

Submission to the OHCHR Call for Inputs on the General Framework, Architecture and Guiding Principles of a Legally Binding Instrument on the Human Rights of Older Persons

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1. Introduction

I welcome the initiative to develop a legally binding instrument on the human rights of older persons. This submission seeks to support the elaboration of a treaty that recognises older persons as full rights-holders within international human rights law, and focuses in particular on the general framework, architecture and guiding principles of such an instrument, with specific attention to the impact of legal and criminal justice systems. The need for a legally binding instrument does not arise from any absence of rights in existing frameworks. Rather, many older persons have remained invisible within international human rights law, often addressed through social policy and welfare frameworks rather than enforceable rights. This reflects patterns observed in other areas, most notably disability, where a shift from paternalism to a rights-based approach was required. Demographic ageing has exposed the limits of existing approaches, with ageism persisting as a structural feature of law, policy and institutional practice in many jurisdictions. Therefore, a new instrument must move beyond restating existing rights. It must develop a treaty that can remove the structural barriers that impede older persons from exercising their rights on an equal basis with others. This submission addresses a number of key issues relevant to the development of such an instrument, including its overarching framework, guiding principles, structure, and selected issues at the intersection of ageing, rights, crime and the criminal justice system.

2. Overarching Framework and Guiding Principles

2.1 A Human Rights-Based Framework: From Ageism to Rights-Holding

The instrument should be grounded in a clear and explicit human rights-based framework that rejects ageism and affirms older persons as subjects of rights, autonomy, and participation. A central lesson from the development of the UN Convention on the Rights of Persons with Disabilities (CRPD) is that formal recognition of rights is insufficient without a corresponding shift in how people are seen within legal systems. A similar shift is required in the context of ageing, recognising that while there are important differences in context and experience, the need to affirm older persons as rights-holders on an equal basis remains fundamental.

2.2 Participation and Voice: “Nothing About Us Without Us”

A central principle that must underpin the development and implementation of a legally binding instrument is that of “nothing about us without us”. Older rights holders must not be treated as passive subjects of policy or protection, but as active participants in the shaping law and policy that impacts upon their lives. Perhaps the *cri de cœur* for the drafting of the new instrument will be “our rights, our say, older voices lead the way”. Regardless of *cri de cœur* symbolic or tokenistic

consultation is insufficient, what is required is meaningful, sustained, and resourced participation at all stages of developing law and policy and indeed in its implementation, and monitoring. Older rights holders bring lived experience that is essential to identifying rights violations, exposing ageism, and designing effective responses. Therefore, the instrument must adopt a model of substantive equality that addresses these forms of structural disadvantage.

2.3 Autonomy, Legal Capacity and Substantive Equality

Many older persons continue to be positioned, implicitly and explicitly, as passive recipients of care rather than as rights holders with right to make legal effective decisions. This is particularly evident in decision-making in areas such as financial decisions, and healthcare etc. A new instrument needs to challenge these assumptions and embed a framework that recognises supported decision-making. Age-based discrimination is frequently normalised within legal systems, including through mandatory retirement, differential access to healthcare, and limitations on legal capacity. Therefore, the instrument must adopt a model of substantive equality that addresses disadvantage.

2.4 Core Principles of the Instrument

The guiding principles of the instrument should reflect both continuity with existing human rights law and the need to address specific gaps affecting older persons. The instrument must affirm the inherent dignity and equal worth of older persons lives and contributions to society.

2.4.1 Autonomy and Legal Capacity

A key principle should be the recognition of autonomy and legal capacity. The widespread use of substituted decision-making regimes, often justified by reference to age-related cognitive assessments, raises serious human rights concerns.

2.4.2 Participation and Inclusion

The instrument should affirm the right of older persons to make legally effective decisions about their own lives and require States to provide supports to enable the exercise of decision-making (if needed) and participation in all aspects of society. Participation must be understood in a broad and substantive sense and that it is not limited to formal inclusion, but requires the removal of barriers that prevent older persons from engaging fully in social, political, legal and cultural life.

