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PREFACE: GLOBALIZATION OF ELDER LAW

James W. Fox Jr.^{*}
Rebecca Morgan^{**}
Wayne Moore^{***}

This volume inaugurates the *Journal of International Aging, Law & Policy*. As the articles in this volume make clear, legal and policy issues related to aging are increasingly crossing borders. Two of the most important “mega-trends” of the twenty-first century—globalization and population aging—are interacting in predictable, yet often unacknowledged, ways. More people live or own property in multiple countries. Other people work and raise families in one country, then retire to another, raising complex legal problems surrounding incapacity, end-of-life issues, and property distribution. And an increasing number of countries are beginning to experience the social and financial issues raised by population aging and are increasingly interested in comparing how other countries address these issues.

The legal globalization raised by these issues takes many forms, from international obligations created by treaties, to complex transnational litigations of guardianship, to parallel legal and regulatory regimes covering health care, income-maintenance, and housing. For these reasons, elder law can no longer be viewed as strictly the province of domestic law; it has become very much part of the international and transnational law affected by globalization, and international and transnational law in turn have already begun changing the “domestic” practice of elder law. As the legal landscape of aging becomes more complex, there is an increasing need for specialized lawyers and advocates to help individuals, corporations, and governments navigate the law. Such specialized bars have already developed in the United States and, more recently, in the United Kingdom, Canada and Australia. This development can only continue across many other regions and

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countries, and in fact, academics and advocates in other countries are working toward an increased awareness of elder law in their respective countries.

Despite the emerging globalization of elder law and policy, until now no forum existed for scholars and practitioners concerned with the legal issues affecting the elderly to exchange and develop ideas, practices, and experiences as a global community. AARP and Stetson University College of Law are filling this void by sponsoring the *Journal of International Aging, Law & Policy*. It is our hope that this *Journal* will provide a place for many people concerned with elder law issues to exchange ideas: scholars in different countries will be able to share information about law reform and significant cases and analyze better all laws affecting the elderly; lawyers and other advocates representing aging citizens will be able to exchange information about laws across the globe that can facilitate their work and inspire changes from within their countries to improve the lives of their elderly clients; and others around the world who are working to make the lives of elderly citizens better will be able to learn more that can help them continue their important work. It is also our hope that this forum can help these groups come together as a global community, not only sharing ideas and information but also building on their shared work, knowledge and energy to foster dialogue and cooperation of action. In particular we hope that this *Journal* can help educate an emerging international community of elder law attorneys.

In some small part the initiation of the *Journal* reflects the beginnings of this international community. The *Journal* could not have managed even a single volume without the patience, hard work, and support of each of the authors: Helen Meenan (England), Issi Doron (Israel); Nancy Coleman, Sally Hurme, and John Kirkendal (United States), Denzil Lush (England); and Sue Fields (Australia). Other people who have been important to this project include Ann Soden (Canada), who has worked for many years to develop the field of elder law in her country. At Stetson, the support of two deans—the late Gary Vause and the current dean Darby Dickerson—has been instrumental in enabling the

often time-consuming administration of the editing and publication required for a journal. Professors Fox and Morgan want to single out Wayne Moore of AARP for thanks—it was his idea to create this Journal. And at AARP, two other people have been critical to the project: John Rother, Director of Policy and Strategy and Theresa Varner, Director of the Public Policy Institute (PPI). Also Sara Rix of PPI provided a very helpful review of the Journal articles.

THE FUTURE OF AGEING AND THE ROLE OF AGE DISCRIMINATION IN THE GLOBAL DEBATE

*Helen Meenan**

I. INTRODUCTION

The world is changing and so are our lives. Population ageing is affecting society at global and national levels and in a unique way at the level of the individual. This is mainly due to the added longevity that many are already experiencing in their own lives and the added and often unforeseen responsibility brought on by the longer lives of others. With the luxury of a little foresight we must plan for our third and fourth ages with greater ingenuity than our parents did. This will involve a variety of actors including the state. For our own part, we must audit our lives and make preparations for our own unique situations. For some, this will involve intricate issues of elder law, such as estate planning or trusts for family members, and for others it will mean working longer than originally intended.

This article will argue that now more than ever, we must view the various elements of our lives in an ‘interconnected’ way. We must be open to new ways of seeing and preparing for our ageing years and older selves and the benefits and burdens they may bring. It is only by taking an ‘interconnected’ approach that our working, independent selves can truly understand the needs we may have in the future and lobby and prepare for their provision in a way that our older, poorer, retired selves may not have the strength or resources to do. In a way, this approach may necessitate a gradual convergence of the interests protected by elder law and those protected by discrimination law. Indeed, it may call for an exploration of the possible nexus between them. This article will attempt to identify the role of age discrimination and anti-discrimination law in our changing lives and worlds and will ask whether we can really

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consider age discrimination on a global scale. In the process of doing so, it will examine the United Nations (UN), European Union (EU), and United States (US) approaches to age discrimination.

Financing our extra years is just one problem we face; one solution is to enable those who are willing and able to work or work for longer. Age discrimination is only one factor affecting older workers who need to remain in or find work. Nonetheless, age discrimination law is an essential starting point. Invariably, in many parts of the world, such law stops at the door of the workplace and does not cover the non-working areas of our lives. This article will show that law has not successfully eradicated discrimination; other mechanisms are needed to complement legislation and to deal with non-discrimination hurdles as well. Above all, we must cast off the shackles of a segmented approach to our lives in which we merely deal with employment problems such as labour and skills shortages or challenges facing the older employee. Growing pressures brought on by population ageing, changing employment and family patterns, and other factors affect all areas of life and demand new approaches at all levels, including that of the individual. This article will also attempt to identify these pressures and potential approaches. It will further ask whether law that is limited to age discrimination in employment truly reflects the emerging reality of our lives.

A. The Phenomenon of Population Ageing

It is well-known that population ageing is set to be a multi-level phenomenon with similar trends occurring at global, European, US, and national levels. According to the UN, the number of people aged sixty and above in the world population will grow from six hundred million in 2001 to 1.2 billion by 2025, and those aged over eighty will grow from fifty million in 1995 to reach 137 million by 2025.¹ A concurrent drop in the proportion of children will mean that the old and the young will represent an equal share of the world's population by 2050.² The situation of developing countries is particularly interesting. They already have over two-thirds of the world's population over sixty³ and are

¹ *General Comment No. 6, The Economic, Social, and Cultural Rights of Older Persons*, United Nations Committee on Economic, Social and Cultural Rights, Thirteenth sess., U.N. Doc. E/C.12/1995/16/Rev.1 (1995) [hereinafter *General Comment No. 6*].

² *Report of the Second World Assembly on Ageing*, U.N. Doc. A/CONF. 197/9, at 5 (U.N. Madrid, Spain, April 8-12, 2002) [hereinafter *U.N. Madrid Conf. Report*].

