

Discussion Papers

Legal issues for strengthening international legislation on the rights of older persons

Three Discussion Papers by Robin Allen QC:

- **How to define 'older people' in the context of global human rights legislation**
- **Identifying a defining principle for a Convention for the Rights of Older Persons**
- **Questions / issues to help frame normative gap research in three issue areas: Legal capacity, Elder abuse, Age discrimination**

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Questions / issues to help frame normative gap research in three issue areas: Legal capacity, Elder abuse, Age discrimination

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Introduction

Age UK seeks to ensure that the human rights of older people are recognised and fully implemented under international law. It supports the international discussions taking place between UN member states through the Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons.

In order to foster a deeper issues-based discussion on how to strengthen international human rights legislation regarding older persons, Age UK commissioned the following discussion papers by the renowned legal jurist Robin Allen QC to stimulate further debate and a better understanding of the legal issues surrounding the establishment of a Convention on the Rights of Older Persons.

Robin Allen is a Queen's Counsel and head of Cloisters Barristers' Chambers (www.cloisters.com), a leading UK law firm. He specialises in equality, discrimination and human rights law, and public and international work. Robin was named Chambers & Partners Employment Silk of 2008 and runner-up Barrister of the Year 2010; in 2011 Equal Opportunities Review named him as number one 'Star of the 2000s'. He works frequently with international bodies such as the European Commission whom he advised on the content of the first European anti-age discrimination Directive and the Harvard Law School Project on Disability. On behalf of Age Concern England, he argued the first age discrimination case to be referred from the UK to the European Court of Justice.

Age UK is one of the founders of The Global Alliance for the Rights of Older People (www.rightsalliance.org) and maintains a firm conviction that a UN Convention on the Rights of Older Persons is a necessary part of the solution for guaranteeing the rights of older persons globally.

Discussion Paper 1

How to define ‘older people’ in the context of global human rights legislation

Introduction

1. This is the first of three short discussion papers commissioned by Age UK to support research into the need for, and the relevance of, a United Nations Convention to strengthen the international human rights system for older people.
2. This paper addresses the key issues in defining the scope *ratione personae* of any new Convention that seeks to define rights for “older persons”. It seeks to set out why it is important that there should be such a definition and certain important points in determining how it is might be constructed.
3. Overall it seeks to set the questions that must be asked in determining: “How to define “older people” in the context of global human rights legislation.”¹

The added value of UN Conventions as part of international law

4. Before addressing the specificities of this question it is important to start with a view of the added value that a new Convention in this field would contribute. There are three general points to note.
5. Firstly and obviously a new Convention would set a *universal human rights norm*. A Convention operates as part of international law. States parties elect whether or not to ratify and give effect to such a Convention. In making that choice they will not only consider the internal effects of implementation but also the importance of subscribing to international norms. There are many benefits to doing so beyond merely ascribing to a statement of international best practice. Economic and security benefits often arise from states ratifying Conventions which mean that the comity between nations operates on the basis of common accepted norms.
6. Secondly the role of such a Convention would be to create a new or greater *legal certainty* firstly in public law and subordinately in domestic law. This aim of legal certainty is particularly important to bear in mind in addressing the definitional question: “How to define “older people” in the context of global human rights legislation.” These points are now explained.

¹ This paper is the first of a short series of ‘think pieces’ commissioned by Age UK to contribute to a better understanding of the legal issues surrounding the establishment of a Convention for the Rights of Older Persons.

7. It is possible (even likely²) that there already exist some rights as part of *ius cogens*³ in this field. However it is because the range of such rights is not well stated in any specific place and they have not been catalogued as having specific relevance to elder persons that this task is now being undertaken.
8. Thus whether or not there already exist such rights the process of cataloguing and stating such rights will create a new certainty through the process of negotiation consultation and finally international agreement necessary for the making of a UN Convention.⁴
9. In doing this it is possible (indeed likely) that the Convention will not cover every aspect of *ius cogens*⁵ related to the rights which older persons may otherwise have. The aim is to create certainty where there is inadequate certainty and not through the process of making a Convention that covers specific rights to create uncertainties as to other aspects of *ius cogens* in relation to older persons
10. It is important also to recall that while legal certainty does not create the rule of law, since the effective rule of law depends on the appropriateness of the laws in question, legal certainty is nevertheless a *condition precedent to the effective rule of law*. It enables law to function as an abstract construct that can be applied in different circumstances.
11. By rendering the extent of a class of rights more certain in international law very important mechanistic effects are achieved that contribute to the rule of law both between states and within states. Thus such rights -
 - a. become the subject of a defined international discourse between states and between international bodies charged with the gathering of data and the assessment of implementation,
 - b. are capable of assessment by the machinery of international rights organisations,⁶
 - c. become within the sphere of comparative law assessment by different countries jurists (both academic jurists and by judges and lawyers) and by politicians, social scientists, NGOs and other members of civil society,
 - d. are likely to be absorbed into the domestic laws of states or groups of states,⁷ and
 - e. overall, are rendered more accessible to individuals.

² For instance in relation to elder abuse there will already been norms in the *ius cogens* which address violence, in relation to health care the same is also likely.

³ i.e. part of the peremptory norms of behaviour in international law. This paper will not seek to discuss the extent to which this is arguable in relation to rights specifically attributable to and held by elder persons.

⁴ The increasing national prohibition on slavery was thought first to be part of *ius cogens* and then was rendered much clearer by later conventions is a very good example of this process.

⁵ Essentially international common law standards.

⁶ As for instance under the review procedures in relation to International Convention on the Elimination of all Forms of Racial Discrimination or the UN Human Rights Committee.

⁷ This can happen automatically as within the United States of America where the Constitution provides for all US Treaties to be part of federal law: see Article 6, or where a dualist approach to international law operates through debate and internal application for instance the European Council has subscribed to the UN Convention on the Rights of Persons with Disabilities thus making it part of primary Union law within the European Union: see Council decision 2010/48/EC.

12. Of course if the aim of the Convention is to impose group obligations on states rather than very specific rights on individuals a more flexible approach can be taken.⁸ If for instance the enforcement of the Convention is intended to be by group action rather than individual petition then the margin of appreciation to states parties to the Convention in giving a *bona fide* interpretation of its measures may be somewhat larger.
13. In summary it is in this way that the process of definition would create a level of legal certainty that enabled rights holders to benefit from the rights that are envisioned by the Convention and those with obligations under the Convention to be held to account.
14. There is a further, wider and complementary point about legal certainty that should be noted. This point arises because international treaties operate within an international law framework: the Convention on the Law of Treaties, signed in Vienna on 23 May 1969 (the Vienna Convention).⁹
15. Article 31 of the Vienna Convention, codifies certain rules of interpretation of general international law and states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.¹⁰ The importance of this principle has been emphasised in many places in the world and by many superior courts.¹¹
16. For this reason, agreement as to the definition of “older persons” as being the subject matter of any new Convention becomes of the absolute first importance for a wider reason. Not only will the definition provide specifically who are to be the rights- holders that are the subject matter of the Convention but it will also provide a major reference point for the interpretation of the measures contained within the Convention.
17. Accordingly, while any participants in the debate on the question: “How to define “older people” in the context of global human rights legislation?” will bring to the discussion their own conception of “older persons”, they must also bear in mind in seeking agreement that the process of definition will be of the first importance for the reason set out above.

⁸ The extent to which it is appropriate or possible to consider “group rights” in relation to old age is a matter which I shall discuss in a further paper on age discrimination.

⁹ See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹⁰ Article 31 says “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

¹¹ As to the European Union see for instance, Opinion 1/91 [1991] ECR I-6079 at [14].

