

The rights of older persons

Protection and gaps under human rights law

Marthe Fredvang and Simon Biggs

August 2012



Brotherhood
of St Laurence

Working for an Australia free of poverty

In Social Policy Working Papers we seek to publish interesting findings and insights from recent research undertaken or presented at the Centre for Public Policy, a research and post-graduate teaching centre within the University of Melbourne, and the Brotherhood of St Laurence, a Melbourne-based community organisation whose work includes social policy research and advocacy. The views expressed in the papers, however, do not necessarily reflect any official position of the publishers. We expect and support the further development of these ideas and their subsequent publication in journal or book form.

Marthe Fredvang worked at the Brotherhood of St Laurence as an intern while studying International Relations at La Trobe University, Melbourne.

Simon Biggs is Professor in Social Policy and Gerontology at the University of Melbourne and Senior Manager, Retirement and Ageing, in the Research and Policy Centre of the Brotherhood of St Laurence.

Note:

This paper has been written to stimulate general discussion and should not be regarded as a legal authority. Readers seeking technical detail are encouraged to refer to the original documents mentioned and advised to seek independent legal advice as required.

Published by

Brotherhood of St Laurence
67 Brunswick Street
Fitzroy Vic. 3065
ABN 24 603 467 024
Phone: (03) 9483 1183
www.bsl.org.au

and

Centre for Public Policy
University of Melbourne
Vic. 3010
Phone (03) 8344 6820
www.public-policy.unimelb.edu.au

ISSN 1832-4339
ISBN 978-1-921623-34-9

© Brotherhood of St Laurence and University of Melbourne Centre for Public Policy 2012

This publication may be downloaded for use in private study, research, criticism and review. Permission is granted for librarians to download a single copy to be made available to library users. The publication may not be reproduced in any other form without the permission of the publishers

Contents

Abbreviations	4
1 Introduction	5
2 The burden of old age	6
The construction of ageing as a social problem	6
3 International human rights law	8
Human rights, international law and the United Nations	8
4 The current protection of older persons' rights	10
Protection in the existing human rights instruments	10
5 Is there a need for a new instrument?	13
The UN Open-Ended Working Group on Ageing	13
The case against a Convention on the Rights of Older Persons	13
The case for a Convention on the Rights of Older Persons	14
The distinctive challenges faced by older persons	17
6 What would a convention do?	18
7 Further steps and recommendations	19
References	20

Abbreviations

CEDAW	Convention on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPRD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination on All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Council
IFA	International Federation on Ageing
MIPAA	Madrid International Plan of Action on Ageing
NGO	Non-government organisation
OEWG	Open Ended Working Group
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
VIPAA	Vienna International Plan of Action on Ageing

1 Introduction

Throughout the world, large numbers of older persons face challenges such as discrimination, poverty and abuse that severely restrict their human rights and their contribution to society. The world has not been quick to respond: a lack of political will and the prioritisation of the special rights of other disadvantaged groups have often been at the expense of the case for older people. Although concerns involving the ageing population are not new, they have traditionally been seen as problems requiring solutions that are functional, piecemeal and reactive.

In a climate where the human rights field has become increasingly specialised, disadvantaged groups such as children, migrant workers, persons with disabilities and women have had their particular needs recognised by the United Nations. More and more people argue it is time that older persons were also identified as a distinct category, deserving special care and attention under human rights law.

While older persons historically have been neglected by human rights law, their rights are becoming a part of the public agenda. International and domestic non-government organisations (NGOs) as well as some nation-states have been pushing for a stronger human rights instrument to protect the rights of older persons. The topic has also been given increasing attention in academic and professional media.

Demographic change is a key factor in explaining the renewed interest in older persons' human rights. Declining fertility rates and longer life expectancy are causing unprecedented proportional growth in the world's older adult population. This will transform many aspects of society and pose new economic and social challenges. Greater numbers of older people are likely to make their rights as a group more prominent and make the abuse of those rights more common.

This paper is part of a series examining debates around the rights, responsibilities and contributions of older people. It explores the extent to which existing international human rights instruments of varying forms offer protection for older persons. It then identifies the key arguments in the debate for and against the drafting of a new Convention on the Rights of Older Persons. In a second paper, the protection and gaps that exists in Australia at the federal level and in one state (Victoria) will be evaluated. In order to contextualise the discussion, an introductory note is first made on contemporary attitudes to later life and how old age has been constructed as a category with social meaning.

2 The burden of old age

The construction of ageing as a social problem

Like childhood and disability, the concept of old age is a socially constructed phenomenon—in other words, it is not simply a biological process, but something that is given particular meaning depending upon its social and historical context (Gergen 2001). This construction affects people's perceptions of older adults and their own ageing. It then acts as a sort of shorthand for professionals and policy-makers, in everyday encounters and by older people themselves. It influences decisions that are made about resources, priorities and the value attributed to different parts of the life course (Estes, Biggs & Phillipson 2003). These ideas can easily assume the status of 'facts', which unless there is a good reason to challenge them, are assumed to be unproblematic. Our everyday understanding of ageing is, then, shaped not only by data, but by non-rational processes, fears, beliefs and perceptions. These assumptions create what Hacking (1995) calls a 'looping effect' that alters the self-conception and behaviour of people who are labelled in this way. Social and economic policies have contributed to this process shaping the production of knowledge about old age, which in turn reshapes human behaviour.