³ HelpAge International, *Equal Treatment, Equal Rights Ten Actions to End Age Discrimination 2* (London, 2001) (available at <http://www.helpage.org/publications/PapersEtc/PapersEtc.html>) [hereinafter *Equal Treatment, Equal Rights*].

predicted to experience the greatest and most rapid change with a quadrupling of the older population during the next fifty years.⁴ Other features also characterise the contrasting profile of ageing in developed and developing countries. In some developed countries and economies in transition, the proportion of older persons is already greater than that of children, with the majority of older persons in developed countries, living in urban areas, while in developing countries they tend to live in rural areas.⁵ There is also a significant contrast in their living arrangements, in developing countries, a large proportion of older persons live in multigenerational households.⁶ Within the global figures, it is also clear that older women outnumber older men and are hampered by factors such as lower salaries, interrupted work histories and family care obligations affecting their engagement in paid work which can contribute to female poverty in old age.⁷ A life course approach to well being in old age is particularly important for women “as they face obstacles throughout life with a cumulative effect on their social, economic, physical and psychological well-being in their later years.”⁸ Older women throughout the world are also said to be less likely than older men to qualify for state support, as most work outside the formal sector.⁹ A gendered approach to ageing would recognise the differing vulnerabilities of older women and men.¹⁰

B. Ageing in Europe and the US

The UN reports a similar increase in population ageing for Europe and the US between 1998 and 2025, with the proportion of older persons increasing from twenty to twenty-eight per cent in Europe and sixteen to twenty-six per cent in the US.¹¹ This will lead to a phenomenon referred to as the “rectangularisation” of the US population as it evolves “from a bottom-heavy triangle, in which the majority of people were younger than twenty, into one in which almost all age groups from 0 to 80+ are roughly the same size.”¹² The EU has reported,

⁴ See *U.N. Madrid Conf. Report*, *supra* n. 2, at 5. The UN regards ‘older persons’ as those aged sixty and above. See *General Comment No. 6*, *supra* n. 1, at 2.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ *Id.* at 6, 11.

⁸ *Id.* at 23.

⁹ Older women are less likely to qualify for state support because they are less likely to have education or literacy, and they often lack sufficient knowledge and documentation. See *Equal Treatment, Equal Rights*, *supra* n. 3, at 8.

¹⁰ *Id.* at 4.

¹¹ *U.N. Madrid Conf. Report*, *supra* n. 2, at 5.

¹² Thomas T. Perls & Margery Hutter Silver with John Lauerman, *Living to 100: Lessons in Living to Your Maximum Potential at Any Age* xii (Basic Books 1999).

in particular, on the impact of demographic change on the labour market and predicts that the European working age population will soon stop increasing in size.¹³ It will then begin to gradually reduce, but at different times and rates in different countries and regions within the EU.¹⁴ This phenomenon is due to factors such as the arrival of the “baby boomers” to the older working ages and the fertility decrease in recent decades, reducing the size of the younger population. By 2005, the age group fifteen through twenty-nine will decrease more rapidly again and the older age groups will simultaneously increase.¹⁵

In response to the shrinking and ageing of the European workforce, the EU aims to achieve activity rates for all groups in the working age population that are as high as possible.¹⁶ In 2000, the EU aimed to raise the employment rate from an average of sixty-one per cent in 2000 to seventy per cent by 2010.¹⁷ In 2001, it set intermediate targets for employment rates of sixty-seven per cent overall by 2005 and sought to raise the employment rate for older workers from thirty-seven per cent in 2001 to fifty per cent in 2005.¹⁸

Workers attracting particular attention in the EU are those who have traditionally not been employed or have been under-employed. For example, young people in training, women waiting to return to work, and persons involuntarily in part-time employment or in early retirement.¹⁹ It is noteworthy that at the national level within the EU, the position of women in particular has so far proven to be crucial. The level of female employment is identified as the main factor distinguishing EU Member States with the highest employment rates from those with the lowest.²⁰

Thus, the main theme emerging on global, North American, European and many national levels is the increase in the proportion of persons in the population that will live to be well over sixty years, and indeed over eighty years, in the near future.²¹ Planning for these extra

¹³ The term “working age population” refers to all males and females aged between fifteen and sixty-four. See European Commission, *The European Labour Market in the Light of Demographic Change* 3, 5 (Brussels 2000)(available at http://europa.eu.int/comm/employment_social/soc-prot/ageing/labour_market/intro_en.htm) [hereinafter *The European Labour Market*].

¹⁴ *Id.*

¹⁵ *Id.* at 7-8.

¹⁶ *Id.*

¹⁷ Lisbon European Council, *Presidency Conclusions* ¶ 30 (Mar. 23-24, 2000) (available at http://europa.eu.int/growthandjobs/index_en.htm).

¹⁸ See Stockholm European Council, *Presidency Conclusions* ¶ 9 (Mar. 23-24, 2001) (available at http://europa.eu.int/comm/stockholm_council/index_en.htm).

¹⁹ Manfred Krenn & Paul Oehlke for The European Work Organization Network, *Thematic paper No. 3, Integration of the Ageing Workforce* 6 (DG Employment & Social Affairs, Nov., 2001).

²⁰ *The European Labour Market*, supra n. 13, at 7.

²¹ The UN reports some exceptions in the global increase in longevity. Some developing countries are suffering a decline in life expectancy due to AIDS and warfare, so are some countries

years requires engagement at every level: global, regional, state, the workplace, and the individual. The various approaches adopted will ideally complement each other but will probably differ from each other. This is due to the very different mandate of each player and their distinct roles within global society. It is important to consider what each player brings to the task of preparing for demographic ageing and tackling age discrimination.

C. The Global Approach: Principles, Recommendations and Resolutions

Ageing has received attention from the UN for many years now. Landmarks include the International Plan of Action on Ageing adopted at the first World Assembly on Ageing,²² Vienna, 1982, and the United Nations Principles for Older Persons, 1991²³ (the UN Principles) which incorporate human rights issues. These have provided guidance at global and international levels and have been built upon recently by the Madrid International Plan of Action on Ageing, 2002 (the Madrid Plan).²⁴ The UN Principles are said to provide a global framework to govern practice on ageing.²⁵ They cover five areas, the independence, participation, care, self-fulfilment, and dignity of older persons and encourage governments to incorporate the supporting principles into their national programmes whenever possible; they unambiguously call for access and opportunities for older people to enjoy the amenities of life, beyond the most basic necessities.²⁶ For instance, they call for the opportunity for older people to work and participate in society and to be able to live in environments that are safe and adaptable to changing capacities.

The Madrid Plan also establishes guiding principles. It identifies thirty-five objectives and makes 239 detailed recommendations for action primarily by national governments, concerning all areas of life. Its recommendations for action are organised according to three priority directions: older persons and development, advancing health and well-being into old age, and ensuring enabling and supportive environments.²⁷

of the former USSR due to economic and psychological hardship associated with transition from centrally planned economies. *Follow-up to the International Year of Older Persons*, U.N. G.A. 55th Sess. 2; U.N. Doc. A/55/167 (2000).

²² *Question of Aging*, G.A. Res. 37/51 at 2; U.N. Doc. A/RES/37/51 (1982).

²³ *Implementation of the International Plan of Action on Ageing and Related Activities*, G.A. Res. 46/91; U.N. 74th Plenary Meeting, Annex, U.N. Doc. A/Res/46/91 (1991) (noting the adoption of the International Plan of Action on Ageing at the World Assembly on Ageing) [hereinafter *U.N. Principles*].

²⁴ *U.N. Madrid Conf. Report*, *supra* n. 2, at 5.

²⁵ *Equal Treatment, Equal Rights*, *supra* n. 3, at 20.

²⁶ *U.N. Principles*, *supra* n. 23.

²⁷ *U.N. Madrid Conf. Report*, *supra* n. 2, at 1.