Possible approaches to “Older Persons”

18. There are several different approaches to the idea of “Older Persons”. They could be defined by reference to one or more of the following points -
- a single chronological age
 - biological age
 - a reference point in other parts of domestic law which it is accepted might change dynamically over time
 - to a local social construct, and
 - to a proportion of the demographic distribution.
19. There will be advantages and disadvantages associated each of these different concepts. Some of these are now outlined, though it may well be that participants in the debate on this issue will see other advantages and disadvantages.

a.) A single chronological age

20. The key advantage of the Convention providing for a definition of older persons as rights – holders under the Convention by reference to a specific and single chronological age is the apparent legal certainty. Thus I note that the age 60 has sometimes been proposed as the threshold to older person status.
21. The disadvantages that need to be noted with such an approach include the following
1. Data recording - A person’s age will not be a recorded fact in all countries of the world. This problem of the reliability of age data is noted here first but it may also be a point that affects other approaches. It is a problem which most states legal systems have learnt to overcome for other reasons such as defining marriageable age or age for competence for driving or for electoral purposes. So it might not be thought to be great.
 2. Different demographics - A single world – wide chronological age will not reflect the same demographic realities in every part of the world. For instance if age 60 is taken to determine on a worldwide basis when the transition to the status of “older person” takes place then it must be accepted that in many countries of the world many and perhaps the majority of persons will never achieve “older person” status, despite being older persons within their own communities.

This point can be made in a stark (though crude) way by comparing the average age of mortality in say Malawi and Canada. In Malawi the current life expectancy at birth is 54,¹² whereas in Canada it is 80.¹³ Using 60 as the chronological age for transition to older person status might therefore seem to be of little relevance to Malawi and if so it would therefore undermine the universality of the Convention.¹⁴ I have no doubt

¹² See http://www.unicef.org/infobycountry/malawi_statistics.html

¹³ See http://www.unicef.org/infobycountry/canada_5911.html

¹⁴ I recognise of course that statistics on life expectancy at birth will give limited guidance as to the numbers of people who will live beyond average life expectancy. Not everyone dies at 54 in Malawi or at 80 in Canada. I also recognise that differing infant mortality rates may well affect the comparison of these countries. The comparison is therefore a very crude statement of the relative age profiles of these countries though it is

that a more sophisticated assessment of comparative demographics would reach a similar view.

On the other hand the Convention could choose not to use a single chronological age for all countries. It could choose a different age for different groups of countries or allow states to set their own age. If either of these approaches were to be taken the rationality for the approach would need to be explored and at least in relation to the latter approach would need to be explicit in the text of the Convention. I discuss this possibility under the heading Old Age as Local Social Construct.

3. Transitional issues – It may not be appropriate to address rights in such an abrupt way. What is the difference between a person who is say 59 and 11 months and a person who is 60 and 1 month?
4. Dynamic issues – Many states will have used single chronological ages to define access to social advantages such as pensions or other benefits. The worldwide increases in longevity have meant that many states no longer consider it possible to continue to give access to such benefits on the basis of a permanently fixed age. In the UK for instance (as in many other European states) access to public pensions is in a dynamic state. Women's pensionable age will be rendered equal to that of men's with effect from 2020 and for both genders it will rise thereafter.

For the Convention to fix one age might lead one to suppose that it will render it subject to likely future irrelevance.

5. Intergenerational fairness - The balance of the population on either side of a single chronological age is very likely to change over time. This gives rise to issues of intergenerational fairness where economic resources are finite. For instance one aspect of the rights to be given by a Convention such as this might be a right to a period of retirement from work. Such a right will not be effect if those who are below the transition age cannot or will not accept the economic cost of the social benefits that are given to those who are above that age.

22. These points show that there is a relationship to be explored between the definition of older person and the benefits and obligations that the Convention confers or imposes. The more limited the rights and obligations then perhaps the less the disadvantages of a chronological age basis. However even then the universal relevance and thus acceptance of the Convention will be very greatly affected by this choice.

b.) Biological age

23. Many academics working in the field of ageing discuss biological age or some similar construct. Without being too prescriptive such a concept attempts to analyse not how far a person has come in time but how far they may expect to go. At one level a person's biological age is based on the single premise of the certainty of mortality so that future periods of life are finite and therefore diminishing and the enriched enjoyment of those years increasingly precious.

adequate to the task of making the point about the difficulty in universalising 60 as the age threshold to benefits under the proposed Convention.

24. The advantage of using biological age rather than chronological age is that it has this greater focus on time to come and less on time past. It seeks to measure or assess the value of time to come for each person so that the relative utility of rights to say a period of secure retirement from work or to appropriate health care support can be assessed by reference to the importance in the overall context of a person's life.
25. It would also have advantages in avoiding the disadvantages that arise from different demographics within different states as set out above.
26. It would also offer a more tailored approach to intergenerational fairness for instance under this approach two persons of 60 one of whom has a life expectancy of three years and another of 25 years would then have very different claims to the benefits in the proposed Convention.
27. There are disadvantages to this approach also
 1. Data recording - This approach would require a different kind of data recording. It is not necessary to know precisely when a person is born but it would require an assessment by an appropriate person of the expectation of life. This is not such a difficult process in some countries. For instance annuity rates are often affected by simple known statistical correlations between disease and aetiology or between ethnicity or diet and mortality.
 2. Legal Certainty – Precisely because this approach seeks to address the disadvantages of the prior approach it would lack one of the key advantages – legal certainty. A decision would have to be taken as to whether this approach was to be based on an individualised assessment or on a group basis. The individualised basis might be fairest overall but at too high a cost. On a group basis – all diabetics or all HIV positive persons etc. – it might be easier to set rights but there would be likely to be those who would benefit disproportionately to expectations.

This legal certainty deficit would not matter so much if the focus of the Convention was on states obligations as opposed to the creation of specific individual rights. Each state could determine more precisely how it would address the obligation and it could be subject to international review as with other Conventions.
 3. Dynamic issues - It is also entirely possible that sudden and profound advances in medical care would render a person's biological age to change to their advantage.¹⁵ How this would be dealt with by states perhaps need not be defined by the Convention but in the drafting this issue must surely be identified.

c.) A dynamic reference point approach

28. Many and indeed perhaps most states have already addressed within their own context the idea of being an older person. Thus decisions may well have been taken in relation to medical screening or access to social advantages such as pensions or reduced cost

¹⁵ There is perhaps no better modern example of this than the impact of modern anti- retroviral drugs on those who are HIV positive or who have experienced AIDS and have then become non-symptomatic.

travel for persons defined with the state as being an “older person” by reference to a chronological age that is apt for that country at that time, but which it is recognised may have to change.

29. The state will rarely have said that such an age can never change in accordance with advances in medical science or in accordance with changes to the economic fortunes of the country or of the demographics of the country. Such a reference point is therefore potentially *dynamic*. It will change as appropriate.
30. There are many benefits to such an approach. It will mean that states parties would be more likely to agree to the Convention if it is seen as offering the state a margin of appreciation in the applicability of the Convention which can be tailored to fit with the internal political constructs.
31. It leaves to the state the issue of determining how intergenerational fairness is best achieved by reference to economic resources and by reference to specific demographics. It is thus a very flexible approach.
32. The main disadvantage to such an approach is that
 1. The narrowness of effect - the width of the margin of appreciation given to states to determine the scope of application *ratione personae* within the state will have an inversely commensurate effect on the certainty that a person has rights or a body, obligations, under the Convention.
 2. Diminished universality and normalising effects – Because states will be able to a significant degree to determine the extent *ratione personae* of the Convention within their territories it will therefore *lack any significant normalising effect* in the international community.

d.) A local social construct

33. Another way of approaching the issue is to start with the fact that in many situations, social discourse and the age stereotyping that is part of that discourse, is not predicated on real, or even presumed, knowledge of a person’s actual age. Rather the treatment a person seeks, gets or is afforded is based on how they feel in themselves or look to others.¹⁶
34. If a person feels old then they will seek treatment which they consider they are entitled to in their society as an “old person”. If a person looks old according to the social constructs of their society (having wrinkles, grey hair, being a grandparent, lack of mobility, etc.) then they may get or be afforded the treatment (good or bad, desired or undesired) that society generally offers to such persons.
35. Inevitably, even though there may be many common themes, what it means for a person to feel old, and what are the hall-marks that cause a person to be treated as old, can differ according to the norms of that society.