Changes in pensions policy is a good example of this process. During most of the 20th century in the 'developed world', pension systems were seen as a way of managing the cost of retirement, a means to compensate the workforce, and of encouraged fixed exit from the world of work on the basis of age (Phillipson 1998). The institutionalising of age-related retirement led to a consensus on when individuals became 'old', regardless of their actual abilities. Despite good intentions, the policies became the source of age discrimination in employment and wider society, and increased the economic dependence of older persons. At the beginning of the 21st century, later life is perceived to be a time where continued working is both possible and desirable, resulting in policy changes that increase the age at which state pensions can be drawn, and create new questions for the purpose of late life in society (Walker 2006). Each suite of policies rests on a series of assumptions about what old age should be like. If one falls outside that 'moral economy', then one is seen to be a less valuable member of society and as less worthy of resources and recognition resulting in fewer options and, by implication, rights (Moulaert & Biggs 2012).

The perception of old age as a social problem rests upon the assumption that older persons are in some way separate from those who are not yet old—that the aged and the non-aged are two different categories of human beings. Older persons are seen as segregated from society, producing a gap that must be bridged, while at the same time recognising the particular needs and contribution of this group. This is manifest in the vocabulary on how older people can 'contribute to society' or alternatively whether they constitute 'a burden of old age'. Economically, older persons are often viewed as non-productive and therefore incapable of contributing to society. Where services exist, they are often of lower quality and inadequately funded, partly as a result of the perceived 'burden' older people come to represent. That older persons are assumed to be economically non-productive legitimises and reinforces their marginality.

When a social group or activity is constructed as a social problem, this takes place as part of a complex process of collective definition (Johnson 2005). Such a process is highly selective, yet it is the collective definition which determines not only what issues constitute a social problem, but also how that problem is approached by policy makers, and what sort of remedial plan is laid out. As part of this process, new ways of seeing the issue are made visible.

This can be illustrated with the example of elder abuse. There is no reason to believe there is anything new in the practice of neglect and abuse of vulnerable older people, but the perception of abuse as a public social problem is relatively new. Like everything that is constructed, the practice of elder abuse is 'real', in so far as it occurs and causes harm. However, whether that harm is recognised as legitimate or illegitimate is a consequence of the social climate in which it occurs (Bonnie & Wallace 2003).

As with all social problems, different forms of 'knowledge' came to be associated with abuse—propositions accepted with little regard for fact. An example is the idea that adults who were abused as children are likely to abuse their own parents, a proposition unsupported by evidence. The tendency to see the practical solution as removing the older adult, by means of residential care, or monitoring without effective action, is still an active element in professional reactions, paralleling the early mistakes of child protection work. The belief about elder abuse, as about child abuse, was that there was a certain truth, a specific 'knowledge' to be had, and that helping professionals were the ones who had it. In sum, the construction of abuse shows how society constructs ideas and 'truths' around something that is real but only recently in the process of being recognised and understood (Biggs & Haapala 2010)—in other words, in the process of social construction.

The point about socially constructed realities is that they can often support commonly held assumptions about marginalised groups that are implicitly prejudicial to their interests. In order to combat such forms of disadvantage, certain rights need to be made explicitly applicable to those groups. This process of making the relationship between rights and specific groups explicit lies at the heart of debate around human rights. Specifically, there is concern that the needs of special groups such as older people, are in danger of being overlooked within a purely generic framework.

For the purpose of this paper, it is important to keep in mind that like other social constructs—gender, childhood, race and disability, for example—it is not old age per se that makes certain rights hard to enjoy, but a particular idea of old age that would deny the full enjoyment of their rights to the ageing (Doron & Apter 2010). It is in this context that the debate around 'the rights of older people', its relevance and the need for defined policy instruments takes place. It concerns whether and in what way older people are made visible to wider society, the priority (both national and international) that wider society gives to this group. The recognition of specific rights of a group is important, not simply in itself, but because it raises the profile of those issues, becomes a basis for action in different contexts and empowers advocates and members of that group to act.

3 International human rights law

Human rights, international law and the United Nations

Before evaluating the current human rights situation for older adults and assessing whether or not there is a need for a Convention on the Rights of Older Persons, it is useful to consider the concepts of human rights within international law, and the role of the main international law body, the United Nations (UN) system.

Motivated by the horrors of the two world wars, the protection of human rights became a concern in the international community during the first half of the 20th century. Human rights were conceived as the inalienable and inherent rights of all human beings, regardless of sex, religion, nationality, ethnic origin, age, or any other status. Human rights are considered by definition to be universal—they are formulated as being equally applicable to any corner of the world. They are also considered indivisible in that they express a form of interdependence: the enhancement of one right will lead to the improvement of others, and the infringement of a right will adversely affect the others too.

Human rights are spelled out in various international instruments produced under the auspices of the United Nations (UN), the Universal Declaration and Bill of Rights being the most influential and important (OHCHR 2011). The UN is an international organisation representing the body of nation-states, founded in 1945. As stated in its Charter, its purpose is to promote human rights, better living standards and social progress, develop positive relations among states and to maintain peace and security.

The first time states agreed on a comprehensive statement of human rights was when the Universal Declaration on Human Rights (UDHR) was adopted by the UN General Assembly in 1948.