Recommendations include that older persons should be able to continue with income-generating work for as long as they want and are able to do so productively.²⁸ Furthermore, age barriers should be eliminated in the formal labour market by promoting the recruitment of older persons and preventing the onset of disadvantages experienced by ageing workers in employment.²⁹ Core themes include the need to mainstream a gender perspective into all policies, programmes and legislation; the full realisation of all human rights and fundamental freedoms of all older persons; reaffirming the goal of eradicating poverty in old age and the elimination of all forms of violence and discrimination against older persons.³⁰ Importantly, the Plan acknowledges that the foundation of a healthy and enriching old age is laid early in life.³¹ The Plan highlights the importance of health promotion activities and health care services that include disease prevention throughout life as the cornerstone of healthy ageing and the need to promote lifelong healthy and adequate nutrition from infancy.³² It also calls for the introduction of policies and support initiatives that ease access of older persons to goods and services particularly housing.³³

Neither the Madrid Plan nor the UN Principles have any legally binding force. However, the Plan was supported and adopted in a uniquely global forum³⁴ by representatives of the Governments present at the Second World Assembly on Ageing and is important for taking a global perspective on population and individual ageing. Many of the issues highlighted therein resonate at national level and the recommendations are largely capable of practical translation into national policy. The widespread scale, timing and implications of world population ageing necessitate attention at the global level and the engagement of states in consensus minded policy-making.

II. ANTI-DISCRIMINATION AND THE GLOBAL AGENDA

The need to tackle discrimination features prominently within the global agenda. In the Political Declaration adopted by the Second World Assembly on Ageing, the representatives of Governments positively commit themselves to eliminating all forms of discrimination,

²⁸ *Id.* at 11.

²⁹ *Id.* at 12.

³⁰ *Id.* at 6-8.

³¹ *Id.* at 7.

³² *Id.* at 23-25.

³³ *Id.* at 34.

³⁴ Government representatives of 159 countries attended the assembly. *Id.* at 45-46.

including age discrimination.³⁵ The recommendations for action speak of a society for all ages that encompass the goal of providing older persons with the opportunity to continue contributing to society. To work towards this goal it is necessary to remove whatever excludes or discriminates against older persons.³⁶

Another recommendation calls for participants to ensure the full enjoyment of all human rights and fundamental freedoms by promoting the implementation of human rights conventions and other human rights instruments, particularly in combating all forms of discrimination.³⁷ This recent emphasis on the human rights needs of older persons in the global agenda is welcome. There was no explicit reference to the rights of older persons in the UN's *International Covenant on Economic, Social and Cultural Rights, 1966* nor the *Universal Declaration of Human Rights, 1948*.³⁸ This omission does not necessarily prevent older persons implicitly benefiting from the covenant and has been explained by the fact that at the time these instruments were adopted the problem of population ageing was not so obvious.³⁹ The phenomenon of population ageing in and of itself has thus helped to improve awareness of the situation and human rights needs of older people.

A. Discrimination: Other International Actors

International responses to age discrimination also occur outside the inter-governmental and UN frameworks. HelpAge International (HAI), a global network of not-for-profit organisations has drawn up ten action points with supporting recommendations to end age discrimination and “ensure that older people across the world benefit from the full range of internationally accepted human rights.”⁴⁰ HAI believes that “all societies discriminate against people on grounds of age,” and “older people are still excluded from dialogue and action to improve their situation” as a result, older individuals are not receiving their fair share of national and global resources.⁴¹ These action points include:

- recognising “the human rights of older people,”
- allocating “older people their fair share of national and global resources,”

³⁵ *Id.* at 2,10.

³⁶ *Id.* at 9.

³⁷ *Id.* at 10.

³⁸ *General Comment No. 6, supra* n. 1, at 2-3.

³⁹ *Id.*

⁴⁰ *Equal Treatment, Equal Rights, supra* n. 3, at 1.

⁴¹ *Id.*

- guaranteeing “adequate social protection and minimum income in old age,”
- providing “accessible and free health care for older people,”
- making “credit, employment, training and education schemes available to people regardless of age,”
- ensuring “policy makers listen to and act on views of older people,”
- establishing “international standards to govern public policy on ageing,” and
- supporting “older people in their role as carers.”⁴²

HAI’s basic premise is that age discrimination occurs across a range of life activities, not just employment, but it states that “[a]ction to support older people in employment is needed.”⁴³ It defines age discrimination as:

Unequal treatment or denial of rights on grounds of age by individuals or organisations. It can be detected in processes, attitudes and behaviour which amount to discrimination through prejudice, ignorance, thoughtlessness and stereotyping which disadvantage older people.⁴⁴

Within the EU, the principal age voluntary organisations have united to form the AGE Platform for Older People (AGE) with members from across the EU to promote the interests of older people. This body is committed to combating all forms of age discrimination in all areas of life and aims to monitor and influence the implementation of the various EU initiatives in this area.⁴⁵ Despite the conviction of all these groups that age discrimination exists and should be tackled in work and other areas of life, it is undoubtedly discrimination in employment that has received the most focussed attention so far.

B. Discrimination in Employment: The International Labour Organisation

The cause of discrimination in employment and occupation has been taken up since the 1950s by the International Labour Organisation

⁴² *Id.* at 3.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 1.

⁴⁵ See AGE, *The European Older People’s Platform*, http://www.age-platform.org/AGE?rubrique.php?id_rubrique=20 (accessed Apr. 11, 2004) [hereinafter *The Age Platform*].

(ILO) a UN specialised agency with 177 member countries.⁴⁶ The Discrimination (Employment and Occupation) Recommendation, 1958 (the recommendation) defines discrimination as including “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁴⁷ Age was notably absent from this definition, but the recommendation provided for the possibility to add to this list. The recommendation calls for “[e]ach [ILO] Member to formulate a national policy for the prevention of discrimination in employment and occupation” which should be applied by “legislative measures, collective agreements between representative employers’ and workers’ organisations or in any other manner consistent with national conditions and practice.”⁴⁸ Whatever the form of action taken, the Members should have regard for a number of principles including, “all persons should, without discrimination, enjoy equality of opportunity and treatment” in access to a whole spectrum of guidance, training and employment issues.⁴⁹

The recommendation is clearly concerned with employment, but importantly the recommendation advocates that the “authorities responsible for action against discrimination in employment and occupation should co-operate closely and continuously with [those] responsible for action against discrimination in other fields” so that “measures taken in all fields may be co-ordinated.”⁵⁰ This was prescient, but where does it leave the many countries and ILO and non-ILO Members throughout the world that do not have anti-discrimination laws outside the field of work or just have them in relation to a very small number of grounds? Those countries consider discrimination in a somewhat narrow fashion. Their citizens only have rights against some forms of discrimination if they have the status of employee and the discrimination occurs while they are at work, seeking or exiting work. This situation ignores the many roles and experiences of individuals outside the workplace and the fact that the perpetrators who are discriminating may themselves be doing so in the course of their own employment providing goods, facilities or services to the public. In any

⁴⁶ These include the USA, the UK, Ireland, and the Netherlands.

⁴⁷ International Labour Office, *R111 Discrimination (Employment and Occupation) Recommendation 1958* 42d Sess. 1 (Gen. Conf. Intl. Labour Org. 1958) (available at <http://www.ilo.org/ilolex/english/reportforms/pdf/22e111.pdf>) [hereinafter *Discrimination Recommendation*].