¹⁶ There is a connection between this approach and the previous one since the assumptions that are made may themselves be partly a consequence of the way the state has hitherto legislated for the social rights of the kind considered under the previous heading. Which came first is really immaterial for this paper!

36. There are some obvious benefits in using the local social construct within a state as the starting point for defining legal rights in an human rights instrument. For a start it has to be recognised that whatever definition is offered in the proposed Convention the process to be adopted by the states parties, in making the rights real for those within its scope *ratione personae*, will have to engage with the local social construct of old age.
37. It should never be forgotten that most citizens are not lawyers. Thus whether the proposed new Convention merely describes a catalogue of rights that already exist, or has new normative provisions having effect beyond existing rights and obligations, its effective communication, at whatever level, to those who are, or will, become rights-holders on ratification and implementation, or to those who will have new obligations at that time, will depend necessarily on the effective engagement with the impact that the Convention is to have on the local social construct of what it means to be old.
38. How important it is to recognise the local social construct as the starting point for communication will depend in part on the modalities of transposition into domestic law of states parties and in part on the extent to which the Convention sets out new rights and obligations for the state in question.
39. If one aim of the Convention is to address prejudice and discrimination inherent in these social constructs then it may be argued that it should engage directly with those social constructs in order to ensure that it has the desired effect. However I consider that this need does not necessarily mean that the scope of the Convention has to be entirely driven by such an aim.
40. There is a difference between *protective rights* such as the right to be protected from harassment and discrimination which is based on the local social construct of old age, and on the other hand, rights which entail different kinds of *positive obligations on states* such as to provide a period of retirement after working life, or a pension or other forms of financial support at the end of life or to a particular level of health care.
41. Broadly where economic costs are associated with benefits conferred by the Convention then it is obvious that states parties will need to set clear legal thresholds as to the access to those rights. The precise setting of those thresholds will have to be left to states to some degree since it will inevitably require some form of assessment of intergenerational fairness. There is surely no prospect that the Convention could be agreed on a basis that did not reflect the political reality that states must have a large degree of autonomy in balancing the distribution of social goods, whose cost the state must bear, as between the generations.
42. On the other hand there is relatively little economic cost in providing that states must treat elder abuse and harassment as a criminal matter and provide adequate protective and restitution rights to victims of such treatment.
43. Moreover less certainty is needed here for another reason. It simply does not matter what age a person is if they are *perceived* according to local social constructs as being old and for that reason suffer abuse or harassment. Whether in fact they have one age, or another, matters not at all because it is the perception as a cause of the treatment that would be the focus of the Convention.

44. Exploring the idea of basing the Convention on the social construct of age therefore throws up key points about defining the personal scope of the Convention by reference to the different kinds of substantive content the Convention offers.
45. Some international measures are more explicit about the scope *ratione personae* than others. For instance the beneficiaries of the Convention for the Unification of Certain Rules for International Carriage by Air concluded at Montreal on the 28 May 1999 (Montreal Convention) are closely defined as being those who are international air passengers¹⁷, whereas the beneficiaries of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which imposes obligations on member states of the European Union to prohibit discrimination on grounds of age and disability are not limited to persons of any particular age nor even to persons who are actually disabled.¹⁸
46. Thus it is possible to leave over to the courts of states parties or to any UN review body, to determine when construing the Convention the personal scope *ratione personae* of any particular provision by looking at the nature of its material scope and inferring from that who should have those benefits.
47. This approach does have some obvious limitations of course since the more that is left to the courts or review bodies to determine, the less will be the universal normative effect of the Convention across states. On the other hand it is probably unrealistic to assume that there would ever be agreement as to the precise extent of the obligations imposed in every situation which the Convention might address unless its formulation was very limited and as perhaps in the context of the Montreal Convention) there were very specific global *economic* reasons for doing so.¹⁹
48. It should certainly be acknowledged that defining the scope of the Convention *where this is thought appropriate* by reference at least in part to a social construct is certainly possible in principle.
49. Thus the UN Convention on the Rights of Persons with Disabilities has defined a disabled person in its “Purpose Clause” in this way –

¹⁷ The Treaty is extended to those who convey baggage and cargo as well.

¹⁸ See Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] European Court Reports I-05603, where the European Court of Justice held that this Directive applied to person who cared for disabled persons even though this was not explicitly stated in the Directive.

¹⁹ It is well recognised that the international Conventions in respect of air travel positively enabled air carriers to act globally by ensuring that their obligations to passengers were substantively the same whatever the country in which they were to be enforced. Thereby insurance risks were allocated on a certain basis and potential benefits of litigating in different countries (so called “forum shopping”) reduced or removed.

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

50. It will be seen that this definition is in fact a mixed definition based both on a medical and social model.
51. It is written in an inclusive way (“Persons with disabilities include those...”). It takes an apparently medical starting point (“...those who have long-term physical, mental, intellectual or sensory impairments...”) but then qualifies that approach by reference to the society in which such persons live (“...which in interaction with various barriers may hinder their full and effective participation in society ...”).
52. It will be up to courts and UN Review Bodies to determine who is also included in the scope *ratione personae* of the UNCRPD beyond those who are identified in this Article.
53. A similar approach for the proposed Age Convention based on a concept of “...full and effective participation in society on an equal basis with others ...” might start with a text such as this –

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all older persons, and to promote respect for their inherent dignity.

Older persons include those who by reason of their having an older age or the perception of their having such an older age suffer barriers to the full and effective participation in society on an equal basis with others.

54. There are many obvious issues that would need to be addressed if such an approach were adopted. For instance it may be thought that this would be adequate to provide the basis for protections against elder abuse or harassment while not necessarily good enough as a basis for any more prescriptive provisions concerning rights with an economic consequence.
55. This is necessarily the stuff of debate in the meetings which would discuss a Convention such as this.

56. Overall it can be said that such a definition could provide the essential focus for the Convention²⁰ while enabling more prescriptive provisions to be defined using one or a variant of the other possible kinds of definition that I have set out above.

e.) A proportion of the demographic distribution

57. Another way of approaching the question as to who is to be considered an older person, by reference principally to actual chronological age, would be to take the distribution of persons by age within any country and to fix on a particular number of centiles of that population as being defined as older persons.

58. For instance it might be considered that persons within the *last quartile* or the *last two deciles* of the distribution of the population at any given time should be included in the definition.

59. It would seem that there are some obvious advantages to such an approach. It could be made to reflect a standardised and international approach to intergenerational fairness within a state.

60. It would almost certainly have normative effects within states and make them focus on the relationship in the distribution of social goods across the age distribution of that state.

61. It would of course depend on sufficient data being known to make the necessary assessment however this should not be a problem. This kind of data is widely collected and is probably available for all states.

62. It might have some unexpected effects however these may not necessarily be bad. For instance it might be found that one state already takes an approach which includes older persons within the last three deciles of the distribution whereas a neighbouring state or another somewhere else takes a different approach.

63. However since the aim of a Convention such as this would be to secure a floor of universal rights then the mere fact that one state has already taken a more generous approach would be of no consequence in law.

64. There might be some effects in terms of attempts to secure better rights. For instance it is possible that persons might wish to move from one state to another because the particular age distribution in the second state would mean that the moving person would be classed as an older person in that second state at an earlier chronological age. However there is no reason at all why the Convention should not leave other eligibility criteria for benefits to be determined by the state. For instance access to state pensions is routinely dependent on such matters as periods of work within the state or nationality and the Convention would not aim to address such fundamental points as those in relation to all economic rights.²¹

²⁰ This point is obviously connected with the discussion to be had in Paper 2.

²¹ It is of course possible that it would seek to address such rights in relation to terminal health care where persons are within the territory of a state even though not citizens of the state.