Article 1 set out the core idea of human rights: ‘All human beings are born free and equal in dignity and rights’. Other rights in the declaration include, but are not limited to, the right to life, liberty, non-discrimination, due process, ownership of property, education, political participation, work and leisure. As a declaration, the UDHR is an example of ‘soft’ international law.

‘Soft law’ encodes norms in various declarations and statements of principles that states agree to act in accordance with—that is, it is aspirational rather than strictly binding. Although it is not legally binding, the leverage of soft law should not be underestimated. This is evident in the case of the UDHR, which over time has achieved the status of customary law and influenced the creation of numerous ‘hard law’ treaties and conventions. The non-binding nature of soft law also allows it to be more elaborate than positive law.

International law is contracted among nation-states mainly to govern their behaviour towards one another, but also how states act toward individuals. Customary law and positive international law constitute ‘hard’ international law. The former (customary law) includes norms and practices so widely accepted that they are considered binding for all states, regardless of any international organisation membership. Positive international law, however, is only binding for states if they chose to sign and ratify the relevant treaty or convention. These legal texts are only considered ‘active’ after a critical mass of states has ratified them. To sign a treaty is to make a preliminary endorsement of it—to show interest without any legal obligation. To ratify a treaty means a state ‘becomes party’ and agrees to be legally bound by its terms. ‘Accession’ to a treaty has the same effect as ratification, but the state skips the signing process and proceeds directly to ratification.

The obligations of states which have ratified a treaty include being subject to scrutiny and regular reporting to a 'treaty body' which is the monitoring system of the treaty. Human rights treaties are often complemented by 'optional protocols' that address a specific area related to the treaty or provide for procedures with regard to the treaty. These optional protocols are themselves treaties, and open for signing by the states which have ratified the original treaty.

In contrast to domestic law, there are essentially no efficient enforcement mechanisms for international law. Despite the existence of tribunals such as the UN International Court of Justice and the International Criminal Tribunal of Rwanda and the former Yugoslavia, no international 'sheriff' exists to implement international commitments. Nonetheless, international law does matter. Evidence shows that international law affects how states behave. Outcries about the breaches of treaties receive more attention than everyday compliance. Plainly, not everyone obeys domestic law consistently either. But just as 'most people follow most laws most the time', so do most states obey international law.

International human rights law is peculiar in that it governs both state-to-state and state-to-citizen behaviour. States make a threefold commitment when they adopt a human rights instrument:

- Firstly, the state commits to respect and refrain from interfering with the enjoyment of human rights.
- Secondly, it commits to protect against human rights abuses.
- Thirdly, it commits to take positive action to facilitate the enjoyment of rights.

A number of human rights instruments exist, from domestic to regional to international. For the purpose of this paper, the main UN instruments are most important. When the UDHR was signed in 1948, there was broad agreement in favour of translating the principles into legally binding instruments at a later time. What followed was the creation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants were adopted by the General Assembly in 1966, and entered into force in 1976. Taken together, the UDHR, the ICESCR and the ICCPR with its two additional protocols make up what is generally referred to as the 'International Bill of Human Rights'.

The ICESCR includes the right to work in just and favourable conditions; an adequate standard of living; education; social protection; the highest attainable standards of physical and mental health; and enjoyment of the benefits of scientific progress and cultural freedom. The ICCPR elaborates on the rights outlined in UDHR and include some additional rights, such as those of minorities and detainees. It covers a vast array of political and civil rights, including freedom of conscience and religion; the right to a fair trial; freedom from torture; and the right to remedy for violations of rights in the Covenant. Optional Protocols supplement both Covenants with additional rights.

At this stage it must be highlighted that most human rights are not absolute: they are occasionally overridden and restricted because of legal punishment, restriction orders or property rights, or for the sake of public order or national security. However, some rights are generally considered to be unconditional, such as the freedom of thought and religion, the right to life and the right to be free from torture and slavery.

In addition to the Bill of Rights, there are seven other core UN human rights treaties: the Convention on the Elimination on All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Convention on the Rights of Persons with Disabilities (2006); and the Convention for the Protection of all Persons from Enforced Disappearance (2006).

4 The current protection of older persons' rights

Protection in the existing human rights instruments

The International Bill of Rights

As mentioned earlier, human rights are universal. They apply to all human beings everywhere, regardless of their sex, age, religious affiliation, disability, sexual orientation and other distinctions. Thus, the human rights of all people, including older persons are tacitly protected in the Bill of Rights. Although it is technically a declaration, the UDHR (part of the Bill of Rights) is generally considered customary law, and thus legally binding. Of particular significance to old age is Article 25(1) of the UDHR that states that everyone has the right to security and a 'standard of living adequate for the health and well-being of himself and his family'.

The two Conventions, the ICESCR and the ICCPR, offer generic protection of cultural, economic, social, civil and political rights. For older persons, important specific rights in the ICESCR are the work-related rights (Articles 6–7) and the rights to social security (Article 9), to an adequate standard of living (Article 11), to education (Article 13) and to the highest attainable standard of physical and mental health (Article 12).

The ICESCR itself does not contain any direct references to older persons. In 1995, the Committee on Economic, Social and Cultural Rights (CESCR) released General Comment No. 6 on 'the economic, social and cultural rights of older persons'. The comment provides a legal interpretation of how the ICESCR ought to apply to older persons. It explains that the omission of 'age' specifically as an illegal ground of discrimination was not intentional, but occurred because when the ICESCR and ICCPR were adopted, 'the problem of demographic ageing was not as evident or as pressing as it is now'.