⁴⁸ *Id.* at 1-2.

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 4.

event, ILO recommendations, unlike ratified ILO conventions, are “soft law” and are not legally binding on Member countries.⁵¹

C. The ILO and Older Workers

The ILO rectified the omission of age from the definition of discrimination in its recommendation on discrimination in employment by adopting the Older Workers Recommendation, 1980⁵² (OWR). This applies to older workers who are “liable to encounter difficulties in employment and occupation because of advancement in age.”⁵³ No definition of older workers is given, but Member countries are permitted to adopt a more precise definition when giving effect to the recommendation, “with reference to specific age categories... in a manner consistent with local laws” and local conditions.⁵⁴ The OWR recommends that

Employment problems of older workers should be dealt with in the context of an over-all and well balanced strategy for full employment and, at the level of the undertaking, of an over-all and well balanced social policy, due attention being given to all population groups, thereby ensuring that employment problems are not shifted from one group to another.⁵⁵

Despite its focus on older workers, the OWR recommends equality of opportunity and treatment for workers of all ages. It calls on the Members “within the framework of a national policy to promote equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers.”⁵⁶ This is important to ensure that workers do not suffer when older because of discrimination when they were younger. It also promotes an approach that recognises that age

⁵¹ For a discussion of the legal status of ILO recommendations and conventions see *Social and Labour Rights in a Global Context: International and Comparative Perspectives* 238-257 (Bob Hepple ed., Cambridge U. Press 2002).

⁵² *R162 Older Workers Recommendation, 1980*, § I (1) (1) (Cen. Conf. Intl. Labour Org. 66th session, Geneva, Switzerland, June 23, 1980) (available at http://www.ilo.org/public/english/employment/skills/recomm/instr/r_162.htm) [hereinafter *Older Workers Recommendation*].

⁵³ *Id.* at § I (1).

⁵⁴ *Id.* at § I (1) (2).

⁵⁵ *Id.* at § I (2).

⁵⁶ *Id.* at § II (3).

discrimination can affect younger workers. The OWR covers additional fields to the 1958 recommendation for other forms of discrimination including: paid educational leave, in particular for training and trade union education; social security and welfare benefits; occupational safety and health measures; and access to housing, social services, and health institutions, in particular when this access is related to occupational activity or employment.⁵⁷ This is a welcome development given the complex needs of many older people in society, but perhaps in light of the multiple identities of all people, including older people, these areas should be extended to all workers and expanded. The pursuit of employment of their choice by older workers, may, in any event, be restricted in exceptional cases by age limits which may be set because of special requirements, conditions or rules of certain types of employment.⁵⁸ A particular example in European countries is mandatory retirement, which already has a downward effect on age limits for training. The EU's Employment Directive, which is discussed below, outlaws discrimination in employment on age and other grounds, although EU Member States may retain national provisions laying down retirement ages and permit "[T]he fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."⁵⁹

The OWR also advocates measures to improve working conditions and the working environment at all stages of working life and specific measures designed to "enable older workers to continue in employment under satisfactory conditions."⁶⁰ It sets out five actions where practicable, to help older workers adapt where difficulties are related to advancement in age, including "adapt[ing] the job and its content to the worker by recourse to all available technical means...."⁶¹ It recommends actions that might be taken at the level of the undertaking such as "promoting the gradual reduction of hours of work" prior to retirement of all older workers who request it.⁶² Wherever possible, measures should be taken with a view to ensuring that retirement is voluntary within "a framework allowing for a gradual transition from working life" to retirement and "making the age qualifying for an old-

⁵⁷ *Id.* at § II (5).

⁵⁸ *Id.* at § II (5)(b)(i).

⁵⁹ Council Directive 2000/78/EC recital 14, art. 6.1(c); 2000 O.J. (L303) 16, 20. See Helen Meenan, *Age Equality After the Employment Directive*, 10 Maastricht J. European & Comp. L. 9, 14-15 (2003) (discussing retirement ages under the Directive).

⁶⁰ *Older Workers Recommendation*, *supra* n. 52, at § III (11).

⁶¹ *Id.* at § III (13)(c).

⁶² *Id.* at § III (14)(b).

age pension flexible.”⁶³ These issues have been echoed recently at supranational and national levels within the EU.⁶⁴ There appears to be a number of rationales for them. These include, to make work more attractive and manageable for older people and to enable those who wish to do so, to stay at work for longer than the traditional norm so that they can add to the labour supply and provide adequately for their own old age.

D. Discrimination Law Assessed

In 2003, the ILO launched a global report on discrimination at work which “lays the blame for continuing discrimination on prejudices, stereotypes and biased institutions that have resisted decades of legal efforts and policy measures undertaken by governments, workers and employers against unequal treatment at work.”⁶⁵ It found that “discrimination is still a common problem in the workplace,” progress has been erratic even for long recognised forms and that “failure to eradicate discrimination helps perpetuate poverty.”⁶⁶ The ILO report identifies the workplace as an important place for tackling discrimination as the elimination of discrimination there is strategic to combating discrimination elsewhere. It states that “[W]hen the workplace brings together people with different characteristics and treats them fairly, it helps to combat stereotypes in society as a whole. It forces a situation where prejudices can be defused and rendered obsolete.”⁶⁷ However, it found that outlawing discrimination at work has failed to eliminate the practice and anti-discrimination laws are an indispensable but insufficient step. It identifies effective enforcement, positive action,

⁶³ *Id.* at § IV (21)(a)-(b).

⁶⁴ See *Presidency Conclusions Barcelona European Council 15 and 16 March 2002*, SN 100/1/02Rev 1, part 1, ¶ 30; part 3, ¶ 26; *Employment and Social Policy* ¶ 10 (Mar. 16, 2002) (available at <http://ue.eu.int/presid/conclusions.htm>; *select* 2002). For the UK see, Zmira Hornstein, *Towards Equality and Diversity: Review of Key Responses to the Government Consultation with Emphasis on Age Discrimination*, Age Concern 15, annex 3 (2002). Notably, the UK’s draft Employment Equality (Age) Regulations 2006 propose introducing a default retirement age of 65 so that employers will have to justify any earlier retirement age. They also propose imposing a duty on employers to consider a request by an employee to work beyond the planned retirement age. See Department of Trade and Industry, *Equality and Diversity: Coming of Age—Consultation on the draft Employment Equality (Age) Regulations, 2006* (Jul. 2005) 58, available at www.dti.gov.uk/er/equality/age.htm [hereinafter *Equality and Diversity*].

⁶⁵ Intl Labour Office, *ILO Launches First Global Report on Discrimination at Work*, Media Release (May 2003)(available at <http://www.ilo.org/dyn/declares/DECLARATIONWEB.INDEXPAGE>; *path* Media; *select* Media Releases) [hereinafter *Media Release*] (citing Intl. Labour Office, *Time for Equality at Work*, International Labour Office Report I (B) of the International Labour Conference, 91 Sess. 2003 (Geneva 2003) [hereinafter *Time for Equality at Work*]).

⁶⁶ Media Release, *supra* n. 65, at 3.

