

Irish Senate

Committee on Public Consultation

Hearing on the Rights of Older People

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**Statement of Professor Gerard Quinn.
on the case for a new UN Treaty on the Rights Older People**

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Chair, Senators, thank you for the high honour and privilege of addressing you this afternoon.

And since this is my first time appearing before this body let me at the outset commend you for having created the Public Consultation Committee. Too often the identification of the public interest in this country has been either postponed or ignored. The public interest is not just a sum of competing vectors. It requires a forum dedicated to deliberative and public reasoning such as this. And it requires taking the long view and making honest efforts to balance high principle with the art of the possible.

The subject matter that brings us here today is a classic example of a field that has been treated as an outlier, that has suffered from silo thinking and in which fresh ideas are so vitally necessary. So it is fortuitous that this new spirit and practice of openness in the Senate finds as its first subject the issue of the rights of older people.

I believe you have already had the benefit of a rich tapestry of testimony from civil society groups. I take the floor mainly to address the issue of whether the process of drafting a new thematic treaty on the rights of older people should be pursued much more vigorously in the UN and what added value such an instrument might have – both here and abroad.

As you are no doubt aware there exists a UN Working Group to consider proposals for the enhancement of the rights of older people. One of the main items on its agenda is whether to proceed to begin drafting a new thematic treaty on the rights of older people. Two sessions of the Working Group were held in 2011 and another crucial one is set for the summer of 2012. The Global Alliance on the Rights of Older People - the main international federation of older people's NGOs – is firmly in favour. Reportedly, the EU is firmly against.

Older people are seldom explicitly mentioned in existing international human rights treaties (the honourable regional exception being the Revised European Social Charter in which there is a specific Article on ‘ the of elderly persons to social protection’) – Art. 23. This textual absence is not helpful in trying to make the general or universal rights we all enjoy equally effective for older persons.

So the process seems to be at an historic impasse which makes your hearings extremely timely. Your conclusions and recommendations will no doubt have an impact far beyond these shores. To my knowledge this is the first time that any European legislature has explicitly addressed the question of the case for such a treaty and, whatever the outcome, I warmly congratulate you on that..

Because time is short and I am sure you have many pertinent observations and questions, I will focus on three main points:

First, I want to frame the ‘problem’ from my perspective as someone involved in human rights and give you a sense of my vantage point on the issues. As will become clear, I value the process of drafting a new treaty as an opportunity to **de-problematize the person** and reconnect the policy debates about older people back into the **mainstream** of thinking about human rights.

Secondly, I want to spell out what I see as the added value of such an instrument and what kinds of issues, topics and rights I would ideally like to see included and made prominent. Maybe unusually, I do not see traditional social welfare rights as being primary – but I do see them playing a new role in advancing a new paradigm on ageing.

Thirdly, I want to look to the next steps and particularly to encourage this August body to add its voice to the chorus of others who are calling out for a new treaty. You have already done a great service by throwing the debate

open to so many groups. More needs to be done and especially in this the European Year of Active Ageing.

I am very fortunate to be accompanied to this hearing by one of my colleagues, Dr Eilionoir Flynn, who produced a major discussion paper on the treaty as well as a briefing note after the last session of the UN Working Group. I believe those documents are circulating among the Committee. She organized a very successful panel discussion at the last session of the UN Working Group with Human Rights Watch, Inclusion International and other groups. I am most grateful for her Trojan work and feel honoured to work in a centre that has her as its senior researcher.

I have also caused to be circulated in this Committee a short but telling literature review by Professor Jerome Bickenbach on dementia and institutionalization and the value of policies that retain social connectedness. I am most thankful to him for permission to circulate this revealing document.

1. The 'Problem' re-framed.

But first how should we frame the issues. Let me put that another way, how should we re-frame the relevant issues. Whats my vantage point?

I have to emphasize I am not a subject specialist on ageing. But I do come at the issue as someone who was closely involved in the drafting of a sister treaty- the UN Convention on the Rights of Persons with Disabilities. Please don't understand me to make the argument that disability and age overlap completely, or that all disability-specific solutions map neatly onto ageing. No, I simply mean to address you as someone who has helped put an international instrument together and am therefore more intimately acquainted than most with the process and some of the hidden pitfalls. AS it turns out these is an overlap between ageing and disability – but thats not the main reason I am here today.

I also appear before you as someone who was a member of an international treaty monitoring body in the Council of Europe system (the European Social Charter – a treaty on social rights). We all know that some key elements of major international instruments were crafted with constructive ambiguity to allow the process move forward. Some ambiguity is often the price you pay to get agreement. This often postpones major issues – which usually can trace their origin to fundamental philosophical differences – and they will often have to be resolved by the relevant treaty monitoring body. The fact is this is normal. This is natural. Without it no high level discussion would take place and no instrument could take shape. We should not make the perfect the enemy of the good. This is relevant because there will not be unanimous agreement on what a new treaty should contain – but that should not, in my view, deter us from seeking as much consensus as possible.