In the same committee's 2009 General Comment No. 20, 'Non-discrimination in economic, social and cultural rights', paragraph 29 holds that 'Age is a prohibited ground of discrimination in several contexts'. The CESCR emphasises the need to address discrimination against older persons in finding work, in professional training, and against those living in poverty with unequal access to pensions because of their place of residency.

In the ICCPR, 'participation rights' of special concern for older persons are the commitment of states to ensure freedom of expression, assembly and association (Articles 18–19, 21). Article 25 recognises the right of all to participate in the affairs of their own country. Article 26 states 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. The article includes race, colour, sex, language, religion, origin 'or other status' as prohibited grounds of discrimination. 'Age' is not mentioned explicitly, yet might be said to be included in the 'and other status'.

A key weakness of human rights law is that it first and foremost governs the behaviour of State entities, rather than individuals and the private sector. However, it is implicit that the State's duty is to protect the rights it signs up to by taking action to limit private actors from denying the rights of others (Judge 2008, unpub.). Furthermore, Article 5(1) in both the ICESCR and the ICCPR imposes obligations on individuals:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Thus, the International Bill of Rights instruments— the UDHR, the ICCPR and the ICESCR make only indirect reference to specific groups.

Binding human rights instruments

Despite the universality of human rights, several UN treaties have been created that deal specifically with the rights of disadvantaged groups. Although none of these focus on older persons, a few mention 'age'. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mentions 'age' in Article 11, in context of the equal rights of women and men to social security and paid leave. The Convention on the Protection of the Rights of Migrant Workers and the Members of their Families (ICMW) includes 'age' in the list of prohibited grounds of discrimination in Article 7.

Among the core human rights treaties, the Convention on the Rights of Persons with Disabilities (CRPD) offers perhaps the most useful protection for older persons. Although certainly not all older persons have disabilities and the Convention does not single out elderly people for special protection, many of its articles can be utilised by older persons seeking human rights protection. The Convention is special in that it does not define 'disability', and it marks a shift from a traditional 'medical' model of disability to a rights-based approach (Kanter 2009).

The principles of the CRPD are particularly relevant to older persons, and among them are respect for dignity; non-discrimination; full participation and inclusion in society; equality of opportunity; and accessibility (Article 3). Article 8 obliges states to combat stereotypes and prejudices relating to persons with disabilities, including those based on sex and age. Article 12 affirms the right of disabled persons to equal recognition before the law. It requires that states stop denying people their legal capacity, and instead enable individuals to exercise their legal capacity by providing necessary support. This article can be useful for older persons seeking protection from paternalistic policies, for example.

'Older persons' are referred to in Article 25(b) of the CRPD on the right to health services, and in Article 28(2)(b) on the right to access to social protection and poverty reduction programs. Article 13(1), on access to justice, refers to 'age-appropriate accommodations'. Article 16(2) mentions the right to 'age-sensitive assistance' by states to ensure freedom from exploitation, violence and abuse. Other articles in the CRPD that could potentially benefit older persons are Article 9 on accessibility, Article 19 on independent living, Article 20 on personal mobility and Article 26 on habitation.

Overall, in binding international law, there are instruments that recognise the human rights of all people, including implicit obligations towards older persons, which apply to signatory states and their citizens. However, the rights of older persons are protected very generally in the Bill of Rights

and are otherwise scattered across some, but not by any means all, other core international human rights instruments. No treaty offers older persons a tailored, comprehensive and binding protection of their rights.

Soft law protection

The 1982 World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing (VIPAA). This was the first UN human rights instrument on ageing. Its recommendations included avoiding the segregation of the elderly, making available home-based care for elderly persons, rejecting stereotypical concepts in government policies and recognising the value of old age. Twenty years later, the Madrid International Plan of Action on Ageing (MIPAA) was adopted as an updated and greatly expanded version at the Second World Assembly on Ageing. The plan has a strong focus on human rights. Two of its main goals are:

- the full realisation of fundamental rights and freedoms for older persons
- ensuring the full enjoyment of the economic, social and cultural rights and the civil and political rights of older persons and the elimination of all forms of violence and discrimination against older persons

It also identified three policy directions to guide policy formulation and implementation:

- older persons and development
- advancing health and well being into old age
- ensuring enabling and supportive environments.

The Political Declaration reaffirms the commitment to elimination of age discrimination, to enhance the recognition of dignity in older persons, their inclusion in society, and the promotion of their human rights in general. The MIPAA has since guided domestic policies and international dialogue on the rights of older people.

In 1991, the UN General Assembly adopted resolution 46/91, the United Nations Principles for Older Persons. Although as an Assembly resolution this too is not legally binding, it lists principles in five areas which governments are encouraged to include in national policies: independence, participation, care, self-fulfilment and dignity. In 1992, a decade after the first World Assembly on Ageing, a Proclamation on Ageing was adopted.