⁶⁷ *Time for Equality at Work*, *supra* n. 65, at 25.

promotion, education, training and employment services and monitoring as essential in addition to legislation.⁶⁸ Juan Somavia, Director-General of the ILO speaking of the report has said that “[T]here is no ‘one size fits all’ solution for equality at work as the problem is different, country-by-country and group-by-group” and that “[e]liminating discrimination at work is everybody’s responsibility.”⁶⁹

Thus, much information and guidance is given at global and international levels by a variety of organisations on what discrimination and age discrimination are and how to address them. The ILO reveals that discrimination law on its own will not change practice but recognises the important role of legislation. The international organisations discussed will have the greatest influence on their own membership, but, even then, the language and structure of engagement depends much on the willingness of their members to pay more than lip service. For instance, implementation of the UN’s Madrid Plan is to be monitored and the ILO Recommendations suggest what Members should do.⁷⁰ A fundamental contrast therefore exists between the powers of global and international organisations that do valuable work in highlighting problems and recommending action to tackle them on the one hand, and national governments and supranational organisations such as the EU to adopt legislation and penalise infringement, on the other. The absence of similar penalties in global and international fora contributes to an impression that nothing truly concrete can be achieved within them. This underestimates their role in garnering the collective will of governments and agreeing where and how action needs to be taken.

The nature of the relationship between the EU and its Member States is also telling. Member States participate in the adoption of Directives and other laws and are bound to implement them correctly by the due date.⁷¹ Any delay or error in implementing Directives in national law can result in an action being taken by the European Commission against them before the European Court of Justice and ultimately in fines.⁷² This diverges from the relationship such states have with international bodies such as the UN or the ILO. The EU is a unique

⁶⁸ *Id.* at xii, 58, 61, 63.

⁶⁹ Media Release, *supra* n. 65.

⁷⁰ See *Madrid Conf. Report*, *supra* n. 2, at 42 (discussing global monitoring, review, and updating of the plan); e.g. *Older Workers Recommendation*, *supra* n. 52, at 1 (determining that its proposals should “take the form of a recommendation”).

⁷¹ Consolidated version of the *Treaty Establishing the European Community* as amended in accordance with the *Treaty of Nice* [2002] O.J., C325/1-184 [hereinafter *EC Treaty*].

⁷² *Id.*

organisation and union of states having a more interdependent relationship with its Member States.

III. EUROPEAN UNION AND US APPROACHES TO AGE DISCRIMINATION

The EU has recently revolutionised discrimination law for most of its fifteen old Member States⁷³ and the ten new countries that joined the EU in 2004.⁷⁴ Traditionally, EU law protected nationals of Member States from discrimination in two areas only: nationality discrimination within the areas covered by the European Community Treaty⁷⁵ and sex discrimination in employment.⁷⁶ Two new EU laws were adopted in 2000 to radically expand the grounds protected from discrimination. These are Directives addressed to EU Member States, which set out the legal framework to be established in national law and require a certain minimum level of protection. The first was the Council Directive on Implementing The Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (the Race Directive) which had to be transposed into national law by 19 July 2003.⁷⁷ The Race Directive establishes a minimum level of protection on grounds of racial or ethnic origin in employment, access to training, social protection, social advantages, education, and access to and supply of goods and services, which are available to the public including housing.⁷⁸ The extension of anti-discrimination protection beyond the field of employment in this instance represents a major innovation for EU equality law.⁷⁹

The second was Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation (the Employment Directive) requires Member States to outlaw “discrimination on the grounds of religion or belief, disability, age, or sexual orientation.”⁸⁰ However, in sharp contrast to the Race Directive only employment and access to vocational training are covered.⁸¹ Most

⁷³ France, Germany, Italy, Belgium, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Portugal, Spain, Austria, Sweden, and Finland.

⁷⁴ Cyprus, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, and Malta.

⁷⁵ *EC Treaty*, *supra* n. 71, at art. 12.

⁷⁶ *Id.* at art. 141.

⁷⁷ Council Directive 2000/43/EC, art. 16; 2000 O.J. (L180) 22-26.

⁷⁸ *Id.* at preamble 12, art. 3(1).

⁷⁹ This was bound up with the fight against racism and xenophobia in the EU. In order to ensure the development of democratic and tolerant societies, action to combat discrimination based on racial or ethnic origin had to go beyond employed and self-employed activities. *Id.* at preamble 5, 7, 10-13.

⁸⁰ Council Directive 2000/78/EC at art. 1.

⁸¹ *Id.* at preamble 9 (stating “Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural, and social life and to realising their potential.”).

provisions of the Employment Directive cover all five grounds though some provisions are specific to one or two grounds only. This Directive had to be implemented into national law by 2 December 2003.⁸² However, “[i]n order to take account of particular conditions, Member States may apply for a three-year extension until 2006 to introduce discrimination law for age and disability.”⁸³

Both Directives require Member States to outlaw direct discrimination, indirect discrimination,⁸⁴ victimisation,⁸⁵ and harassment⁸⁶ on all grounds and permit them to maintain or adopt positive action measures.⁸⁷ They also provide for a genuine and determining occupational requirement (GDOR)⁸⁸ which corresponds, though not identically, to the bona fide occupational requirement (BFOQ) in the Age Discrimination in Employment Act of 1967 (ADEA).⁸⁹ The ADEA permits employers to use age as a BFOQ, which is “reasonably necessary to the normal operation of the particular business....”⁹⁰ It has been used by US employers to justify mandatory retirement in some jobs but is difficult to prove. The EU’s provision allows Member States to provide that

a difference of treatment which is based on a characteristic related to any of the grounds ... shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁹¹

The author believes it is less likely that an EU Member State would attempt to justify mandatory retirement ages for certain jobs by invoking a GDOR. In any event, the Preamble to the Employment Directive makes it very clear that it is only “[i]n very limited circumstances” that such a difference in treatment may be justified.⁹² In

⁸² *Id.* at art. 18 ¶ 1.

⁸³ *Id.* at art. 18 ¶ 2.

⁸⁴ *Id.* at art. 2 (1); Council Directive 2000/43/EC at art. 2(1).

⁸⁵ Council Directive 2000/78/EC at art. 11; Council Directive 2000/43/EC at art. 9.

⁸⁶ Council Directive 2000/78/EC at art. 2(3); Council Directive 2000/43/EC at art. 2(3).

⁸⁷ Council Directive 2000/78/EC at art. 7; Council Directive 2000/43/EC at art. 5.

⁸⁸ Council Directive 2000/78/EC at art. 4; Council Directive 2000/43/EC at art. 4.

⁸⁹ 29 U.S.C. § 623(f)(1) (2000).

⁹⁰ *Id.*

⁹¹ Council Directive 2000/78/EC at art. 4 (1).

⁹² *Id.* at preamble 23.

relation to age, specific provisions in the Employment Directive allow Member States to choose not to apply the provisions on age or disability to all or part of their armed forces⁹³ and Article 6 contains an exceptional opportunity for Member States to justify differences in treatment on the age ground only.⁹⁴

A. The Employment Directive and the ADEA Compared

A number of key differences exist between the Employment Directive and the ADEA. One is the issue of differing terminology and meaning in both instruments. For instance, in the Directive, “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be treated in a comparable situation, on any of the grounds....”⁹⁵ By contrast the ADEA makes it unlawful for an employer

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual’s age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or
- (3) to reduce the wage rate of any employee in order to comply with [the ADEA].⁹⁶

The Directive, like other EU equality provisions, also provides for indirect discrimination, which “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons....”⁹⁷ There is a possibility to objectively justify such a provision, criterion, or practice by a legitimate aim if the means of achieving that aim are appropriate or necessary.⁹⁸ The ADEA does not have a provision that corresponds with indirect discrimination. However, the disparate impact theory in US law is very similar as it

⁹³ *Id.* at preamble 19, art. 3(4).

