁵ General Assembly, 67th Session, A/67/PV.60, 20 December 2012.

⁴⁷ 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.

⁴⁸ Including members of the Economic and Commission of Latin America and the Caribbean (ECLAC) and Organization of American States.

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."

⁵⁰ Open ended Working Group on Ageing, Sixth Working Session, *Report of the Open ended Working Group on Ageing*, 14-A/AC.278/2015/2, 16 July 2015, 7/11.

⁵¹ Statement of Japan to 2nd Meeting of the 7th Session of the Open Ended Working Group on Ageing, 12 December 2016. <http://statements.unmeetings.org/media2/7664280/japan.pdf>.

⁵² Statement of EU to 2nd Meeting of the 7th 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.

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.

⁵⁴ Above note 9, p.4.

⁵⁵ Statement of Canada to the 1st Meeting of the 7th Session of the Open Ended Working Group on Ageing, 12 December 2016. <http://statements.unmeetings.org/media2/7664275/canada.pdf>.

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.⁵⁶ 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.⁵⁷ 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."⁵⁸ Some have observed the triteness of this approach given the US' ratification history indicates that it would likely sign this convention.⁵⁹

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."⁶⁰ 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."⁶¹ They also assert that the rules of the General Assembly require simple majority not consensus.⁶²

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."⁶⁴

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".⁶⁵ Their statement to OEWGA's Sixth Session confirmed their position that "the rights and freedoms of older people are appropriately protected by existing ... treaties."⁶⁶ The

⁵⁶ Above note 33, p.16.

⁵⁷ Statement of Albania to 3rd Session of the Open-ended Working Group on Ageing. See <https://social.un.org/ageing-working-group/documents/Albania.pdf>.

⁵⁸ Statement of USA to 2nd Meeting of the 7th Session of the Open Ended Working Group on Ageing, 12 December 2016. <http://statements.unmeetings.org/media2/7664295/usa.pdf>.

⁵⁹ See <http://www.bayefsky.com/docs.php/area/ratif/state/184>

⁶⁰ Statement of Slovenia to 2nd Meeting of the 7th Session of the Open Ended Working Group on Ageing, <http://statements.unmeetings.org/media2/7664270/slovenia.pdf>.

⁶¹ Ibid, 7/11-8/11.

⁶² General Assembly of the United Nations, Rules of Procedure, Rules 82-85.

⁶⁴ Statement of People's Republic of China to the 1st Meeting of the 7th Session of the Open Ended Working Group on Ageing, <http://statements.unmeetings.org/media2/7664284/china-e-.pdf>.

⁶⁵ <http://www.australianageingagenda.com.au/2014/09/05/aust-govt-rejects-international-convention-older-people/>.

⁶⁶ Statement to Sixth Working Session <http://statements.unmeetings.org/media2/7650726/australia.pdf>.

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.

⁶⁸ General Assembly, 65th Session, *Follow-up to the Second World Assembly on Ageing*, A/RES/65/182, 4 February 2011.

⁶⁹ 18 April 2011 to 21 April 2011, 1 August to 4 August 2011, 21 August 2012 to 24 August 2012, 12 August 2013 to 15 August 2013, 30 July 2014 to 1 August 2014, 14 July 2015 to 16 July 2015, 12 December 2016 to 15 December 2016.

sufficiently by existing mechanisms and therefore require further international protection.”⁷⁰ The resolution was championed by El Salvador and co-sponsored by twenty-five states.⁷¹

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...”⁷² 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...”⁷³

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...”⁷⁴ 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.”⁷⁵ Other States echoed this contention.⁷⁶

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.*⁷⁷

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.

⁷⁵ Contribution by the Republic of Albania to the work of the Open-ended Working Group on Ageing, pursuant to the Resolution 67/139 of the General Assembly to Fourth Session of Open Ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/fourth/Albania.pdf>

⁷⁶ See for example, Statement of Canada to the 4th Session of the Open Ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/fourth/Canada.pdf>; Statement of US to the 4th Session of the Open Ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/fourth/US.pdf>; Statement of Japan to the 4th Session of the Open Ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/fourth/Japan.pdf>.