65. Overall this approach can be commended because in the context of dynamic changes to the age profile of a country, it would provide a constant framework within which the core issue of intergenerational fairness could be addressed.
66. Thus the justification for giving specific rights to certain persons based on where they are in the age distribution of the country concerned would be supported by both the aim of fairness across the generations and the certainty that those who fall within the group are a discrete and *constant* proportion of the population. The justification would not so much be based on the chance of living to a particular age but of living so as become part of the “third age group” for that country.

Preliminary conclusions and questions

67. The approach to be taken to defining the scope of application *ratione personae* to this proposed Convention cannot be taken entirely separately from the issue of its application *ratione materiae*.
68. If the aim of the Convention is to provide more for intergenerational fairness than for instance a floor of rights for those who by reason of the nature of their work have become weakened or physically exhausted then a different approach might be relevant. If the aim were more to secure a minimum worldwide floor of rights for persons within the last 5 or 10 % of their expected lives perhaps a different approach would be taken.
69. Accordingly it is suggested that each of these approaches is considered by reference to certain questions which are concerned with the scope of the Convention
1. What key aims are there for the Convention in terms of normalising effects?
 2. Are those aims intended to lead to single age structure on a universal basis? If not what is the intended normalising effects of the Convention?
 3. How much certainty is the desired aim and how much should be left within the margin of appreciation for each state in giving effect to the provisions of this Convention?
 4. Is it intended to lead to portable rights which individuals can take between one state and another? Are some rights intended to be portable and others not? If so how are they to be defined?
 5. Are issues of economic affordability and budgetary constraints to be important to determining the nature of all or any of the rights to be contained in the Convention?
 6. In what circumstances will the local domestic social construct of old age be critical for the effective communication of the rights to be found in the Convention?
70. The answers to these questions will help determine which of the four general approaches identified above are most likely to be of greatest utility.
71. The issue can be taken the other way around – thus the utility of each of the four approaches to secure real gains in a Convention in relation to the kinds of benefits contemplated in the previous paragraph will also be an equally valid approach to the determination of these issues.

– END –

Discussion Paper 2

Identifying a defining principle for a Convention for the Rights of Older Persons

Introduction

1. This is the second of three short discussion papers commissioned by Age UK to support research into the need for, and the relevance of, a United Nations Convention to strengthen the international human rights system for older people.
2. The overall aim is to support research into the need for, and the relevance of, a United Nations Convention to strengthen the international human rights system for older people.
3. In 2011 the UN Department of Economic and Social Affairs published its report “Current Status of the Social Situation, Wellbeing, Participation in Development and Rights of Older Persons Worldwide”¹ which contained an important section reviewing the current level of protection of older persons and the growing debate about a new UN Convention.²
4. However it did not resolve the issue as to what should be the defining principle for such a Convention; thus it said under the heading Final Remarks³ -

In recent years, concerns relating to older persons have been increasingly addressed from a human rights perspective by civil society, with growing public support. NGOs and other stakeholders have pushed for the adoption of a new, comprehensive international instrument to protect the rights of the ageing population. Advocates point to the current lack of a specific instrument, the fragmentation of relevant issues across existing human rights treaties, the inconsistency in focus among the different mechanisms, and the rising demand for States to implement comprehensive measures to address the demographic shift. They contend that a specialized committee could provide a focal point and centre of authority for advocacy, offering guidance to policymakers, legislators and courts about the rights of older persons and working to increase the visibility of issues affecting older persons in national law-making and policy design.

¹ See <http://www.un.org/esa/socdev/ageing/documents/publications/current-status-older-persons.pdf> (visited 21 June 2012)

² Op. cit. Chapter V.

³ Op. cit. section G at pages 66 – 67. The Report added that “Others have advocated for the creation of a special procedure mandate under the Human Rights Council with a focus on the rights of older persons, which would signal the support of the international human rights machinery for raising the visibility of the older population and their key concerns. It has been pointed out that a special rapporteur could play a critical role in bringing to light the many human rights issues faced by older men and women around the world, drawing from multiple instruments to develop the scope and content of his or her mandate, analysis and recommendations. The rapporteur could potentially provide guidance and support to States in the design, implementation and monitoring of legislation, policies and programmes developed to address the issues of older persons.”

5. This paper now looks at the issues that arise in identifying a defining principle for such a proposed Convention for the Rights of Older Persons.

The role of a defining principle

6. The questions posed by Age UK assume that it would be necessary or desirable for the proposed Convention to have a defining principle. It is necessary first to explore this premise and to ask: Why should a Convention have a defining principle? This question is particularly important since as the UN Current Status Report noted⁴ -

Human rights are by definition universal, and the core international instruments developed to protect human rights therefore apply to all members of society—including the ageing population. However, older persons do not constitute a homogeneous group, so the challenges they face in exercising their human rights are highly variable and often complex.

7. Nonetheless there are real practical, legal and normative reasons why a Convention that is made with the intention that it should become part of international law should be constructed with a defining principle.
8. *Practical* – Firstly if there is no central purpose agreed at an early stage in the process of agreeing a text for such a Convention then it is likely that the process will become unruly and that different contributors to the discourse will bring up different ideas that do not conveniently fit into place with other ideas. Moreover it will be difficult for those engaged in the process to be able to seek and obtain the political approval from their home states. It must be remembered that politicians deal in briefs which contain short explanations of the task on which administrators and others are engaged before seeking approval to future actions. If there is an agreed defining principle then this makes this task easier. Such a principle will then be identifiable either explicitly in the Recitals at the commencement to the Convention (the Whereas Clauses) or by clear implication.
9. *Legal* – Politicians, lawyers, NGOs and administrators will all contribute to the making of this proposed Convention but it will be for the judges of those states that sign and ratify the Convention or for the members of the appropriate and relevant UN Committee to giving rulings, judgments and opinions as to the extent to which states (or others) have acted in conformity with the Convention. It is standard practice for judges to take a particular type of approach to legal texts of this kind. Thus the Court of Justice of the European Union has said that it will take a literal, teleological and contextual approach to the interpretation of any Union law provision.⁵
10. Obviously if the Convention contains a clearly accessible defining principle then it will enable those with the task of interpretation and application of the Convention in a judicial context to ensure that their rulings, judgments and opinions most closely accord with the Convention. This is standard legal interpretative practice.

⁴ Op. cit. at p. 58.

⁵ See for a recent example of this approach Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* Judgment of the Third Chamber of the 5 May 2011 at [31] et seq..

11. *Normative* – The Convention will not be read by everyone to whom it applies. Most people in all countries do not read legal texts such as this. However they will – over time - become generally aware of provisions which have effect on their lives. Politicians, journalists and other opinion formers, different organisations and bodies will convey what is believed by them to be the effect of the provisions of the Convention just as they do with other legal texts. Their discourse will not always be based on a comprehensive knowledge of the text of the Convention any more than it is now when discussions ensue about for instance the UN Convention on the Elimination of Discrimination against Women (CEDAW).
12. The normative effects of a legal text are thus often derived from a very undetailed and superficial knowledge of the applicable law. So a defining principle that is short and readily comprehensible will be more accessible. If well formulated it should have the capacity to transcend the lack of legal accuracy inherent in public discourse. A well-chosen a defining principle would empower ordinary people with an understanding the purpose of the Convention. It would enable them to be more confident to believe that they know what the Convention entails.
13. A good example of this effect is provided by the UN Convention on the Rights of the Child (CRC) which although it has many provisions is known by its defining principle that the best interests of the child are primary or of paramount importance.⁶ This simple proposition is what has given that Convention its widest normative force.⁷
14. Accordingly a well-chosen defining principle for this proposed Convention may be expected to speed its path to conclusion and agreement, aid its detailed interpretation and increase its normative force. It may be that great effort will be needed in securing such a principle but the energy and effort expended on this is likely to be very worthwhile.