⁹⁴ *Id.* at art. 6.

⁹⁵ *Id.* at art. 2(2)(a).

⁹⁶ 29 U.S.C. §623(a)(1)-(3).

⁹⁷ Council Directive 2000/78/EC at art. 2(2)(b).

⁹⁸ *Id.* at art. 2(2)(b)(i).

concerns an employer's apparently neutral policy or practice that has a significant adverse impact on the protected group even though discriminatory intent may be missing.⁹⁹

Another issue is that of age limits. The ADEA commences protection for employees at the age of forty and is without an upper age limit, but state police and fire departments are allowed to set mandatory recruitment and retirement ages.¹⁰⁰ Company executives or high policy-making employees may be compulsorily retired at sixty-five, subject to certain conditions.¹⁰¹ The Employment Directive contains neither upper nor lower age limits for protection from age discrimination; this matter is left for the Member States and it does not affect national retirement ages which may remain the same on implementation of the Directive or may be altered at a later date.¹⁰² However, by virtue of Article 6, EU Member States may permit minimum or maximum age limits for recruitment where they can be objectively and reasonably justified by certain legitimate aims such as employment policy, labour market, and vocational training objectives.¹⁰³

A fundamental difference exists in the manner in which discrimination claims are brought in the US and in Europe. The Employment Directive envisages what may be referred to as the individual litigation model whereby a person brings an action usually against his or her employer in an appropriate forum such as a court or tribunal.¹⁰⁴ This approach is predicated on waiting until an act of discrimination has already taken place and does nothing to audit and intercept questionable practices. Member States are free however to provide a higher level of protection than that required by the Directive and to use additional means to achieve equality.¹⁰⁵ The Employment Directive, unlike the Race Directive, does not require the establishment or designation of a body or bodies for the promotion of equal treatment

⁹⁹It has been difficult for age discrimination claimants to prove successfully disparate impact as compared with race and sex discrimination claimants. Some US appellate courts have held that it is unavailable under the ADEA. See generally Laurie McCann, *Age Discrimination in Employment Legislation: The United States Experience* (available at <http://www.aarp.org/research/work/agediscrim/a2003-03-25-agediscrimination.html>); Helen Meenan, *Age Discrimination: Law-Making Possibilities Explored*, 4 Intl. J. Discrimination & L. 247, 269 (2000).

¹⁰⁰ 29 U.S.C. § 623 (j).

¹⁰¹ 29 U.S.C. § 631(c)(1), (2).

¹⁰² Council Directive 2000/781/EC at preamble 14.

¹⁰³ *Id.* at art. 6(1)(b)-(c).

¹⁰⁴ *Id.* at art. 9.

¹⁰⁵ The Irish Employment Equality Act of 1998 already provides for codes of practice, research and information, equality clauses, inquiries, non-discrimination notices, equality reviews, equality action plans and review of the legislation. See generally *Employment Equality Act 1998* as amended by the *Equality Act 2004* (available at http://www.equalitytribunal.ie/html/equality_legislation_reviews/irish_acts_stat_instr.htm).

on any of the grounds, which *inter alia* would provide independent assistance to victims.¹⁰⁶

By contrast, the ADEA provides a number of clear roles for the Equal Employment Opportunities Commission (EEOC), the federal agency charged with enforcing the ADEA and other employment discrimination statutes.¹⁰⁷ In the US, individuals may not proceed directly to court, but must first file a charge of discrimination with the EEOC.¹⁰⁸ Charges must be filed within 180 or 300 days of the discrimination.¹⁰⁹ Once the charge-filing requirement has been satisfied, individuals may file a lawsuit in court at any time from sixty days after they file the charge up to ninety days after they receive notice from the EEOC that it has terminated its proceedings.¹¹⁰ Once notified, the EEOC has powers of investigation and will first attempt to resolve the problem between employer and employee by informal means such as conciliation.¹¹¹ Although the EEOC may file suit under the ADEA on behalf of discrimination victims, it does so in only a very small number of the charges it receives.¹¹² However, if the EEOC does file suit, the individuals named in the EEOC's suit may not bring their own private lawsuits.¹¹³

There is also a major potential difference in outcome in an age discrimination action. The ADEA does not provide for punitive or compensatory damages, unlike Title VII of the Civil Rights Act 1964 for sex and race discrimination.¹¹⁴ This situation has attracted criticism as it implies that age discrimination victims are less deserving of a remedy and the separate statutory protection suggests that age discrimination is less wrong than sex and race discrimination.¹¹⁵ The Directive provides that Member States shall lay down rules on sanctions, which may

¹⁰⁶ See Council Directive 2000/43/EC, *supra* n. 77, at art. 13(1) (requiring Member States to “designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”).

¹⁰⁷ 29 U.S.C. §§ 623, 626 (2005); EEOC, *Laws Enforced by the EEOC*, <http://www.eeoc.gov/policy/laws.html> (accessed Feb. 20, 2005).

¹⁰⁸ 29 U.S.C. § 623 (d) (2005); EEOC, *EEOC's Charge Processing Procedures*, http://www.eeoc.gov/charge/overview_charge_processing.html (accessed Feb. 20, 2005).

¹⁰⁹ 29 U.S.C. § 623 (d)(1) (2005); EEOC, *Filing a Charge of Employment Discrimination*, http://www.eeoc.gov/charge/overview_charge_filing.html (accessed Feb. 20, 2005).

¹¹⁰ 29 U.S.C. § 623 (b)(d) (2005); EEOC, *EEOC's Charge Processing Procedures*, http://www.eeoc.gov/charge/overview_charge_processing.html (accessed Feb. 20, 2005).

¹¹¹ 29 U.S.C. § 623(b)(d) (2005).

¹¹² See EEOC, *EEOC's Charge Processing Procedures*, http://www.eeoc.gov/charge/overview_charge_processing.html (accessed Feb. 20, 2005).

¹¹³ 29 U.S.C. § 623(c)(1) (2005).

¹¹⁴ For damages and other remedial provisions of Title VII see 42 U.S.C. § 1981a(b), § 2000e (2004).

¹¹⁵ E.g. Cathy Ventrell-Monsees & Laurie McCann, Lecture, *Ageism: The Segregation of a Civil Right* 11-14 (Annual Meeting of the Gerontological Soc. of Am., Nov., 24, 1991).

comprise the payment of compensation to the victim, but in line with previous EU case law, sanctions must be effective, proportionate, and dissuasive.¹¹⁶ Thus there must be sanctions but the separate issue and nature of any compensation is left to the Member States to decide.¹¹⁷ One of the greatest contrasts between the EU and US regimes is the availability of class actions in the US. The Directive is silent on this issue, theoretically permitting Member States to provide for class actions to combat discrimination on the various grounds. Class actions as understood in the US are not yet possible in the UK or Ireland, for example.¹¹⁸ Another difference is the fact that the US does not have unfair dismissal laws, which operate at national level in the EU and enable employees to challenge their dismissal. In the UK, workers who are sixty-five or over the normal retirement age are currently precluded from bringing an action for unfair dismissal or redundancy.¹¹⁹ This has recently withstood a robust challenge in the British Employment Tribunal system.¹²⁰ In the UK such employees appear at present to have fewer employment rights than their younger colleagues. The British government has stated that these rules are incompatible with the Employment Directive and sought views from the public on its proposal that “employees can seek redress at any age, but retirement at a justifiable age will be a fair reason for dismissal;” in 2003, it proposed that employers would have to justify any normal retirement age below seventy and employees would still be able to claim unfair dismissal at seventy or above for reasons other than retirement.¹²¹ However, in 2004, it decided to set a default retirement age of sixty-five and a right for employees to request working beyond a mandatory retirement age so that

¹¹⁶ Council Directive 2000/78/EC at art. 17.