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...”⁷⁸ 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.”⁷⁹ OEWGA and the OHCHR⁸⁰ have undertaken comprehensive thematic analysis of the issues including protection of elder specificities.⁸¹ 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.’⁸² This outcomes document “is a plan of action for people, planet and prosperity.”⁸³ The goals came into effect on 1 January 2016 and guide decisions over the next fifteen years.⁸⁴ Older persons and ageing are in twelve of the seventeen goals.⁸⁵ Like human rights, the “Sustainable Development Goals and targets are integrated and indivisible, global in nature and universally applicable...”⁸⁶ The goals relationship with a convention is yet to be debated.⁸⁷ 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.⁸⁸

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.

⁸⁰ <http://social.un.org/ageing-working-group/documents/fourth/compilation.pdf>.

⁸¹ See Above note 7 and De Hert, P and Mantovani, E, ‘Specific Human Rights for Older Persons’, [2011] EHRLR, Issue 4, p.398.

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://unsdn.org/2016/05/06/older-persons-2030-agenda-for-sustainable-development/>.

⁸⁶ Above note 78, ¶51.

⁸⁷ It is beginning to be mentioned more frequently. See for example Statement of France to the 7th Session of the Open Ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/seventh/France.pdf>. See also Remarks by Ms. Daniela Bas, Director, Division for Social Policy and Development, DESA, Panel Discussion on “Human rights dimensions concerning older persons in recent policy developments and initiatives in multilateral processes”, Open-ended Working Group on Ageing, 14 December 2016, See <https://social.un.org/ageing-working-group/documents/seventh/UNDESA.pdf>

⁸⁸ Statement of the Office of the High Commissioner for Human Rights, to the 7th Session of the Open ended Working Group on Ageing, 14 December 2016. See <https://social.un.org/ageing-working-group/documents/seventh/OHCHR.pdf>

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 laws⁹⁷ and an Analytical Paper⁹⁸ that suggested “there is a demonstrable inadequacy

⁸⁹ World Health Organization, World Report on Ageing and Health, 2015, 14.

⁹⁰ Ibid, p.218.

⁹¹ Global Strategy and Action Plan on Ageing and Health 2016-2020. See <http://www.who.int/ageing/global-strategy/en/>.

⁹² Ibid.

⁹³ Human Rights Council, 21st Session, *The human rights of older persons*, A/HRC/RES/21/23, 17 October 2012.

⁹⁴ Australian Center Cardiovascular and Chronic Care, Australia National Association of Community Legal Centres – PILCH, Australian Age Discrimination Commission.

⁹⁵ Human Rights Council, 24th Session, *Summary report of the consultation on the promotion and protection of the human rights of older persons*, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/24/25, 1 July 2013, p.16.

⁹⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>.

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.”⁹⁹

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.”¹⁰⁰ Thematic mandates are “front line protections actors”¹⁰¹ who “bring all States under scrutiny.”¹⁰² They are also attractive as quick and cost-effective measure. Funding arrangements¹⁰³ for special procedures mandate holders are usually “thinly resourced”¹⁰⁴ and they suffer from chronic underfunding and understaffing.¹⁰⁶

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:¹⁰⁷ Costa Rica, Mauritius, Slovenia and Austria and three thematic reports including on autonomy and care.¹⁰⁸ Her mandate is complementary to OEWGA and is focused on the implementation of national, regional and international standards.¹⁰⁹ It isn’t directly within the Expert’s mandate to investigate a convention. Her mandate was recently extended for a further three years¹¹⁰ 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’.¹¹¹

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.”¹¹² She pointed to a hierarchy of concerns:

⁹⁸ Above note 9. It was informed by an Expert Group Meeting on Human Rights of Older Persons, May 2012-
<http://social.un.org/ageing-working-group/egm2012.shtml>.

⁹⁹ Ibid, p.3.