2.4.3 Independent Living, Community Inclusion and Ageing in Place

The principle of participation and inclusion must also be recognised. Older persons should have the right to participate fully in all aspects of life, including political and public life, and in decisions that affect them. This includes participation in the development of laws and policies concerning ageing. The principle of independent living and inclusion in the community is equally important. Segregation and institutionalisation remain prevalent features of ageing policy in many jurisdictions and raise significant concern around deprivation of liberty. The instrument should recognise the right of older persons to live in the community, with access to the supports if needed.¹ In developing this right, the draft should engage meaningfully with the jurisprudence of the Committee on the Rights of Persons with Disabilities, in particular its interpretation of Article 19

¹ See United Nations Human Rights Council, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons* UN Doc A/HRC/39/50 (10 July 2018), at pages 14-16.

of the Convention, which affirms both the right to live independently and the right to be included in the community. This framework must address the concept of ageing in place, recognising its centrality to the lived experience of older persons and ensuring that it is fully realised within the broader understanding of this right and its emphasis on autonomy, choice and community inclusion.

2.4.4 Substantive Equality and Intersectionality

As mentioned above commitment to substantive equality should underpin all provisions. This requires States not only to prohibit discrimination but to take proactive steps to address structural inequalities and ensure equal access to rights. The instrument must recognise the intersectional nature of ageing. Older persons are not a homogeneous group, and experiences of ageing involve a multiplicity of factors such as disability, gender, socio-economic status, and ethnicity and other minority identities.² Therefore, this instrument should adopt an intersectional approach that reflects these complexities.

3. Defining Older Age?

The question of how to define “older persons” will be a central and potentially contentious issue in the development of a legally binding instrument and warrants careful consideration at an early stage. The experience of the Convention on the Rights of Persons with Disabilities is of interest.³ Debates on the definition of disability revealed tensions between those favouring an open and evolving concept, and those seeking a more precise definition to limit the scope of obligations.⁴ A similar dynamic is likely to arise in the context of ageing. However, unlike disability age is often tied to fixed legal thresholds, which vary across contexts, including mandatory retirement, access to pensions and social welfare, and eligibility for services. This creates both a challenge and an opportunity. A rigid chronological definition risks reinforcing arbitrary distinctions and excluding those who experience age-related disadvantage earlier or differently, while the absence of any definition may create uncertainty in implementation. There is no typical older person.⁵ Therefore, a flexible and context-sensitive approach should be adopted, recognising the diversity of experiences among older persons and avoiding definitions that may inadvertently narrow the scope of protection. Early engagement with this issue will be essential, as it is likely to shape both the scope of the instrument and the extent of State obligations.

4. Architecture of the Instrument and Categories of Rights

In terms of structure, the instrument should adopt a clear and coherent architecture that reflects established treaty practice while incorporating lessons from more recent instruments. A preamble should situate the instrument within the broader human rights framework and acknowledge the impact of ageism and demographic change. It should also emphasise the need for a shift towards a rights-based approach to ageing. The operative provisions should include sections on general principles and general obligations, followed by substantive rights. Given the importance of implementation, the instrument should include robust monitoring mechanisms, including the establishment of a dedicated treaty body, as well as procedures for periodic reporting and, where

² Amanda Grenier, Chris Phillipson and Richard A Settersten Jr (eds), *Precurity and Ageing: Understanding Insecurity and Risk in Later Life* (Policy Press 2021).

³ Gerard Quinn and Charles O'Mahony, 'Disability and Human Rights: A New Field in the United Nations' in *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Turku, 2012), at pages 278-280.

⁴ World Health Organization, *World Report on Ageing and Health* (2015), at page 3.

⁵ *Ibid.*

appropriate, individual or collective complaints. The experience of other treaty bodies demonstrates the importance of such mechanisms in giving practical effect to rights.

A useful starting point in thinking about the substantive rights part of a new legally binding instrument on the rights of older persons is to recognise that the rights will fall into a number of overlapping but useful categories. The substantive rights could be understood as comprising a number of broad clusters.⁶ A similar approach may be useful here in thinking in advance about the architecture of a future convention on the rights of older persons.

(i) Rights that protect the person

These are rights will be directed towards protecting older persons from harm and abuse and towards securing their dignity and integrity. In the context of older persons, this would include protection from exploitation, violence, abuse and neglect, as well as protection against torture, inhuman or degrading treatment, and respect for physical and mental integrity. These are particularly important in institutional, care, health and detention settings, where older persons may be at heightened risk.

(ii) Rights that restore or safeguard autonomy, choice and independence

These are rights that will go beyond protection or safeguarding to shield the person from abuse to recognise and support their status as a rights holder able to make decisions about their own life. In the context of older persons, this category would include legal capacity, supported decision-making, respect for privacy, family life, bodily autonomy, and the right to live independently and be included in the community. These rights are especially important in resisting paternalistic assumptions that continue to shape responses to ageing and older people.