Formulating the defining principle

15. In order to meet the functional purposes described under the previous heading it will be necessary look for a principle that is sufficiently concise to serve its three purposes well. If it is not concise it will fail to inspire and therefore lack normative force and it will almost certainly have failed to inform the politicians whose approval will be required to secure its agreement in the first place.
16. It will also need to demonstrate that the Convention has utility on a wider basis and it is in this context that perhaps the most work needs to be done first. This exercise will

⁶ Article 3 of CRC actually says “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” It is not until Article 21 where the CRC makes provision for adoption that the adjective “paramount” is used.

⁷ For an important assessment as to how the CRC has been implemented in line with this defining principle see Global Perspectives On Consolidated Children's Rights Statutes published by UNICEF in 2008 and available at http://www.unicef.org/policyanalysis/files/postscript_Childrens_Codes_formatted_final.pdf (visited 21 June 2012).

therefore need both to absorb the current human rights law that affects older persons and also to take a step forward

17. The utility of any proposed Convention is likely to be assessed by the extent to which it prescribes desired or needed rights or defines entitlements for older persons, in a richer and more accessible way.
18. One way to start may be to catalogue the rights that older persons have and compare them with those which they need and desire.⁸ There are some limits to this approach though.
19. Firstly the proposed Convention is not intended to prescribe a general right to be free from age discrimination altogether in the way in which some other texts do. Its focus is on the position of older persons vis-à-vis the society in which they live and perhaps more widely.
20. Those within the personal scope of the proposed Convention (*ratione personae*) will be persons who, on average or normally,⁹ will be closer to the end of their lives than others within their society.¹⁰ The treatment of older persons therefore will have to take into account at least two general truths that flow necessarily from this proposition irrespective of the life that a person has lived prior to old age -
 1. **Diminishing lifetime** - The future lifetime available is recognisably significantly diminished so that the value of that future time is more precious, and
 2. **Human dignity** - While old age is a time of diminishing human capacity older persons do not have a diminished human worth and the importance of their dignity is no less than that of any other person.
21. Two points seem very likely to arise in the discussions as to the defining principle. These concern
 1. **The balance of life** - whether it is relevant when deciding on the rights of older persons to take into account, if at all, the extent to which those who on entering old age have had to that point a life relatively full of advantage or conversely disadvantage, and
 2. **Intergenerational fairness** – whether it is relevant to take into account the extent to which either affording rights to older persons, or the content of those rights, should be moderated by the effect that they will have on younger persons or indeed those not yet in the defined category, in the same society as those older persons.
22. There is no doubt that if the obligations in a Convention are less dependent on a relativistic assessment they will have greater legal certainty. On the other hand, as already noted in Discussion Paper 1, it is surely not realistic to ignore the fact that life

⁸ UN Current status report Op. cit. at Chapter V.

⁹ The qualifiers “on average” or “normally” have been used because in certain places at certain times war or illness can reduce the expected age of morbidity for certain younger age groups in a way which means that their lives may be shorter. Pandemics among the most sexually active and civil war are examples of such situations.

¹⁰ See here Allen R., How to define ‘older people’ in the context of global human rights legislation, Discussion Paper 1, Age UK 2012.

expectancy in any country in the world is a dynamic concept changing according to the state of many variants such as the state of civil and food security and the provision of health care. Moreover as a development goal¹¹ it is intended that it should increase and in many places this goal is being achieved.

23. Further concerns that could also be important in developing the defining principle are firstly that it is broadly accepted that all persons have an entitlement to a period at the end of life when they are freed from the burden of work – **a right to retirement**; secondly it is often accepted that they have a right to **social security** and other **social advantages** including appropriate **health care**.

Questions

24. In identifying the defining principle it would seem sensible to ask
1. How it should address if at all, diminishing lifetime, human dignity, the balance of life and intergenerational fairness;
 2. To what extent should the principle take on board rights to a period of retirement from work and appropriate social advantages including health;
 3. How will the principle operate on a practical, legal and normative basis;
 4. To what extent is the proposed Convention to go beyond what is to be found in existing human rights texts;
 5. To what extent is the proposed Convention intended to clarify and consolidate those texts?
25. It is not necessary to assume that the Convention should have such a simple core theme as the CRC nevertheless it would be helpful to work round the idea that the rights of older persons require special emphasis because of the vulnerability associated with old age, and the importance of their rights being clear and accessible and appropriate to their diminished life expectancy.

– END –

¹¹ The first Millennium goal is of course to “Eradicate extreme poverty and hunger”; see <http://www.un.org/millenniumgoals/poverty.shtml> (visited 21 June 2012).

Discussion Paper 3

Questions / issues to help frame normative gap research in three issue areas: Legal capacity, Elder abuse, Age discrimination

1. This is the third of three short discussion papers commissioned by Age UK to support research into the need for, and the relevance of, a United Nations Convention to strengthen the international human rights system for older people.
2. This paper addresses the framework within which Legal capacity, Elder abuse, and Age discrimination are currently addressed in international human rights instruments.¹

Legal Capacity

3. The obligation on states to grant full legal capacity can be seen in foundational provisions of the Universal Declaration on Human Rights 1948 with its emphasis on dignity and the rule of law.²
4. The rule of law necessarily entails an obligation to provide legal capacity. Like the prohibition of torture, or cruel, inhuman or degrading treatment or punishment³, the obligation to provide full legal capacity is therefore one of the highest norms in international law. It also for this reason inter-relates with other higher level human rights norms.
5. For instance the right to free and informed consent is an aspect of full legal capacity, and is also derived from the right to health and the right to respect for integrity. Legal capacity is also commonly seen as an aspect of self – determination which is of course an aspect of personal dignity.⁴
6. Indeed the value given by any state to the right to exercise self-determination is one measure of the extent to which the state affords legal capacity to those within its territories or subject to its rule of law.
7. Many states expressly state that legal capacity is a constitutional norm, right or principle or have constitutional principles that recognise equality before the law and the equal application of the law.

¹ See Age UK's concept note.

² See Universal Declaration First Whereas Clause in the Preamble and Articles 1 and 17.

³ Ibid. Article 5.

⁴ Human dignity is of course a richer concept than merely the right to self – determination: see for instance the discussion in McCrudden, 'Human dignity and judicial interpretation of human rights', *European Journal of International Law* (2008), 19(4), 655-724, Moon and Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality', 6 *European Human Rights L Rev* (2006) 610.

8. Therefore the actual importance and weight given to those statements or principles in relation to the situations of older persons is a really important measure of the way that a state ensures the protection of human dignity.
9. Thus if the proposed Convention engages with the general obligation to provide legal capacity in the specific context of older persons it will enhance these generic higher law principles.
10. There is already at least one well known particular context in which this is taking place. For instance full legal capacity is widely recognised as a necessary condition for the proper protection of physical and mental integrity and preventing medical experimentation without consent.

An example in a regional charter

11. The right to respect for physical and mental integrity and the concomitant right to the recognition of full legal capacity is guaranteed in many regional instruments across the continents , so it may be helpful to look at how this sort of point is addressed in a major Regional Charter.
12. As an example I shall set out below some provisions of the African (Banjul) Charter on Human and Peoples' Rights⁵ (the Banjul Charter) which show how it engages with legal capacity -

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

13. The Banjul Charter does not specifically protect older persons though in Article 18 it provides for special measures for the aged and persons with a disability –

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

14. So the Charter lacks a specific statement of the right to full legal capacity for persons who might be thought to lack it or who otherwise are not always recognised as having

⁵ See http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf (visited 21 May 2012)

such a right. This is the major omission which can be found elsewhere. Secondly while the Charter recognises that special measures are necessary, it does not state when, and in what way, in relation to legal capacity issues.

15. It is obvious that there may be many different ways in which older persons might be denied capacity and also may need assistance to secure such capacity. It is not possible to identify every such problem associated with legal capacity in this paper. However there are some relatively well-known problems which will be relevant to the debate about older persons' rights.