And I appear before you as someone who sat on the Irish Human Rights Commission for nearly 10 years. The core mission of that body is to bridge international law and find a way of allowing its fresh air to influence domestic change for the benefit of our citizens.

I am only too painfully aware that, while international law has a certain aura of elegance, it is never an end itself. It is only valuable if it can help trigger a process of change where none exists or help keep that process trending in the right direction where it already exists. You are no doubt aware that Ireland has yet to publish its much awaited National Strategy on Ageing. It will be important that the emerging national strategy should play its part in advancing any new UN treaty – and *vice versa* - of which more anon.

So what then is the core ‘problematic’ – how should the issues be framed and what use would a new thematic treaty on the rights of older people have? This is the key and core to what we would expect of a new treaty.

After nearly 25 years studying rights and particularly the rights of so-called vulnerable groups I have come to observe the near universal experience of what the great legal historian Sir William Blackstone called 'civil death' on the part of these groups. Blackstone was writing of women and their 'legal disappearance' as persons upon marriage. It is certainly striking how personhood is somehow discounted with respect to the groups and individuals concerned. It is as if the terms of entry and participation in the lifeworld – the world of social connectedness, public participation and civic engagement – are set to effectively exclude some.

The depressing thing is that this exclusionary ethic seems deeply embedded in almost all cultures – an indelible part of the human condition! And the truly amazing thing is that the exclusion is experienced by most people as 'natural' even when it flagrantly violates our highest *professed* values such as dignity, autonomy, equality and social solidarity. In the result, the person is 'problematized,' the exclusion is made feel 'natural' and consciences are salved by the use of welfare which cushions people at the edge of society!

So, to me, one of the most important functions of an international thematic treaty is that it holds up a mirror to each society – it forces us to take a good look at ourselves and to challenge the gap between the myths of the system and the way the system actually operates.

The ageing process seems particularly captive to this exclusionary tendency. True, we go through several cycles throughout our lives and true, our social circle expands or contracts depending on where you are situated in your life's journey. The 'mystic cords of memory' – the ties that bind – seem to get implicitly renegotiated as our lives progress.

But all of this is distorted wildly by encrusted cultural assumptions that badly need to be dissolved. Culture sees capacity as declining inexorably in old age. Culture does not see any use value for older persons in the economy. Culture does not see

the value of social connectedness for all – not to mention for the elderly themselves. And social change – influenced powerfully by tectonic changes in the economic base of the country in the past 20 years have exacerbated the move from an expansive concept of community (albeit suffocating at times) to a society organized to suit a particularly narrow model of economic rationality – what the Germans call the march from *gemeinschaft* to *gesellschaft*.

The result has been policies that compensate for their absence, policies that maintain people at the edge of society, policies that accentuate institutionalization, policies that do not proactively stitch back together social connectedness and build on Ireland's amazingly dense networks of social capital.

Or, to be even more blunt, , the policy focus has been on who pays to maintain elder persons and how public services get delivered. There is nothing wrong with this on its own – but when it becomes the sole focus it tends to reinforce dependence, passivity and cements into place negative stereotypes.

The great thing about modern social science is that it shows how out of date these cultural assumptions - and the policies that depend on them - are. Studies like TILDA show the value of moving toward a much more positive outlook on ageing – and with a different set of policy responses to build on this positive outlook. Look to the sterling work of the Ageing Well Network in Ireland to get a sense of these creative policy innovations. The great neuro-scientist Antonio Dimasio claims that the mind is a function of human relations. The policy lesson is clear – build or rebuild those social connectors that help form who we are as persons. And new 21st century theories of justice are emerging that emphasize human capabilities across the lifecourse (Amertya Sen).

So we have the science that shows the usefulness of a completely new frame on ageing. And we have the theory to make this fit well with our legacy values on

justice. What we lack is the spur for change – and that’s where the proposed UN treaty on the rights of older persons comes into sharp focus.

2. The Added Value of a Convention and its possible content.

What would a new treaty do to reverse decades of perverse cultural assumptions and policies that were built on them?

Allow me to put one blockage to one side before proceeding. The UN Working Group and many States seem fixated with the question whether there are normative gaps in general international human rights treaties that need to be filled. If such gaps are proven then a treaty might be allowed to proceed. The quest is to see are there some rights (or bits of rights) missing from the general schema on rights that would justify a new rights-drafting exercise. I believe this is completely wrongheaded.

Of course there are no normative gaps in the general norms on human rights which are, after all, stated to be **universal**. The problem is not that there are gaps – it is that the universal norms are heavily distorted by cultural assumptions which dilute them heavily. The whole point about drafting a new treaty is to redress the imbalance between myth and reality.