The UN Secretary-General's report (2011) on the follow-up to the Second World Assembly on Ageing concludes that some good measures have been introduced since 2002 with regard to older persons' rights. However, these policies are inconsistent among nation-states and do not indicate the presence of a comprehensive legal, policy and institutional framework for the protection of the human rights of older persons:

Particularly lacking are mechanisms of participation and accountability. In varying degrees, contributions underline deficits in implementation of policies, when available, while others note measures may be effective but insufficient when confronted with large and growing demands. In situations where more structural measures are required, some governments have chosen a welfare approach which may not ensure sustainability or long-term impact on the enjoyment of human rights without discrimination (UN Secretary-General 2011).

In sum, the international soft law protection of the human rights of older persons is wide-ranging and includes sets of principles, declarations, the MIPAA, and comments on how to interpret the

ICESCR with regards to older persons. These documents are useful guides for state action in setting standards and influencing domestic policies, however, none of the documents contains legally binding obligations. As result, implementation can be weak, and states often fail to incorporate these international standards into their domestic policies.

A summary table produced by the UN of the items included in the MIPAA, the UDHR and the ICESCR is available at <<http://social.un.org/ageing-working-group/documents/Table%20HR%20&%20MIPAA%20-%20April%202011.pdf>>.

5 Is there a need for a new instrument?

The above assessment shows that there are many international treaties and conventions offering generic human rights protection that implicitly include older persons. In addition to binding law, there are soft law provisions—the MIPAA and General Comment No.6 on the ICESCR being the most prominent—that guide the application of law and add to the overall protection of older people. However, many NGOs such as HelpAge International, the International Federation on Ageing (IFA) and the Council on the Ageing (COTA), as well as some UN member states, argue that these fail to provide explicit support and are easily subject to ageist interpretation (see, for example, HelpAge International 2009). These organisations argue for the need for a new international human rights instrument explicitly for the protection on older persons—a Convention on the Rights of Older Persons.

The UN Open-Ended Working Group on Ageing

With resolution 65/182 in December 2010, the UN General Assembly established an Open-Ended Working Group on Ageing for the purpose of strengthening the protection of the human rights for older persons. The task of the group was to evaluate the current international human rights framework for older persons, to identify gaps and how best to address them, and to consider the possibility of additional instruments and measures (UNOEWG 2011). At the time of writing, the group has had two working sessions, where both member states and NGOs have been allowed to participate.

Statements from member states and NGOs and the *Follow-up to the Second World Assembly on Ageing: Report of the Secretary General to the Second Session* in August 2011 reveal that there exist both normative gaps and implementation gaps in the international protection system for older persons. This does not, however, indicate that all parties agree on the drafting of a new specific Convention on the Rights of Older Persons. While South American nations as a group as well as NGOs are in favour of a legally binding instrument, member states such as the United States, New Zealand, Canada, China, Switzerland, Norway and Russia, together with the European Union, believe instead in the stronger use of those instruments which already exist. Before surveying the current gaps in the protection of older persons' rights, why a convention would be useful and how it can be achieved, it is useful to be aware of why there is opposition to it.

The case against a Convention on the Rights of Older Persons

Arguments against a convention specifically identifying older people centre on five main points:

- that universalism ensures the rights of all groups
- that soft law protections are strong enough
- that a further convention would be too costly for something that essentially lacks teeth

- there are paradoxes within conventions that work against the rights of specific groups
- that drawing attention to older people in this way will increase their social marginalisation.

Firstly, the entire human rights regime is based on the idea of the universality of rights. According to those who resist a new convention, the rights of older persons are therefore sufficiently covered, albeit implicitly, in existing international law. To insist on the continued fragmentation of human rights endangers the whole rationale and coherence of ‘universal human rights’. It is sufficient to insist on the guarantee for older persons of the rights which are guaranteed to all (Megret 2011).

Secondly, in this view, the soft law protection for older persons is strong under the existing international instruments. The influence of soft law on the development of customary international law should not be underrated. Also, soft law provides a detailed guide on policy matters, yet its non-binding legal character makes it more likely to be adopted in local policies. Thus, the UN Principles for Older Persons, the Proclamation on Ageing and the MIPAA and its Political Declaration provide enough protection if taken seriously. The focus of advocates of the rights of older persons ought to be on better implementation and respect for present conventions, treaties, principles and declarations (see Doron & Apter 2010).

Thirdly, drafting a convention is a costly and lengthy process. There are limits to the enforceability of international conventions, the accountability system is weak and there are no effective sanctions. The system that handles complaints and monitors the implementation of existing treaties is already under too much stress. UN member states are already obliged to submit many reports to UN monitoring committees and to deal with complaints and many are reluctant to commit to even further obligations (ICHRP 2006).

Fourth, history shows that some countries with bad human rights records are the most eager to sign a new convention so that they can argue that they respect human rights. Thus, a convention may only result in the creation of superficial legal rights and not real social change. Others argue the advocates of ‘human rights for older persons’ are disconnected from the reality of the hard choices that a government faces every day. Perhaps it is more useful that those in favour of a convention focus their energy instead on working with and lobbying agencies and government bodies that actually deliver services to older persons (Judge 2008).

Finally, a new instrument that singles out older persons is unwise in that it will only underline further the distinction between them and ‘normal’ society. Past experience also shows that the creation of a new convention embeds paying a ‘price’ in political compromise. In the drafting of CEDAW, for example, there was only a focus on domestic violence, while honour killings were ignored due to political pressure from member states. To ignore such an atrocity in a major convention on women’s rights can be seen as legitimising it (Doron & Apter 2010).