Multiple discrimination in relation to legal capacity

16. For instance it has been identified that women suffer a particular problem in relation to legal capacity in old age.
17. Thus the Committee on the Elimination of Discrimination against Women has issued a General Recommendation 27 entitled "Older Women and the Protection of Their Human Rights"⁶ which recognises and seeks to address some of the issues of multiple discrimination including in relation to capacity issues that affect older women.⁷
18. The following paragraphs (which have a close relationship to issues of a particular form of elder abuse) seem particularly relevant

18. ... Older refugee and internally displaced women are sometimes denied access to health care because they lack legal status in the country of asylum, lack legal documentation, and are resettled far from health-care facilities, or experience cultural and language barriers in accessing services.

...

22. Older women may not be eligible to claim family benefits if they are not the parent or legal guardian of children for whom they care.

...

26. Under some statutory and customary laws, women do not have the right to inherit and administer marital property on the death of their spouse. Some legal systems justify this by providing widows with other means of economic security, such as through support payments from the deceased's estate. However, in reality these obligations are seldom enforced, and widows are left destitute. Some of those laws particularly discriminate against older widows. Older widows are particularly vulnerable to "property grabbing".

27. Older women are particularly vulnerable to exploitation and abuse, including economic abuse, when their legal capacity is deferred to lawyers or family members without their consent.

28. As stated by the Committee in its General Recommendation No. 21,

⁶ See the report of its Forty-seventh Session, 2010, and see <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/53/PDF/G1047253.pdf?OpenElement> (visited 21 May 2012)

⁷ In other documents Un Committees have recognised that older women have been vulnerable to attack as practising witchcraft: See eg CEDAW concluding comments: Zambia, A/57/38 (SUPP) para 238; CEDAW concluding comments: Mozambique, 38th session, 14 May-1 June 2007, para 42. See also E Miguel 'Poverty and witch killing' (2005) 72 Review of Economic Studies 1153-1172.

“[p]olygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.”
Nevertheless, polygamy continues in many States parties, and there are many women in existing polygamous unions. Older wives are often neglected in polygamous marriages once they are considered to be no longer reproductively or economically active.

19. In my view it would be profitable for those considering the proposed UN Convention to consider this document very carefully and perhaps to discuss its implications with the relevant UN Committee.

The close connection between the right to full legal capacity for older persons and for persons with disabilities

20. Secondly (as is plainly inherent in the Banjul Charter) the lack of real and effective legal capacity has long been realised to be a very serious issue for persons with disabilities – particularly mental disabilities and this problem may be compounded in the case of older persons. So it will be important to see how this has been addressed in the UN Convention on the Rights of Persons with Disabilities (UNCRPD).
21. As might be expected the UNCRPD placed legal capacity within the framework of equal protection before the law. It did so in a way that might be thought to mirror closely the need for equivalent protections for older persons’ rights to a fully recognised legal capacity.
22. Thus Article 12 UNCRPD states –

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate

and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

23. It is obvious that this text might be amended as necessary and used to give Older Persons⁸ similar rights. The substitution of “Older Persons” for “persons with disabilities” would make complete sense and would provide a contribution to international human rights law.
24. The UN Enable website⁹ explains this provision. I have set out the key passage below substituting “older persons” for “persons with disabilities” in order to show the close connection between the needs of older persons and those of persons with disabilities in relation to legal capacity and to show how this provision would provide a good working model from which to develop ideas for the proposed Convention.
25. The passage is as follows

LEGAL CAPACITY AND SUPPORTED DECISION-MAKING

Imagine having your capacity to make decisions, sign contracts, vote, defend your rights in court or choose medical treatments taken away simply because you ~~have a disability~~ are an older person. For many ~~persons with disabilities~~, older persons this is a fact of life, and the consequences can be grave. When individuals lack the legal capacity to act, they are not only robbed of their right to equal recognition before the law, they are also robbed of their ability to defend and enjoy other human rights. Guardians and tutors acting on behalf of ~~persons with disabilities~~ older persons sometimes fail to act in the interests of the individual they are representing; worse, they sometimes abuse their positions of authority, violating the rights of others.

Article 12 of the Convention recognizes that older persons ~~with disabilities~~ have legal capacity on an equal basis with others. In other words, an individual cannot lose his/her legal capacity to act simply because of age ~~disability~~. (However, legal capacity can still be lost in situations that apply to everyone, such as if someone is convicted of a crime.)

The Convention recognizes that some older persons ~~persons with disabilities~~ require assistance to exercise this capacity, so States must do what they can to support those individuals and introduce safeguards against abuse of that support. Support could take the form of one trusted person or a network of people; it might be necessary occasionally or all the time.

With supported decision-making, the presumption is always in favour of the older person ~~with a disability~~ who will be affected by the decision. The individual is the decision maker; the support person(s) explain(s) the issues, when necessary, and interpret(s) the signs and preferences of the individual.

⁸ See Paper 1 for a discussion as to how Older Persons might be defined.

⁹ See <http://www.un.org/disabilities/default.asp?id=242> (visited 21 May 2012)

Even when an older individual ~~with a disability~~ requires total support, the support person(s) should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual. This distinguishes supported decision-making from substituted decision-making, such as advance directives and legal mentors/friends, where the guardian or tutor has court-authorized power to make decisions on behalf of the individual without necessarily having to demonstrate that those decisions are in the individual's best interest or according to his/her wishes. Paragraph 4 of article 12 calls for safeguards to be put in place to protect against abuse of these support mechanisms.

Supported decision-making can take many forms. Those assisting a person may communicate the individual's intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant ~~disabilities~~ is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.

While some good models of support networks exist, there is generally no clear policy framework; guardianship laws and practice still dominate. It is sometimes difficult to designate support networks, particularly when an individual cannot identify a trusted person or people. In addition, people in institutional settings are often denied support, even when it is available. Establishing comprehensive support networks requires effort and financial commitment, although existing models of guardianship can be equally costly. Supported decision-making should thus be seen as a redistribution of existing resources, not an additional expense.

26. The UN website points to British Columbia (a province of Canada) as a place where there is particularly good practice in relation to supported decision making. It might also be noted that this provision of the UNCRPD has been considered¹⁰ by the European Court of Human Rights in two cases including D.D. v. Lithuania¹¹ and Alajos Kiss v. Hungary.¹²

Financial security for older persons

27. Because many of the problems of legal capacity that arise with old age will also be a consequence of the older person having a disability within the meaning of the UNCRPD, it might be thought that there are strong reasons for not wanting to create a difference in the text of the current UNCRPD and the proposed Convention.

28. However some caution should be exercised before simply adopting the text of the UNCRPD because there may also be some specific situations in which the rights of older persons to full legal capacity must be addressed whether or not they are also

¹⁰ The author of this paper contributed to the intervention submissions of the Harvard Law School Project on Disability in each case.

¹¹ (Application no. 13469/06) judgment 14th February 2012, see

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=harvard&sessionid=96612008&skin=hudo-c-en> (visited 21 May 2012).

¹² (Application no. 38832/06) judgment 20th May 2010, see

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=harvard&sessionid=96612008&skin=hudo-c-en> (visited 21 May 2012).

persons with a disability. I should add, though, that I have not found it easy to think of a broad range of such contexts.

29. One such context might arise in the treatment of financial resources which have been put away for the later stages of life through a pension or by accumulating savings.
30. A person with a pension entitlement or with savings might be denied full legal capacity to access that pension or those savings because the state has decided to control how they are to be used or because the law attributes other interests in those funds. In such a context giving full legal capacity might be important.
31. Now that securing inter-generational fairness is increasingly important as a political issue for governments, it seems possible and even likely that ensuring full legal capacity in relation to the acquisition of financial security in later life will also be increasingly important.
32. In those states where pensions are individually funded, this kind of problem might be treated as one concerning the definition of contractual right rather than one of capacity. However where pensions are a state social security advantage to which an individual has no private law right but only a public law right it may be argued that the state does not treat them as having equal legal capacity.
33. A variant of such a problem might arise where older persons are denied full legal capacity to use their savings by state decisions that such funds have to be used in a particular way for dependents or in relation to the provision of particular state granted benefits such as health care.
34. I suggest that these possibilities prompt a wider consideration of the extent to which legal capacity is an issue for older persons even where they are not disabled. That is the key question if it is thought that the UNCRPD model is apt.