¹¹⁷ *Id.*

¹¹⁸ However, there has been an expansion of group litigation claims in the UK in specialised fields such as financial services’ liability. The British government conducted a consultation exercise in 2001 on whether to introduce a general provision for representative actions but the response indicated a lack of support for this approach. It may introduce more specialised legislation for certain areas. See generally Dept. for Constitutional Affairs, *A Lord Chancellor’s Department Consultation Paper: Representative Claims: Proposed New Procedures* (Feb. 2001), <http://www.dca.gov.uk/consult/general/repclaims.htm> (accessed Feb. 20, 2005); Dept. for Constitutional Affairs, *Consultation Response: Representative Claims: Proposed New Procedures* (Apr. 2002), <http://www.dca.gov.uk/consult/general/represp.htm> (accessed Feb. 20, 2005).

¹¹⁹ Employment Rights Act, 1996, §§ 109(1)(a)-(b), 156(1)(a)-(b) (U.K.). The U.K.’s draft Employment Equality (Age) Regulations 2006 propose amending the law so that employees working over the age of 65 will have unfair dismissal rights and the right to redundancy payments. See *Equality and Diversity*, *supra* n. 64, at 55.

¹²⁰ See *Sec. of State for Trade and Industry v. Rutherford*, 3 C.M.L.R. 27 (Empl. App. Trib. 2003); Frances Gibb, *Pensioners Lose Court Fight for Rights at Work 2*, *The Times* (London) (Oct. 3, 2003).

¹²¹ Dept. of Trade and Indus., *Equality and Diversity: Age Discrimination in Employment and Vocational Training: The Age Matters Consultation 2003*, 31-33 (July 2003) (available at [http://www.dti.gov.uk/er/equality/age;select The Age Matters Consultation](http://www.dti.gov.uk/er/equality/age;select%20The%20Age%20Matters%20Consultation)).

no one will have to retire before sixty-five without appropriate justification.¹²²

B. Existing Innovations at National Level within the EU

In truth many EU Member States already had anti-discrimination law covering disparate grounds prior to these Directives. The UK, Ireland, and Northern Ireland could rightly be regarded as champions among this group. The UK for its sex, race, and disability laws and more recently for imposing a positive duty on public authorities requiring them to promote racial equality by actively identifying barriers to equality and tackling them in their dual role as public service providers and employers.¹²³ The innovations in Northern Ireland's equality and human rights law, inspired by historical divisions within its society, are too numerous to document here. However, Northern Ireland law provides a similar though not identical duty on public authorities to "have due regard to the need to promote equality of opportunity" when carrying out their functions between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally and between persons with a disability and those without.¹²⁴

Prior to the adoption of the Directives, Ireland had the most comprehensive anti-discrimination law in Europe.¹²⁵ The Employment Equality Act, 1998 (EEA) was a model for the Employment Directive and outlaws discrimination in employment on nine grounds: gender, marital status, family status, sexual orientation, age, disability, religion, race and being a member of the Traveller community.¹²⁶ It is worth noting that protection from age discrimination in employment previously started at the age of eighteen and ended at age sixty-five in Ireland but has been altered to cover workers from the age of sixteen and the upper age limit of sixty-five has been removed;¹²⁷ this is hugely important as it

¹²² See Dept. of Trade and Indus., *Government Unveils Plans on Age Discrimination*, Press Release (Dec. 14, 2004) (available at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=139225&NewsAreaID=2>).

¹²³ *Race Relations Act 1976* as amended by the *Race Relations Act 2000* and the *Race Relations Act 1976 Regulations 2003* ch. 76, 77, schedule 1A.

¹²⁴ *Northern Ireland Act, 1998*, ch. 47, § 75(1) (N. Ir.).

¹²⁵ E.g. *Employment Equality Bill Bars Discrimination on Nine Grounds*, EIRR 273, 22, Oct. 1996.

¹²⁶ See *Employment Equality Act, 1998* § 6 (2) (Ir.). The term "Traveller Community" refers to "the community of people...who are identified (both by themselves and by others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland." *Equal Status Act, 2000*, No. 8 § 2 (Ir.).

¹²⁷ *Employment Equality Act, 1998* § 6(3)(a) as amended by the *Equality Act 2004*. However, employers may set a minimum recruitment age of 18. *Id.* at § 6(3)(b).

increases protection for people of all working ages both younger and older from age discrimination. Although very extensive, the EEA still required amendments to comply with the Employment Directive. The most striking feature of Irish equality law is not just the wide range of grounds covered but significantly the fact that the Equal Status Act, 2000 (as amended) (ESA) outlaws discrimination on the same nine grounds in the sale or provision of goods, facilities, and services.¹²⁸ Thus, Irish law greatly exceeded the coverage provided by EU law. While the ESA has a lower age limit of eighteen for age discrimination, it does not contain an upper age limit. This is invaluable in achieving equality for older people. It recognises that while older people may cease employment at sixty-five and sometimes sooner, they continue to be consumers and purchasers of goods, real estate, and services, which are disposed of to the public long after that age. It also recognises that it is generally more difficult to establish a rationale for upper age limits in laws against discrimination outside employment.

C. A Unique Challenge for the EU and the US: The Case of Airline Pilots

Many factors mitigate against older people in employment, of these age limits and mandatory retirement are among the most impenetrable barriers. Some professions have lower retirement ages than others. While airline pilots are not the most everyday example, their position highlights the complex interplay of capability, mandatory retirement, public safety, national, and international regulation in a way that few other professions do. They also highlight the fact that US federal and EU attempts to tackle age discrimination fail to cater for what may be termed inter-regional and intra-regional differences in age limits for certain professions. This can affect the ability of individuals to do their job if it involves travelling across borders and, can affect them migrating in search of employment. Airline pilots have garnered attention on both sides of the Atlantic. Resolution of this issue is not necessarily within the remit of governments or supranational organisations, such as the EU and in the case of air travel may rest, with international or regional transport associations governing the industry.

D. The Situation of Pilots in the EU

The EU does not set age limits for airline pilots flying in Europe; at the moment this is a matter for the Member States. Inadequacies with

¹²⁸ *Equal Status Act, 2000* § 3 as amended by the *Equality Act 2004*.

this approach were brought to light in 2000 by a petition presented to the European Parliament by the British, Independent Pilots Association which has members up to sixty-five years of age.¹²⁹ This petition was made on behalf of pilots who had lost their jobs or whose jobs were in jeopardy due to a French ban on pilots in command over the age of sixty.¹³⁰ Such captains from EU and non-EU countries alike cannot fly over France. The Convention on International Civil Aviation [“Chicago Convention”] governs the licensing of flight crews on international commercial flights.¹³¹ Annex One of the Convention prohibits pilots in command over the age of sixty on international flights and also recommends that co-pilots on such flights should not be over sixty.¹³² According to the European Commission’s reply to the petition (the reply), some countries have filed a difference with Annex One of the Convention to allow their own licences to operate beyond this age limit.¹³³ However, they are unable to compel other states to accept this difference for flights over their territory. The reply speaks of the role of the Joint Aviation Authority (JAA) which operates at the European level and previously reached a compromise to allow licences to remain valid up to the age of sixty-five, provided the captain operates on a multi-crew plane and the co-pilot is under sixty.¹³⁴ This compromise was non-binding therefore any JAA Member State can still refuse to allow a commercial plane to fly over its territory if the captain is over sixty.