Thus, many arguments can be raised against the drafting of a Convention on the Rights of Older Persons. Some say their rights are already sufficiently protected in the existing hard and soft law human rights instruments, and the focus ought to be on how to make states respect and implement this legislation. Others express concern that new specific instruments will dilute the idea of universal human rights, and stress that the current system is already under too much strain.

The case for a Convention on the Rights of Older Persons

Arguments in favour of a convention explicitly aimed at older people include the following:

- that older people experience specific forms of rights violation based on their age
- that diversity of definition should not inhibit the articulation of age-specific rights
- that there are normative gaps that affect the dignity of older people
- that gaps in the implementation and monitoring of legal instruments prejudice older people
- that drawing attention to older people in this way will strengthen the struggle against ageism.

First, many advocates who support the drafting of a new convention focus on the simple fact that the human rights of older persons are often violated. The most common form of improvement is by creating group-specific conventions. Once it is accepted that older people suffer specific forms of abuse, such as social ageism, discrimination in the workplace, in health care and in housing need, for example, then it is argued there would be no reason deny them a specific instrument of this type as has been granted to other disadvantaged groups.

In order to make the case for a new instrument, a strong argument would be required that the human rights of older persons are disproportionately violated and that the violations they suffer are somewhat different to those suffered by the rest of the population. According to proponents of this view, the existing regime is inadequate and new legislation necessary. Megret (2011) proposed that three elements are required to make a strong case for any group-specific human rights approach:

- a definable population based on common characteristics or a shared experience
- insufficient consideration of the needs of such a population by the existing human rights instruments
- distinct challenges in terms of specific rights, preferably across the range of guaranteed rights.

Second, a specific convention should not be inhibited by acknowledged difficulties in defining older persons as a distinct group because of the differential social construction of later life between contexts and cultures. The concept is contingent on chronological age, self-identification, social practice and other external factors, as is the case with disability, for example. To determine a cut-off date for old age is difficult, which is reflected in the tendency to speak of ‘older’ persons and not the ‘old’ as a category. This diversity means that old age will interact with, but not be the same as or subordinate to other forms of identity such as gender, race, ethnicity, class and so on.

As a category similar to race and gender, the vulnerability of older persons to poverty, discrimination, abuse, marginalisation and exploitation is shared across cultures and borders. In times of economic crisis, military conflict or natural disasters, older persons are disproportionately affected. They are also in need of more care and services than the rest of the population. Thus, despite the fact that the older population is heterogeneous, and includes higher as well as lower status participants in society, there seems to be a shared experience of vulnerability by a disproportionate number of older persons.

Identifying gaps and strengthening anti-ageist practice

What follows will be the elaboration of the last three points that are required to make a strong case for the drafting of a new convention. As already mentioned, there are no legally binding human rights instruments that focus on older persons. There can be identified both normative and implementation gaps in the protection of older persons.

Normative gaps

Advocates argue that there are normative and/or implementation gaps that make the current instruments inadequate. A normative gap ‘exists when a recurrent event (or act or structural factor) deprives human beings of their dignity’ (ICHRP 2006). Such a gap requires a more comprehensive instrument that can frame the rights of the affected group more clearly, even when existing instruments already provide some protection. According to the 2009 report by the Human Rights Council Advisory Committee, there is a normative gap in the existing human rights literature because age is not listed explicitly as a reason for discrimination.

An example where such a normative gap was identified and remedied in form of a new instrument is in the creation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Although the UDHR guarantees all its rights and freedoms to women and reaffirms that men and women are equal, women have been disproportionately affected by economic inequalities and poverty, unequal access to education, training, and health care. The visible inequality of power distribution and decision-making, stereotyping and violence towards women, as well as a general lack of respect for women’s human rights, made it clear that a normative gap existed. Women lobbied for a distinct convention from the 1960s when more elaborate and comprehensive human rights standards could be set (Fraser 1999).

Children’s rights were also technically covered in the UDHR and the 1959 UN Declaration on the Rights of the Child. Yet, the reality of their vulnerability led to the recognition of children as a distinct group whose human rights required special attention. Like the rights of older persons, the children’s rights were scattered among a multitude of legal instruments and it was evident that they were applied inconsistently. Arguments were made that a convention was needed to lay down precise, binding obligations for the signatory states, to enable children to protect their rights more effectively and to draw attention to their cause generally.

Just as women and children have been recognised as distinct groups who require specific care in human rights law, the case can be made that older persons too should be recognised as a distinct group who deserve special attention.

Implementation gaps

An implementation gap occurs when nation-states fail to pass domestic legislation, or do not establish procedures and institutions that are required to implement an international standard (CHRP 2006)—in other words, when a state fails to abide by the commitments it has signed. To detect such a gap is difficult: one must evaluate each state that is party to an instrument, make note of any reservations the state made when signing and then compare practice and policies against these commitments.

Additionally, Article 2(1) of ICESCR introduces the principle of ‘progressive realisation’—that a state must take steps, economically and technically, ‘to the maximum of its resources’ to progressively achieve full realisation of the rights in the Convention. Thus it is also necessary to take into account resource constraints and difficulties a government might have when evaluating its compliance.