Forgive me if I digress further. We did not argue for a UN treaty on the rights of the disabled based on supposed normative gaps – we argued for it on the basis that the existing norms did not have sufficient bite in the crevice of disability. We did not argue for it on the basis that new rights were needed. No, we argued for it on the basis that the old rights needed to be made real in the specific context of disability. By shining the light of these norms into that crevice meant tailoring them to meet the exigencies of persons with disabilities. So the argument that there are no normative gaps and that a treaty drafting process should not therefore proceed seems wide of the mark to me. Instead we should be asking why are the general

rights seemingly ineffective on the context of ageing, how can the distorting variables from culture be dissolved, how might the general rights be tailored to assure them critical bite on the context of ageing and how can we do this in a way that underpins mainstream rights and not fragment them.

Before addressing the question of the added value of a new treaty let me first outline what such an instrument might contain.

First of all, there must be a **clear valorization of the human difference of ageing** in any new treaty. Put another way, the fact of ageing should not be the occasion for the implicit diluting of universal rights we all supposedly enjoy – it should trigger a renewed debate about how those rights can be made real for older persons. If you will, this should be the paradigm shift of the treaty on the rights of the elderly.

Secondly, there must be a **commitment to centering older persons to take charge and remain in charge of their own lives.** There was a remarkable breakthrough in this regard in the convention on the rights of persons with disabilities. Article 12 effectively requires States to move away from substitute decision-making regimes (whether plenary or limited guardianship) and to place their policy priorities instead on enhancing residual capacity and supporting persons to make decisions for themselves. Now the vast majority of older persons do not have fragile decision-making capacities. But in as much as they might, the emphasis should similarly shift to supporting them make decisions for themselves. It follows ineluctably that their decisions must be respected. Implicit in this – to me at least – is a corresponding reduction of protective policies based on an exaggerated theory of paternalism. To be avoided is the infantilization of the elderly – an over-willingness to take decision-making power away from them even in their own ‘best interests.’

Thirdly, the right to **live independently and be included in the community seems quite vital.** This looks like a contradiction. For someone might choose to

live so independently as to be not involved in the community. But the interplay between the two is in fact a crucial dialectic. Again, social connectedness is the key to maintaining a positive sense of self and indeed personhood. So what? Well, to me the new treaty should provide a very positive philosophy of living independently and being included in the community.

I say positive because the accent should not be on institutions as such. In the UN disability convention we took care to spell out the ingredients of this right. Of course, it implicitly places institutions – all institutions – on the defensive. Some months ago the HSE published a report recommending the ending of all congregated settings on the ground of disability. This would include group homes over 4 people. This makes sense to me. If you cluster people together on the basis of something that is arbitrary from a moral point of view (sharing a skin colour, or a gender or a disability) then people in the mainstream are not apt to see the person – they are more apt to see an agglomeration of people to whom stereotyped traits will be imputed.

It seems to me that exactly the same logic should apply to institutions for the elderly – and mini-institutions such as nursing homes – in Ireland. You may have seen an interesting article in the New York Times called ‘shrinking the nursing home until it feels like home.’ (November 1). This development is long, long overdue in Ireland. If it happened it wouldn’t happen overnight. Too much resources are now tied up into an archaic system. But the first step in any transition toward change is to admit that large nursing homes are not the right way to proceed. And the advent of a new treaty should underpin this dynamic of downsizing.

Naturally, there will have to be included in any new treaty a right to protection against violence, exploitation and abuse in institutions. You will have noticed a major report from the Human Rights and Equality Commission of England and Wales a few days ago on just this topic. I didn’t put this front and centre only because I don’t believe the majority of institutions that exist should exist. Even if we

successfully unbundle the institutional mix for the elderly in Ireland violence, exploitation and abuse will just have moved to the community. So some proactive strategy is required. But a personal plea- lets not get so over-protective that we chill the right of an individual to live they way they want rather than the way we think they should live.

Fourthly, **economic and social rights have to be better harnessed to ensure the dignity and especially autonomy and social connectedness of older people.** Its interesting how people reflexively think that the elder rights equals social expenditure or that when people think of rights of older people they think primarily of welfare rights. To me, whats the use of welfare entitlements – even lavish ones – if no efforts are in place to keep social channels open and prime people to participate in their community. It would be much better to think through what these social supports are for and to configure them to have maximum impact in terms of embedding people in their own communities.

What of services? The right to live independently and be included in the community– as we expressed it in the disability convention – included a right to wrap services much more insistently around personal choice. There is a general trend in Western countries in any event toward the personalization of social supports and services. This even includes personalized (i.e., developed) budgets. Forgive me for saying so, but this does not appear to me to call so much for more money but for a complete revolution in how services are imagined and delivered – something our Government is committed to doing in any event.