(iii) Rights of access and participation

These rights are concerned with removing barriers to the mainstream of social, political, legal and cultural life. In a future instrument on older persons, this category could include accessibility, access to information, access to justice, political participation, and participation in social, cultural and community life. These rights are essential if older persons are to be recognised as rights holders and to ward off paternalism and substitute decision-making.

(iv) Liberty rights

These are rights concerned with freedom of movement, liberty and security of the person, and protection against arbitrary deprivation of liberty. In the context of older persons, they would have particular relevance to institutionalisation, involuntary admissions to nursing homes, coercive care practices, detention, and the treatment of older prisoners. This category is especially important in contexts where age-related assumptions are used to justify restrictions on liberty on the basis of best interests.

(v) Economic, social and cultural rights

These rights are central to ensuring that older persons can live with dignity and security in the community. In the context of ageing, they would include rights relating to health, housing, social

⁶ Gerard Quinn and Charles O'Mahony, 'Disability and Human Rights: A New Field in the United Nations' in *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Turku, 2012), at pages 282-295.

protection, care and support, work, and an adequate standard of living. These rights will be about ensuring the conditions necessary for autonomy, inclusion, and participation in society on an equal basis.

These categories are not hermetically sealed and many rights will overlap. This reflects the interdependence and indivisibility of rights, and the need to ensure that the future instrument does not reproduce artificial distinctions between protection, autonomy, participation, liberty and access to services and supports.⁷ They do, however, offer a useful way of thinking about the likely structure of the substantive rights part of a future convention.

For the purposes of this submission, particular attention is given to some of the key rights issues arising in the context of crime, punishment, rights, and the criminal justice system.

5. Key Issues at the Intersection of Ageing and Criminal Justice

This section addresses a number of key issues at the intersection of ageing, criminal justice, and human rights, which warrant careful and anticipatory consideration in the development of a new legally binding instrument. Experience from the drafting and implementation of the Convention on the Rights of Persons with Disabilities demonstrates that certain areas, particularly those relating to legal capacity, deprivation of liberty, and criminal responsibility, gave rise to significant debate and resulted in voluminous interpretive declarations and reservations by States Parties, in respect of Articles 12 and 14. These issues have proven to be among the most complex and contested within international human rights law.

It is likely that similar tensions will emerge in the context of ageing, particularly where questions arise concerning autonomy, decision-making, and the role of the State in protective or coercive interventions. Therefore, there is value in engaging with these debates at an early stage as it may assist in clarifying the normative framework, avoiding fragmentation in the development of international human rights law. It also provides an opportunity to revisit the unresolved questions that arose in the disability context, with a view to ensuring that the emerging framework on the rights of older persons will drive the global programme of law reform that will be required by State Parties to implement it.

5.1 Legal Capacity and Criminal Responsibility

Legal capacity must be understood as a gatekeeper right in the context of criminal justice.⁸ It is, in many respects, the key to unlocking the effective enjoyment of all other rights.⁹ Without recognition as a person before the law, and without been permitted to make legally effective decisions, an older person is placed at a profound disadvantage in seeking to invoke, exercise, or defend their rights within the justice system. The ability to instruct legal representatives, to participate in proceedings, to give evidence, and to challenge human rights violations all depend, on the recognition of legal capacity. Therefore, the recognition of older persons as rights holders with the capacity to make legally effective decisions has direct implications across all stages of the criminal process, including investigation, trial, sentencing, and detention. As has been seen in the development of the Convention on the Rights of Persons with Disabilities, the move towards

⁷ Ibid, at pages 268-269.

⁸ Charles O'Mahony, 'Legal Capacity and Detention: Implications of the UN Disability Convention for the Inspection Standards of Human Rights Monitoring Bodies' (2012) 16(6) *The International Journal of Human Rights* 883.

⁹ See Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12: Equal Recognition before the Law* UN Doc CRPD/C/GC/1 (11 April 2014).

recognising legal capacity on an equal basis with others represents a significant shift away from models that locate decision-making authority in third parties.

In the context of ageing, there is a risk that age-related assumptions about mental capacity may lead to the restriction of legal capacity, particularly in criminal proceedings. This can arise in areas such as fitness to stand trial, the giving of evidence, or the ability to instruct legal representatives.¹⁰ A new instrument should make clear that age alone can never justify the denial or restriction of legal capacity, and should require States to provide appropriate supports to enable older persons to participate effectively in criminal proceedings.