Disproportionate or overbearing responsibility

35. Another issue is the problem of disproportionate legal responsibility. In some states elder persons shoulder a responsibility not only for themselves but for more junior family members. Of course often this responsibility is welcomed because of the respect which is both the source and consequence of that responsibility. Yet it can have overbearing effects. These are then situations in which older persons do not have less than full legal capacity but have too much legal responsibility imposed on them.
36. The consideration of what protections of the full legal capacity of older persons are needed must also engage with the question to what extent can states impose legal responsibility on older persons precisely because they are of greater age and moral responsibility within their communities.
37. This has become an issue in those countries where the HIV/AIDS pandemic has hollowed out the age structure of the state or a section of the population of a state. Older persons instead of finding support within the family have found that they are expected to give more support for longer to those for whom they would not otherwise be so directly responsible

38. It has been commented¹³ that

While in traditional African societies older persons were generally supported and cared for by their children or extended family, the changing societal dynamic brought about by among other factors, globalisation, urbanisation and the HIV/AIDS pandemic has impacted negatively on the cohesion of the family and its ability to create a nurturing and enabling environment for the protection of older persons. Under these circumstances there is clearly a need for increased state intervention in support of the elderly based on universal human rights norms and standards. While the African Charter provides a broad normative rights framework, there may be merit in developing a specific treaty that articulates both clear and concise human rights standards for older persons and provides a mechanism for implementation and accountability, both of which are currently lacking.

A possible checklist

39. It is therefore suggested that it would be sensible to work through the check list provided by the UN Enable website to give guidance to politicians and other civil society actors, but with an eye to the situation of older persons.

40. The checklist (with the same amendments as identified above) is as follows

- Consult with civil society organizations to see whether supported decision-making exists in your constituency for older persons in states.
- Examine laws on guardianship and consider whether laws and policies promote supported decision-making and respect the legal capacity of older persons with disabilities.
- Raise the issue of supported decision-making, and encourage the development of programmes to promote supported decision-making, in parliament.
- Visit ~~psychiatric~~ older persons' institutions to see what support networks exist.
- Hold public meetings or consultations with older persons groups in constituencies to hear about the experiences of ~~persons with disabilities~~ older persons concerning legal capacity and support.
- Gather examples of good practices in supported decision-making and share them with parliamentarians in other countries.
- Ensure that parliamentary committees ~~on the Convention~~ include legal capacity and supported decision-making on their agendas.
- Propose the development of a national framework for supported decision-making ~~consistent with the United Nations Convention~~.

41. To this I would add the questions:

- a. Are older persons ever given too much responsibility?

¹³ Kollapan 'The Rights of Older People- African Perspectives' November 2008

See <http://www.globalaging.org/elderrights/world/2008/africa.pdf> (visited 25 May 2012).

- b. Is there a basis on which this can be identified so that a protection can be drafted for inclusion in the proposed Convention?

Elder Abuse

42. Older persons as a class are generally vulnerable to the vicissitudes of life; they are particularly vulnerable to abuse. Commentators in many states have recognised that abuse can be perpetrated by a very broad range of persons:
 - a. care staff,
 - b. relatives,
 - c. friends and
 - d. strangers.
43. Elder abuse can take many forms including:
 - a. sexual abuse,
 - b. financial abuse,
 - c. abuse of medication in controlling and sedating patients,
 - d. physical abuse,
 - e. neglect
 - f. harassment, and
 - g. behaviour designed to degrade and humiliate.
44. The protection of older persons from abuse is therefore a measure of their inclusion into civil society and the value that societies give to them. There is already a huge catalogue of literature covering scholarly treatises, investigations, and reports by parliamentary, state and human rights bodies, on the nature of the phenomenon in different parts of the world.
45. That elder abuse exists and must be prevented is not in doubt. The protection from such abuse is critical because the lack of effective protection would undermine the effectiveness of all other proposed rights within the proposed Convention. For that reason I consider that it is less necessary to identify normative gaps in international law¹⁴ as to ensure that there is an international provision which specifically and comprehensively addresses the problem.
46. In my view there are two key questions that arise in relation to the inclusion of such a protection in a new UN Convention; they concern the overall scope *ratione materiae* of the Convention. These are
 - a. As there is as yet no universal definition of elder abuse, what is the definition of elder abuse that should now be adopted? and
 - b. What are the contexts within which states should be required to protect older persons from elder abuse?

¹⁴ There is little doubt that such gaps exist. See for instance Kollapan, 'The Rights of Older People- African Perspectives' November 2008, commenting on the extent to which the African Charter lacks substantive normative effect in this area. See <http://www.globalaging.org/elderrights/world/2008/africa.pdf> (visited 25 May 2012).

The definition of elder abuse

47. As to the definition of elder abuse, it is suggested that the proposed Convention should adopt an open inclusive definition that recognises that states may wish to adopt a wider and yet more inclusive definition. This is not an area where the Convention should be too prescriptive.
48. However with that qualification it is suggested that the definition should be designed to protect to the fullest extent possible the moral and physical integrity of elder persons from all forms of assaults, harassment or other degrading treatments, or invasions, that adversely interfere with, or diminish, the dignity of that person.
49. It will be necessary to consider whether this is sufficiently comprehensive or whether a larger (or smaller) definition should be used.

The contexts

50. It has been suggested that in some states that while elder abuse occurs in institutional settings, it occurs more often than in the home.¹⁵ This may not necessarily be the case in all states. I do not consider it necessary to discuss where it most commonly happens since it is wrong wherever it happens.
51. Whatever the position, it is clear that the proposed Convention must address the possibility that such abuse can occur in different settings including the home, residential and other institutions, and the community at large.
52. Again consideration should be given to whether this is too small a range.

Age Discrimination

53. The idea, that someone could improperly suffer discrimination on grounds of their age and that they had a concomitant right not to suffer such treatment, has been very slow to take hold in international discourse.
54. In some parts of the world it has been held to be a right that has long existed even if its potency is only now being addressed, though this approach is controversial.¹⁶ Differences have arisen as to whether persons should be protected from age discrimination only from a specific age or at all ages, and also to the extent to which on what grounds differential treatment of persons of different ages is justifiable.
55. Thus what is the true nature of this right is not as yet fully worked out in different states and the jurisprudence of various courts is too little for judge made law to fill the gap adequately.

¹⁵ See for instance the Summary of the UK House of Commons Health Committee Report '*Elder Abuse*' HC 111-I, Second Report of Session 2003–04 Volume I, see <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhealth/111/111.pdf>

¹⁶ See for instance the discussion of Advocate General Sharpston in Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] European Court Reports I-07245.

56. A major reason for this is that age has been such a common, and seen as such a “useful”, proxy for matters such as health and capacity, that it has been used very widely. Taking time to deconstruct the appropriateness of using such a proxy has been seen as having secondary importance to addressing other stereotypes about race or gender.
57. Even now it is commonly thought that it is broadly justified to use age as a proxy in many varied circumstances. This conclusion usually is based on the fact that all of us are born dependent and not capable, only slowly and over time acquire capabilities, and many (and perhaps most) of us die when no longer capable of doing many of the things that had characterised the abilities of our heyday.¹⁷ So there has been an underlying sense that age as a proxy for competence is stereotype which can claim some basis in a common truth.
58. Yet equally it is now well accepted in some states with a human rights culture that though age may be a good proxy at some times and for some things, that by no means entails that it is a good and apt proxy at all times and in all circumstances. The proposed Convention therefore has to address the extent to which it will permit age to ever be used as a proxy for anything. Moreover to secure a degree of international acceptance it will have to address the different stages in the development of ideas about the utility of age based stereotypes.