I would add a fifth element which probably is more important than most. The slogan ‘nothing about us without us’ should be emblazoned on the new treaty. Generally speaking, if people are given space to help shape public policy they do not do so in a manner that is disrespectful to the rightful claims of others or in some sense exaggerated. TILDA shows that older people in this country give back to the

community in abundance. What a fitting tribute to 1916 it would be for Ireland to work to enshrine this in the new treaty.

And what then of the added value of such a new treaty?

One plausible answer is, nothing! It might be said that we have enough treaties already – two general human rights treaties, one focusing on civil and political rights and another on economic, social and cultural rights – as well as a plethora of thematic treaties which deal with the rights of particular groups like women, children, persons with disabilities and migrants. Why crowd the field further and thus risk even greater fragmentation? And aren't the existing treaties of limited use anyway especially in a dualist country like Ireland that often seems to strive mightily to keep international law out?

I disagree with the argument – but I actually agree with some of the sentiments behind it. Take fragmentation. Fragmentation is bad. It disconnects the particular from the general and risks undermining general values, rights and principles.

But reflect on this. The intention behind drafting a thematic treaty is never to create an island of norms disconnected from the mainland of the two general UN Conventions. Quite the opposite. The intention is to particularize what the general rights mean in the specific context of a particular group. And the object is never to grow ever disconnected bodies of jurisprudence on women, migrants, people with disabilities, racial minorities and the elderly. The intention is to grow the relevant jurisprudence in order trigger the attention of the mainstream treaty bodies. Actually, that strategy has worked remarkably well in the disability convention.

So, to me, the argument that a specific treaty might detract from the general human rights treaties does not stack up.

Nevertheless you might be wondering – so what – we have a treaty that might inform other treaties but this is surely a high luxury ‘out there’ in the international ether – we are more concerned with Tralee and Kinvara. I’m with you on this. There has been far too much attention lavished on the elegance of international norms – as if this alone ever changed anything. The trick is to get traction going between the international norms and the domestic process of change. This gap has been well known for decades. But there is no need to be defeatist on this. We do need a new approach to international law – specifically to the interface between international law and domestic law. There is innovation that can be mapped onto any new treaty on the rights of older people. Article 33 of the new disability treaty envisages a sort of triangulation between the domestic focal point and coordination mechanism for change in the Executive branch, the domestic independent monitoring mechanism (which I assume will be the soon-to-be merged Human Rights Commission and Equality Authority) and civil society. This is the key to keeping the dynamic of change trending in the right direction and closely aligned to the UN treaty.

I suggest it should be no different with respect to a new treaty on the rights of the elderly. There are ways of opening the window onto international law without ceding command and control. The other impediment – the fact that Ireland tends to take an extreme view of dualism (the complete separation of international law from domestic law unless our domestic legislature takes the positive step of directly incorporating an international treaty) even relative to other common law countries – is a separate debate that deserves a separate and fuller airing.

3. Next Steps.

Senators, the next session of the UN Working Group is due in the summer of 2012. As you are well aware, Ireland’s position on such issues when negotiated through multilateral for a such as the UN are forged in close alliance with our EU partners. Reportedly, the EU is opposed – or at least not yet convinced – on the idea of a treaty.

I am not personally convinced that this opposition is based on close consultation with civil society. How many older people in Ireland were even aware that this process was underway in their name? If this position were to be taken by the EU at the next session then at the very least it should be done so after active consultation with older people and their representative bodies.

The argument that we need to prove normative gaps exist before a treaty drafting process is allowed to go ahead is wrongheaded. It is the discounting of the humanity of older people that counts more and is the uniting experience between them and others who have had the benefit of a thematic treaty. If gaps were an insurmountable hurdle there would never have been a convention on the rights of the child.

A new treaty should primarily valorize positive ageing and turn around encrusted layers of stereotypes and prejudices. It should aim particularly at forging and retaining social connectedness to enhance the personhood and inclusion of older people. And the insights gained should be used to trigger the attention of the existing treaty bodies.

Ways can and should be found to ensure that a new treaty helps anchor national strategies. Ireland is (hopefully) about to announce its National Ageing Strategy. Despite the very best of intentions such strategies tend to lose momentum as the political moment passes. The value of a new treaty is that it would keep us focused on the long term and not just on quick fixes from election to election. This is not to criticize politics or politicians – its just the way the normal democratic process works.

In a few short years we will mark 1916. Freedom in a civic republic is primarily public – not private. It is the right to belong, to be seen to belong, to be valued and to participate. This is the kind of freedom that a new treaty could valorize.

In short I commend the process of drafting the proposed treaty on the rights of older people to this House and would urge you to add your voice to those of others arguing for the process to proceed.