5.2 Diversion, Support and Alternatives to Criminalisation

The recognition of legal capacity also requires careful consideration of the use of diversion within the criminal justice system. In practice, older persons, particularly those with support needs, may be diverted away from formal criminal processes into care or treatment settings. While diversion can play an important role in avoiding the disproportionate and often harmful impact of imprisonment on older persons, it also raises significant human rights concerns where it results in the substitution of informal or administrative control for procedural safeguards. Drawing on debates in the disability context, particularly under the CRPD, there is a need to ensure that diversion is not used as a mechanism to bypass due process rights or to impose coercive interventions without consent.¹¹

5.3 Older Prisoners

An often overlooked dimension of ageing and human rights is the position of older persons within places of detention.¹² While prison populations have traditionally been composed predominantly of younger men, there has been a clear and sustained demographic shift towards older prisoners across a number of jurisdictions.¹³ This trend is driven by multiple factors, including longer sentences, changes in sentencing practices, and the abolition of the death penalty in Europe, resulting in a growing cohort of individuals serving long or life sentences into older age.

Despite this shift, prison systems remain structured around the needs and capacities of younger, physically fit populations. The physical design of prisons and the organisation of daily life frequently fail to accommodate the realities of ageing. Multi-storey accommodation without lifts, steep staircases, bunk beds without safe access, and regimes that require rapid movement between locations all reflect institutional assumptions about physical capacity that do not hold for many older prisoners.¹⁴ As a result, older persons in detention may experience indirect discrimination, exclusion from activities, and reduced access to services, simply because the system is not designed with them in mind. The Council of Europe has recognised these challenges, noting that prison environments and regimes are often ill-suited to older prisoners and require adaptation to ensure humane treatment and dignity.¹⁵

¹⁰ Piers Gooding and Charles O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122.

¹¹ Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities* (September 2015), at para 21.

¹² Council of Europe, *European Prison Rules* (Council of Europe Publishing 2006, revised 2020), at page 129.

¹³ Penal Reform International, *Older Persons in Detention: A Framework for Preventive Monitoring* (PRI 2021). Available at: https://cdn.penalreform.org/wp-content/uploads/2021/06/PRI_DMT-Older-persons_WEB.pdf

¹⁴ Council of Europe, *European Prison Rules* (Council of Europe Publishing 2006, revised 2020), at page 129.

¹⁵ *Ibid.*

This emerging reality underscores the importance of explicitly addressing the rights of older persons in detention within any new legally binding instrument. This requires more than general guarantees of equality. It calls for specific obligations relating to accessibility, reasonable accommodation, humane treatment in detention, and access to healthcare and support, as well as consideration of alternatives to continued detention where it no longer serves a legitimate purpose.

5.4 Exploitation, Violence and Abuse

The prevention of exploitation, violence and abuse requires explicit and targeted recognition within the instrument. Older rights holders face distinct and often under-recognised forms of harm, including financial exploitation, coercive control, neglect in care settings, and abuse within institutional environments such as hospitals, residential care, and places of detention.¹⁶ These crimes frequently arise in contexts of dependency, trust, and unequal power, and are often obscured by ageist assumptions that diminish the visibility and credibility of older persons.¹⁷ While existing human rights frameworks prohibit inhumane and degrading treatment and torture, they do not adequately capture the specific forms of abuse not meeting this threshold. People often live in conditions in which exploitation, violence and abuse occur in later life. Domestic law often fails to address the ways in which institutional settings, care relationships, and social isolation can create environments in which abuse is more likely to occur and less likely to be detected or reported. The approach adopted in Article 16 of the Convention on the Rights of Persons with Disabilities provides a useful and instructive model.¹⁸ That provision recognises the need for a comprehensive framework encompassing prevention, protection, recovery, and accountability, alongside obligations to monitor facilities and programmes designed to serve persons at heightened risk. A similar approach is warranted in the context of ageing. The risks faced by older persons, particularly in institutional and care settings, demonstrate the importance of moving beyond prohibition towards systemic and preventative obligations. There is a strong case for a dedicated substantive provision on exploitation, violence and abuse within the instrument.

5.5 Access to Justice

Access to justice is a critical dimension of the rights of older persons, yet it remains one of the areas where people that have the greatest legal need face the most barriers in accessing justice. Older persons face intersecting barriers to accessing justice, including limited awareness of rights, dependency and power imbalances, restrictive legal aid frameworks, inaccessible procedures, digital exclusion, and ageist attitudes within justice systems.¹⁹ This is particularly evident within the criminal justice system, where older persons may engage as victims, witnesses, accused persons, or prisoners. Across each of these roles, justice systems often fail to account for the realities of ageing, resulting in exclusion, diminished participation, and, in some cases denial of access.