It is difficult to determine the member states’ commitment to furthering the rights of older persons, especially on a global scale. However, according to Judge (2008) the figures from the 2000–08 reports from states to the various human rights monitoring bodies provide an indication:

- Out of 124 state reports to the Human Rights Committee¹, only three made specific reference to actions taken to address age discrimination, and only one highlighted the vulnerability of older people in long-term care homes.
- The CESCR received 124 state reports, containing 24 references to older people and their rights.
- The Committee on the Elimination of Discrimination Against Women received 190 state reports, where older women and their rights were referenced 32 times.

These figures may or may not prove the existence of an implementation gap in addressing older persons' rights; however they do show that many states are 'age-blind' in their reporting. Even those which did mention age did not always do so in the context of positive action taken, but sometimes merely as an expression of concern about the situation of older persons (Judge 2008).

A 2011 study undertaken for the United Nations Population Fund and HelpAge International discovered that monitoring bodies rarely asked the member states to include older persons in their reporting, and that the work of special rapporteurs and independent experts who examine rights in geographic areas failed to consider the rights of older persons as a specific category (UNFPA & HelpAge International 2011).

The persistence of ageism and age discrimination bears witness to the failure of governments around the world to incorporate older persons' rights in their policies. If there is an implementation gap, some will say that it is not necessary to create a new instrument as the rights themselves are already spelled out in the Conventions, that what is necessary is to transform them into reality. However, when the rights of a particular group are so obscured, not necessarily because of explicit intent, but because of societal values, it can be argued that there is a need for a new instrument (Judge 2008).

The advocates for the Convention on the Rights of Persons with Disabilities (CRPD) made the case that although the principle of non-discrimination should in theory have enabled disabled persons just as much as the able bodied, this was thwarted by the interpretation of welfare arising in most states. Thus, the advocates were able to argue that a new instrument was required to clarify the obligations of states to protect, promote and ensure the rights of persons with disabilities. Not only does the CRPD prohibit discrimination, it identifies and requires states to make positive steps to realise the human rights of disabled persons. A corresponding argument could conceivably be used by the advocates of a Convention for the Rights of Older Persons.

The distinctive challenges faced by older persons

To build on the case for the necessity of a new instrument, this section highlights some of the distinctive human rights challenges faced by older persons. It is not the purpose of this report to give great detail; rather, the aim is to identify areas for further investigation.

Discrimination

To be discriminated against is a violation of one's human rights. Yet many older persons are routinely treated differently because of their age. Social ageism is a specific prejudice against and stereotyping of persons based on their age, which is particularly found in later life. Ageism can both interpersonal and a result of institutional practice. Where countries have prohibited age discrimination by law, this usually only relates to employment and not other areas such as social care, healthcare or other services (HRC 2009).

¹ The Human Rights Committee is the ICCPR monitoring body.

Poverty

Older persons are disproportionately affected by poverty for various reasons: the mandatory retirement ages in some countries; inheritance laws that deny women the right to own or inherit property when their husband dies; susceptibility to illness and disability; or financial exploitation—each contribute to age-related forms of economic disadvantage (OEWG 2011). Further, millions of older persons world-wide do not have access to pensions or adequate social assistance, nor do they have a regular income. Lack of secure minimum income causes many older persons and their families to fall into poverty.

Abuse and violence

The increased physical vulnerability of older persons causes greater susceptibility to violence and abuse—at home, in care settings, or in times of conflict. Abuse may take the form of discrete neglect; street crime; verbal, sexual, financial abuse; and psychological or physical violence.

Physical and mental health

Special measures are necessary to ensure the guarantee the rights of older persons in relation to health. These include the right to a reasonable quality of life, information, privacy, personal integrity, and freedom of movement. For many, health services are too expensive, or they are denied treatment and care because of age-based criteria.

Many rights violations in old age are constructed as phenomena where widely held assumptions inimical to older persons' rights are seen as common sense, which can make them difficult to see and to respond to. If, however, specific rights violations are identified by a specific convention, recognition and reparative action would, it is argued, be significantly enhanced. It is difficult to read some of the objections to a convention without recognising the imprint of a denigration of old age relative to other forms of disadvantage, and as such reflecting the very negative constructions that a convention would address.

6 What would a convention do?

One of the arguments made for a specific convention is that it facilitates activity that may otherwise be subject to normative or implementation gaps. Some of these opportunities are outlined below.

- Allow human rights advocates to monitor the situation in their countries and lobby governments to incorporate their obligations under international law into domestic law
- Contribute to the generation of a political will for positive change.
- Establish legally effective international standards to assure older people's rights and prohibit all forms of discrimination
- Promote awareness of older persons' human rights on both national and international levels
- Educate the public and possibly lead to a shift in bias and attitudes towards older persons
- Frame older persons' issues as an integral part of the broader international human rights agenda
- Serve as a tool of both empowerment and protection
- Mark a paradigm shift from a traditional medical/social welfare model of older persons to the view of older persons as rights-holders

- Provide a rationale for a further move toward a holistic, legally binding approach to older persons' rights at national level
- Provide specificity on the unique human rights challenges encountered by older persons
- Articulate new precepts and elaborate on the duties of states as well as the private sector and individuals towards older persons
- Increase the allocation of government resources to older persons
- Lead to better training of people involved in older persons' issues, such as healthcare personnel and the judiciary.

Of course, the value of these changes would not be uncontested. There will be differences between nation states, and there may be reluctance by states with existing legislation to invest in international agreements. However, the facilitative role of a convention in identifying, extending and implementing the rights of older people should not be underestimated.