¹⁰⁰ Statement of USA to 2nd Meeting of the 7th Session of the Open Ended Working Group on Ageing,
<http://statements.unmeetings.org/media2/7664295/usa.pdf>.

¹⁰¹ B. Ramcharan, ‘The Special Rapporteurs and Special Procedures of the United Nations Commission on Human Rights and Human Security’ in B. Ramcharan (ed.), *Human Rights and Human Security* (The Hague: Kluwer Law International, 2002), at 81.

¹⁰² O Hoehne ‘Special Procedures and the New Human Rights Council – A Need for Strategic Positioning’ (2007) 4(1) *Essex Human Rights Review*.

¹⁰³ Human Rights Council, *Review of the work and functioning of the Human Rights Council*, HRC/RES/16/21, 12 April 2011.

¹⁰⁴ Columbia Law School, Human Rights Initiative, *Engaging Un Special Procedures to Advance Human Rights at Home: A Guide for Us Advocates*, July 2015, p.13.

¹⁰⁶ Above note 102.

¹⁰⁷ <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/CountryVisits.aspx>.

¹⁰⁸ <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Reports.aspx>.

¹⁰⁹ Human Rights Council, *The human rights of older persons*, A/HRC/RES/33/5, 5 October 2016.

¹¹⁰ Ibid.

¹¹¹ Above note 102.

¹¹² Independent Expert on the enjoyment of all human rights by older persons, Brdo – Slovenia / Geneva (14 April 2016).

*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

¹¹³ Human Rights Council, 33rd Session, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, A/HRC/33/44, 8 July 2016.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, A/HRC/31/14, 13 January 2016, 30.

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.

¹¹⁹ General Assembly, Third Session, Draft Declaration of Old Age Rights, A/C.3/213 and A/C.3/213/REV.1.

¹²⁰ Co-authored by Yale Law School and the International Longevity Centre.

community legal centres¹²¹ and American Elder Law professors¹²² introduced documents in 2014. Key civil society members Help Age International¹²³ and Age Platform Europe¹²⁴ 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.¹²⁵

Regional organizations have prepared normative standards for ratification. These include the Organization of American States¹²⁶ and the African Union.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.¹²⁸

It also has characteristics grounded in the African experience such as providing protection from abuse and harmful traditional practices¹²⁹ and providing a right to support for the care of orphans and vulnerable children.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.¹³¹

¹²¹ National Association of Community Legal Centres (Australia) ‘Commentary and Draft Articles of a Convention on the Rights of Older Persons’ (2014) shared at the ESCAP Workshop on the Social Integration and the Rights of Older Persons in the Asia-Pacific region. See <https://www.unescap.org/events/workshop-social-integration-and-rights-older-persons-asia-pacific-region>.

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

¹²³ Help Age International’s two documents: ‘Main Elements of a New Legal International Instrument to Promote and Respect the Rights and Dignity of Older Persons’ and A new convention on the rights of older people: a concrete proposal (2015). See <https://social.un.org/ageing-working-group/documents/sixth/HelpAgeInternational.pdf>.

¹²⁴ Age Platform Europe Manifesto: Older people take a stand on their human rights (2016). See <https://social.un.org/ageing-working-group/documents/seventh/AGEPlatformEuropeEN.pdf>.

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.

¹²⁶ Inter-American Convention on Protecting the Human Rights of Older Persons

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

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

¹²⁹ Article 10.

¹³⁰ Article 13.

¹³¹ Article 20.

Neither document is yet widely ratified. Other regional standards that describe older persons' rights include the Council of Europe's,¹³² the European Social Charter, the EU Charter of Fundamental Rights and the 1999 Kuwait Declaration on the Rights of Elderly - An Islamic Perspective.¹³³

THE WAY FORWARD

OEWGA convened its Seventh Session in December 2016.¹³⁴ 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.*¹³⁵

This and other like-minded statements¹³⁶ 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.*¹³⁷

Some countries like China still contended that on the "formulation of a new legal instrument, gradual process is required to ensure full consultations."¹³⁸ 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 documents¹³⁹ and academic¹⁴⁰ and human rights commentary.