Access to justice, now recognised as a distinct and substantive right within international human rights law, found its most explicit articulation in Article 13 of the Convention on the Rights of Persons with Disabilities. Its inclusion marked a significant shift, acknowledging that the effective enjoyment of all rights depends on the ability to access and participate in justice systems on an

¹⁶ European Union Agency for Fundamental Rights, *Places of Care = Places of Safety? Violence against Persons with Disabilities in Institutions* (Publications Office of the European Union 2025).

¹⁷ World Health Organization, *Global Report on Ageism* (WHO 2021).

¹⁸ See Judy Laing, 'Preventing Violence, Exploitation and Abuse of Persons with Mental Disabilities: Exploring the Monitoring Implications of Article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 *International Journal of Law and Psychiatry* 27.

¹⁹ OECD, *OECD Framework and Good Practice Principles for People-Centred Justice* (OECD 2021), at page 35.

equal basis with others.²⁰ The development of this provision reflects a broader recognition that formal guarantees of rights are insufficient in the absence of mechanisms to enforce them. In the context of a new legally binding instrument on the rights of older persons, access to justice must be given similarly careful consideration as a core component of the overall rights framework. This is particularly important given the structural and systemic barriers that continue to limit the ability of older persons to seek and obtain effective remedies.

The International Principles and Guidelines on Access to Justice for Persons with Disabilities are also instructive in this context.²¹ While developed in the disability field, they expressly recognise the importance of age-appropriate accommodations and supports in securing effective participation in legal proceedings. In particular, the Introduction refers to the need for “procedural and age-appropriate accommodations”, and Principle 3 requires “gender and age-appropriate individualized procedural accommodations” to ensure equal access to justice. These principles are relevant to older persons because they underscore that effective participation in justice systems cannot be secured through formal equality alone. It requires practical adjustments, support, and procedural design that respond to the realities of age and to the barriers that arise in criminal and other justice settings and processes.

In this context, the provision of procedural accommodations is essential. Drawing on developments in international human rights law, particularly in relation to persons with disabilities, such accommodations should not be understood as discretionary or contingent measures. Rather, they should be recognised as immediate and necessary components of the right to a fair trial and effective participation in the justice system. Unlike reasonable accommodation, which is often framed in terms of proportionality and undue burden, procedural accommodations in the justice context must be treated as non-negotiable obligations, reflecting the fundamental importance of access to justice as an enabling right.

“Procedural accommodation: all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of “disproportionate or undue burden”.²²

A legally binding instrument on the rights of older persons should therefore include clear and specific obligations on States to ensure that justice systems are accessible, age-appropriate, and responsive. This includes the provision of appropriate supports to enable participation in proceedings, adaptations to procedures and environments, and training for justice sector professionals to recognise and respond to age-related barriers and discrimination.

6. Conclusion

The development of a legally binding instrument on the rights of older persons presents a critical opportunity to address longstanding gaps within international human rights law and to confront the structural realities of ageism and exclusion. To be effective, the instrument must establish a clear, and coherent framework that affirms older persons as rights holders on an equal basis with others. This requires early and careful engagement with foundational issues, including the

²⁰ See Charles O’Mahony, *Access to Justice: A Baseline Study of Article 13 of the UN Convention on the Rights of Persons with Disabilities* (Irish Human Rights and Equality Commission 2024, at chapter 2).

²¹ United Nations Human Rights Special Procedures, ‘International Principles and Guidelines on Access to Justice for Persons with Disabilities’ (Geneva, August 2020).

²² *Ibid*, at page 9.

definition of older age, to ensure that the scope of protection is sufficiently flexible, inclusive and responsive to lived experience. It also requires a willingness to engage directly with complex and contested areas, particularly those relating to legal capacity, deprivation of liberty, and criminal justice. The legitimacy and effectiveness of the instrument will depend on the meaningful participation of older persons in its development. This must go beyond formal consultation and include sustained and adequately resourced engagement, particularly with organisations representing older persons from the Global South. Without such investment, there is a risk that the instrument will fail to reflect the diversity of ageing experiences and the realities of those most affected. The instrument has the potential not only to strengthen protection, but to underpin a comprehensive agenda of legislative and policy reform over the coming decades. If developed with clarity and ambition, it can deliver meaningful and sustained improvements for ageing populations, ensuring that older persons are recognised, in practice as well as in principle, as full and equal participants in society.