7 Further steps and recommendations

In reviewing the state of play, the authors suggest the following steps be taken:

- The Open-Ended Working Group should continue its work on identifying gaps and consider further measures and instruments to address these. The group should be allocated dedicated financial resources to facilitate greater participation.
- A UN Special Rapporteur on the Rights of Older Persons should be appointed to examine and report on the human rights situation of older persons throughout the world as well as to draw attention to the issue.
- The process of discussing the human rights situation of older people must take place on local, regional and international levels. It is essential that older persons themselves have a central role.
- The lack of will among many Western countries to support the drafting of a new convention ought not discourage the continued advocacy by the interest groups and UN member states in favour of it.
- Advocacy groups should educate the general public on the rights of older persons and the shortcomings of the current system, as well as lobby their governments to take the lead in the international community to advocate a UN convention.
- In addition to promoting a UN convention, advocacy groups should work with technical agencies such as the World Health Organization and the International Labour Organization to elaborate standards on specific issues of relevance to older people
- The adoption of a convention on the Rights of Older People would significantly enhance the ability of governments and related helping organisations to address the needs of older adults.

The Brotherhood of St Laurence would support the adoption of a Convention in so far as it would reduce the marginalisation of older people in Australia, increase their social inclusion and help eliminate disadvantage specifically associated with later life.

A second report in this series will outline the context and current instruments available in Australia.

References

- Blumer, H 1971, 'Social problems as collective behaviour', *Social Problems*, vol. 18, pp. 298–306.
- Biggs, S & Haapala, I 2010, 'Theoretical development and elder mistreatment', *Ageing International*, vol. 35, no. 3, pp. 171–84.
- Bonnie, RJ & Wallace, RB (eds) 2003, *Elder mistreatment: abuse, neglect and exploitation in an aging America*, National Academies Press, Washington, D.C.
- Doron, I & Apter, I 2010, 'The debate around the need for a new convention on the rights of older persons', *The Gerontologist*, vol. 50, pp. 586–593.
- Estes, C, Biggs, S & Phillipson, C 2003, *Social theory, social policy and ageing*, Open University Press, Maidenhead, UK.
- Fass, PA 2011, 'A historical context for the United Nations Convention on the Rights of the Child', *The ANNALS of the American Academy of Political and Social Science*, vol. 633, pp. 17–29.
- Fraser, AS 1999, 'Becoming human: the origins and development of women's human rights', *Human Rights Quarterly*, vol. 21, pp. 853–906.
- Gergen, K 2001, *Social construction in context*, Sage, London.
- Hacking, I 1995, 'The looping effect of human kinds', in D Sperber, (ed.), *Casual cognition: a multi-disciplinary debate*, Oxford University Press, New York.
- HelpAge International 2009, *Why it's time for a convention on the rights of older people*, written by Bridget Sleap, HelpAge International, London, viewed 1 May 2012, <www.helpage.org/download/4c3cfa0869630/>.
- International Council on Human Rights Policy (ICHRP) 2006, *Human rights standards: learning from experience*, International Council on Human Rights Policy, International Council of Jurists & International Service for Human Rights, Geneva, viewed 14 May 2012, <http://www.ichrp.org/files/reports/31/120b_report_en.pdf>.
- Johnson, M 2005, 'The social construction of old age as a problem', in M Johnson (ed.), *The Cambridge handbook of age and ageing*, Cambridge, New York.
- Judge, L 2008, *The rights of older people: international law, human rights mechanisms and the case for new normative standards*, viewed 11 May 2012, <<http://www.globalaging.org/elderrights/world/2008/internationallaw.pdf>>.
- Kanter, AS 2009, 'The United Nations Convention on the Rights of Persons with Disabilities and its implications for the rights of elderly people under international law', *Georgia State University Law Review*, vol. 25, pp. 527–73.
- Megret, F 2011, 'The human rights of older persons: a growing challenge', *Human Rights Law Review*, vol. 11, pp. 37–66.
- Moulaert, T & Biggs, S 2012, 'International and European policy on work and retirement: reinventing critical perspectives on active ageing and mature subjectivity', *Human Relations*, vol. 65.
- Bonnie, RJ & Wallace, RB (eds) 2003, *Elder mistreatment: abuse, neglect and exploitation in an aging America*, National Academies Press, Washington, D.C.
- Office of the High Commissioner for Human Rights (OHCHR) 2011a, *Background paper: human rights of older persons: international human rights principles and standards*, United Nations, New York.
- 2011b, *International human rights law*, <www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (Access to international legislation).
- Phillipson, P 1998, *Reconstructing old age*, Sage, London.
- UN Secretary-General 2011, *Follow up to the Second World Assembly on Ageing*, report 2011, United Nations, New York.

United Nations Open-Ended Working Group on Ageing (UNOEWG) 2011, United Nations Open-Ended Working Group on Ageing, viewed 30 November 2011, <<http://social.un.org/ageing-working-group>>.

United Nations Population Fund & HelpAge International & 2011, *Overview of available policies and legislation, data and research, and institutional arrangements relating to older persons: progress since Madrid*, United Nations Population Fund & HelpAge International, New York.

Walker, A 2006, 'Active ageing in employment: its meaning and potential', *Asia-Pacific Review*, vol. 13, no. 1, pp. 78–93.