¹³² Recommendation CM/Rec (2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons. See also related Recommendation CM/Rec (2011)5 of the Committee of Ministers on reducing the risk of vulnerability of elderly migrants and improving their welfare, Recommendation CM/Rec(2009)6 on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society, and Recommendation Rec(94)9 concerning elderly people.

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

¹³⁴ <http://social.un.org/ageing-working-group/seventhsession.shtml>.

¹³⁵ Statement of United Kingdom to the 7th Working Session of the Open Ended Working Group on Ageing, 12-15 December 2016. <http://statements.unmeetings.org/media2/7664282/united-kingdom.pdf>.

¹³⁶ Statement of Slovenia to the 7th Working Session of the Open Ended Working Group on Ageing, 12-15 December 2016. <http://statements.unmeetings.org/media2/7664270/slovenia.pdf>.

¹³⁷ <https://social.un.org/ageing-working-group/documents/seventh/ChairsSummaryOEWG7.pdf>.

¹³⁸ Statement of China to the 7th Working Session of the Open Ended Working Group on Ageing, 12 December 2016. <http://statements.unmeetings.org/media2/7664284/china-e.pdf>.

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.”¹⁴¹ The chair also reinforced the importance of regional dialogue.¹⁴²

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

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.¹⁴³

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

OEWSGA’s decision to formalize the participation of Global Alliance of National Human Rights Institution-accredited national human rights institutions in its proceedings is significant.¹⁴⁴ It was first General Assembly subsidiary body to formalize such participation. Starting with the Eighth Session, Status accredited NHRIs in full compliance with the Paris Principles will be invited to participate in, and contribute with their human rights expertise, to OEWSGA. Many NHRIs 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.”¹⁴⁵ GANHRI has a similar position reiterated at the Seventh Session of OEWSGA.¹⁴⁶

CONCLUSIONS

A variety of UN processes are moving towards a convention – some have already endorsed one. OEWSGA is mandated to identify how to strengthen the promotion and protection of the human rights of older persons, to articulate “main elements”¹⁴⁷ and “possible content for a multilateral legal instrument” and report back to the General Assembly.¹⁴⁸

OEWSGA 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/>.

¹⁴⁴ Open ended Working Group on Ageing, 7th Working Session, *Report of the Open ended Working Group on Ageing*, A/AC.278/2016/L.1, 1 December 2016.

¹⁴⁵ Australian Human Rights Commission, OHCHR Response to the public consultation on the human rights of older people – 2013, 3.

¹⁴⁶ Statement of Global Alliance of National Human Rights Institutions to the 7th Working Session of the Open ended Working Group on Ageing, See <https://social.un.org/ageing-working-group/documents/seventh/SunghoLee.pdf>.

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.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.¹⁵⁰ Drawing parallels with the focus issues chosen by OEWGA, we find common ground in the CRPD at articles 3, 5, 12 and 16¹⁵¹ and in General Comment on article 12.¹⁵² 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.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.”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.”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.¹⁵⁶ Though we are still on the journey to the mythical isle, hopefully land is now in sight.

¹⁴⁹ Above note 9, p.35.

¹⁵⁰ See for example, J Clifford ‘The UN Disability Convention and its Impact on European Equality Law’ (2011) 6 *The Equal Rights Review*, 11; Neil Englehart et al ‘The CEDAW Effect: International Law's Impact on Women's Rights’ (2014) 13(1) *Journal of Human Rights*.

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.

¹⁵⁴ HelpAge International, A new convention on the rights of older people: a concrete proposal, March 2015.

¹⁵⁵ Above note 9, p.35.

¹⁵⁶ Israel Doron ‘Ithaka: On the journey to a new international human rights convention for the rights of older persons’ in Ruebner, R., Do, T., & Taylor, A. (Eds.) *International and Comparative Law on the Rights of Older Persons* (pp. 18-34. Lake Mary, FL.: Vandepul Publishing.