The UN Human Rights Committee jurisprudence

59. The starting point for those drafting the Convention must necessarily be the jurisprudence of the UN Human Rights Committee.
60. There have been three cases before the UN Human Rights Committee in which it has had to assess whether direct age discrimination (that is to say acts which are taken precisely because a person has a certain age) are contrary to international human rights norms.
61. Each case was decided by reference to Article 26 of the International Covenant of Civil and Political Rights (ICCPR) which says as follows

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

62. It will be quickly noted that this provision does not include age as an enumerated ground of protection. The Human Rights Committee therefore had to decide first whether the words “...or other status...” include age.

¹⁷ Thus Lord Walker pointed out in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2006] 1 AC 173, at [60], “Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years”.

63. This it did in its decision in Communication No 983/2001 *Love and others v. Australia* given on the 25th March 2003¹⁸ where the Committee had to consider a complaint that a mandatory retirement age imposed on airline workers was not lawful permitted by Article 26.

64. The Committee stated that

8.2 The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organisation has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions. These considerations will of course not absolve the Committee's task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.

65. The Committee decided that air safety was a legitimate aim and that in the light of the approach taken at the time of the treatment of the authors of the complaint by the International Civil Aviation Organization (ICAO) to air safety and age Australia were justified in imposing a mandatory rule for pilots of retirement at 60.¹⁹

66. In its decision on Communication No. 1016/2001 *Rubén Santiago Hinostroza Solís V. Peru* the Committee referred to the above jurisprudence without further comment. However in Communication No. 1637/2007 *Néstor Julio Canessa Albareda and others v. Uruguay* it not only adopted the jurisprudence but also found for the authors of the complaint that they had suffered age discrimination in breach of Article 26 because of the terms on which they were required to leave the diplomatic service of Uruguay.

67. The Committee said

¹⁸ See <http://www.unhchr.ch/tbs/doc.nsf/0/0d00e8a26c3f0ae3c1256d2500374086?OpenDocument>

¹⁹ That rule has subsequently changed as was discussed by the Court of Justice of the European Union (CJEU) in Case C-447/09 *Prigge and others v Deutsche Lufthansa AG*, [2011] IRLR 1052; see also <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109381&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=935728> where an age 60 rule was held not justified where international rules permitted pilots to fly to age 65 with suitable co-pilots.

Consideration of the merits

...

9.2 The Committee must determine whether the authors were victims of discrimination in violation of article 26. The Committee recalls its long-standing jurisprudence that not every differentiation of treatment necessarily constitutes discrimination within the meaning of article 26 if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁸ The Committee takes

the view that age may constitute one of the grounds for discrimination prohibited under article 26, provided that it is the ground for establishing differentiated treatment that is not based on reasonable and objective criteria.⁹

9.3 In the case at hand, the Committee observes that the State party has not explained the purpose of the distinction established by article 246 of Act No. 16.170 between secretaries and other category M civil servants of the Foreign Service which led to the authors' cessation of duties, nor has it put forward reasonable and objective criteria for such a distinction. The Supreme Court of Uruguay mentions, as a possible *ratio legis* of the contested provision, the loss of reflexes and memory that might have an adverse effect on the effectiveness of staff performing the duties of first secretary, a reasoning which the Court does not find irrational.

9.4 The Committee takes the view that, while the imposition of a compulsory retirement age for a particular occupation does not *per se* constitute discrimination on the ground of age,¹⁰ in the case at hand that age differs for secretaries and for other category M civil servants, a distinction which has not been justified by the State party. The latter has based its reasoning on the argument of the Supreme Court to the effect that the difference of treatment "does not appear irrational" and on the defence of a degree of discretion to which it would be entitled in exercising its right to rationalize the Public Administration. The Committee notes, however, that the State party has not explained how a civil servant's age can affect the performance of a secretary so specifically and differently from the performance of a counsellor, minister or ambassador as to justify the difference of 10 years between compulsory retirement ages. In light of the above, the Committee concludes that the facts before it reveal the existence of discrimination based on the authors' age, in violation of article 26 of the Covenant, read in conjunction with article 2.

8 - See communications Nos. 1565/2007, *Gonçalves et al. v. Portugal*, Views adopted on 18 March 2010, para. 7.4; 983/2001, *Love et al. v. Australia*, Views adopted on 25 March 2003, para. 8.2; 182/1986, *F.H. Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, para. 13; 180/1984, *L.G. Danning v. The Netherlands*, Views adopted on 9 April 1987, paras. 13 and 14; and *S.W.M. Broeks v. The Netherlands* communication No. 172/1984, Views adopted on 9 April 1987, para. 13.

9 - See in this respect communications Nos. 983/2001 (footnote 8 above), para. 8.2; and 1016/2001, *Hinostroza Solís v. Peru*, Views adopted on 27 March 2006, para. 6.3.

10 - See in this respect communication No. 983/2001 (footnote 8 above), para. 8.2. CCPR/C/103/D/1637/2007,1757&1765/2008

68. A similar approach had already been taken by the Supreme Court of Canada in *Dickason v. University of Alberta*, [1992] 2 SCR 1103,²⁰ though it should be noted that the Canadian Supreme Court recently refused to reconsider its 1992 judgment in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 SCR 604 while indicating that it may be appropriate to do so on another occasion.
69. This jurisprudence of the Human Rights Committee is a meagre basis from which to resolve the issues that arise in relation to prohibitions of age discrimination. It is true that the approach to Article 26 is very similar to the approach taken to Article 14 of the European Convention on Human Rights (ECHR) (which is similarly worded to Article 26) by the European Court of Human Rights (ECtHR), however the ECtHR has also not developed an extensive jurisprudence on age discrimination.²¹
70. The American Supreme Court has taken a somewhat different view of the protection from age discrimination that is currently afforded by for instance the European Union and the United Kingdom. It has held that only older persons are protected from less favourable treatment compared with younger persons rather than the other way around: *General Dynamics Land Systems, Inc. v. Cline* 540 U.S. 581.²² This approach treats protection from age discrimination as the preserve of older persons only.
71. There are obvious issues in drafting the proposed Convention that arise from this approach. For instance it makes arguments about intergenerational fairness look very different. If younger persons have no rights to be treated comparably with older persons then an argument from intergenerational fairness towards such younger persons has a different juristic value compared with a system where this is not the case. This would not now be accepted by many states and in the future the number of such states is likely to grow as demographics change.
72. The European Union is one such area where a decision to act out of fairness towards younger persons can justify direct discrimination of older persons when relying on the provisions of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation: *Case C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, [2010] 2 CMLR 830.
73. So a difference in approach on this point could mean that the United States of America would be less likely to ratify such a Convention if it were to anticipate a wider right to protection.
74. There are some other really fundamental points that need to be considered in this context. These include:

²⁰ See <http://www.canlii.org/en/ca/scc/doc/1992/1992canlii30/1992canlii30.html>

²¹ There are cases in which age has been a factor taken with another ground that have been considered as a basis for claims of discrimination: see e.g. *Stec v United Kingdom* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348, at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2006/1162.html&query=Stec+and+v+and+United+and+Kingdom&method=boolean>

²² Though it should be added that this decision may follow in part from the fact that the U.S. Age Discrimination in Employment Act of 1967 only applies to persons who were at least 40 years old.

- c. Should the Convention only recognise the rights of older persons to be free from all forms of discrimination?
- d. Is there a need to consider whether the acceptance of such a Convention as legitimate would be impaired if it did not recognise the issue of intergenerational fairness head on?
- e. Is it necessary to state explicitly that the treatment of older persons may be justified by the obligation to avoid non-discriminatory treatment of younger persons?
- f. If persons are entitled to a period of retirement from work at the end of life are states entitled to force them to become retired?
- g. What other limitations should be imposed on the right of older persons to complain of discrimination?

– END –