The reply indicated that the European Commission was planning to present a proposal to harmonise flight crew licensing throughout the European Community, in effect to transpose the JAA compromise into EU law.¹³⁵ However, the EU has since adopted a regulation in 2002 to create the European Aviation Safety Agency (EASA)¹³⁶ and “establish and maintain a high uniform level of civil aviation safety in Europe.”¹³⁷

¹²⁹ Petition 118/2000 by Mr. M.J. Barringer on behalf of the Independent Pilots Association, on possible age discrimination which obstructs the free movement of persons and services within the EU, considered by the Committee on Petitions of the European Parliament on 10 April 2001. Note more recently, Easy Jet and BALPA’s campaign against France, Portugal and Italy’s ban on pilots in command over sixty, see Andrew Clark, *Easy Jet Wants Its Ageing Pilots Free to Fly Anywhere*, The Guardian (London) (Dec. 1, 2003) (available at http://www.easyjet.com/EN/News/20031201_01.html).

¹³⁰ The reason given in the petition for the French lowering the age limit was “for internal political reasons.”

¹³¹ Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 295 (Dec. 7, 1944).

¹³² *Id.* at annex 1.

¹³³ Summary of Petition and Commission reply received by the Committee on Petitions on February 2, 2001, CM\432\432837EN.doc PE 299.626.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Council Regulation 1592/2002 art. 12(1), 2002 O.J. (L240) 1, 7. (Common Rules in the Field of Civil Aviation and Establishing a European Aviation Safety Agency).

¹³⁷ *Id.* at art. 2(1).

The EASA was inaugurated in 2004 and will take up the matter of flight crew licensing by giving an opinion to the European Commission, which in turn will make legislative proposals addressing this issue.¹³⁸ The outcome of this process cannot be pre-judged at this point and will take some time to reach.

E. The Situation for Pilots in the US

In effect, US pilots in command and co-pilots have been prohibited on commercial flights over the age of sixty (the age sixty rule) by Federal aviation regulations since 1960.¹³⁹ A number of unsuccessful attempts have been made to change the law so that the Federal Aviation Authority (FAA) could be required to license pilots up to the age of sixty-five.¹⁴⁰ The FAA has also been challenged in US courts mainly because it steadfastly refuses to grant exceptions to the age sixty rule.¹⁴¹ The position is further complicated by the fact that the age sixty rule does not apply to flight engineers. Depending on an airline's internal policy a captain or first officer may be able to downgrade his or her position to flight engineer on reaching sixty.¹⁴² This too has led to litigation with airlines fighting claims where pilots were unable to down bid in this way.¹⁴³ Some pilots have been successful in establishing that denial of such an opportunity violates the ADEA where the airline cannot justify its decision on the basis of reasonable factors other than age. Some airlines also attempt to apply the age sixty rule to flight engineers and then plead the rule as a BFOQ when defending an ADEA claim, with mixed results.¹⁴⁴

The consequences of this state of affairs are obvious for non-US and US pilots alike. It seems US pilots must where possible, choose their employer with a good deal of foresight and cannot command or co-pilot

¹³⁸ *Id.* at art. 7, 12. See also Jacques Barrot, Address, *Inauguration of the European Aviation Safety Agency (EASA)* (Cologne, Dec. 13, 2004) (available at http://www.easa.eu.int/home/events_en.html, path 13 Dec. 2004:Speeches; select Address by Jacques Barrot).

¹³⁹ 14 C.F.R. § 12.383 (c)(2003).

¹⁴⁰ Harry A. Risetto, *Age Discrimination Act and Americans with Disabilities Act Issues Affecting Airline Employees*, in *Airline and Railroad Labor and Employment Law: A Comprehensive Analysis* 1419, 1421 (ALI-ABA 2003). (also available as course materials from the ALI-ABA at <http://www.ALI-ABA.org>).

¹⁴¹ *Id.* The FAA asserts that it is a regulator of the airline industry rather than an employer within the scope of the ADEA. *Id.* at 1422. Alternatively, it asserts "that the age 60 rule is a bona fide occupational qualification [BFOQ], and therefore, comes within an exception to the Act." *Id.*

¹⁴² *Id.* at 1421.

¹⁴³ *Id.* at 1423-1425.

¹⁴⁴ *Id.* at 1422-1423.

any commercial passenger flight once they reach sixty.¹⁴⁵ Practically speaking a European or foreign airline landing or over-flying the US must either, have a captain and co-pilot under sixty or can it mean that a captain or co-pilot who is over sixty must swap seats with the flight engineer before entering US air space? European pilots who are sixty and are licensed to fly until sixty-five by their own country are very restricted in the practise of their calling. They are unable to fly into or fly over France and the US, among others.

F. Crash Risk, Capability, Age and Older Pilots

The age sixty rule has survived in the US despite a growing number of studies over many years into the influence of ageing on professional pilots. A study published in 2003 explored the correlation between age, experience, and crash involvement in professional pilots.¹⁴⁶ It differed from earlier studies, which were based on cross-sectional rather than longitudinal data, and examined over 3,300 pilots aged between forty-five and fifty-four years in 1987, from 1987 to 1997.¹⁴⁷ It posed the “fundamental question concerning... the ‘age-60 rule [of] whether pilots’ risk of crash involvement changes significantly in the process of ag[e]ing”¹⁴⁸ and found that crash risk was not significantly associated with advancing age.¹⁴⁹ The eleven year study period revealed that pilots with less than five thousand hours of flight experience were nearly twice as likely as more experienced pilots to be involved in a crash and crash rates remained fairly stable as pilots’ ages rose from forty-five to forty-nine years to fifty-five to fifty-nine years.¹⁵⁰ Thus, flight experience is a more significant determinant of crash risk than ageing.¹⁵¹ The study also found that “[t]he protective effect of flight experience on crash risk appeared to level off after total flight time at baseline reached 10,000 hours.”¹⁵² These results can partly be explained by what the authors describe as the “healthy worker effect,” pilots experiencing greatest declines in function due to ageing, were likely to have been weeded out through rigorous medical screening.¹⁵³

¹⁴⁵ The age sixty rule was extended to commuter air carriers and air taxis with fewer than ten passenger seats and came into effect in 1999. 14 C.F.R. § 135.243 (a)(1) (2004).

¹⁴⁶ Guohua Li et al., *Age, Flight Experience, and Risk of Crash Involvement in a Cohort of Professional Pilots*, 157 Am. J. Epidemiology 874 (2003).

¹⁴⁷ *Id.* at 875.

¹⁴⁸ *Id.* at 875.

¹⁴⁹ *Id.* at 878.

¹⁵⁰ *Id.* at 877.

¹⁵¹ *Id.* at 878.

¹⁵² *Id.*

¹⁵³ *Id.*

Additionally, pilots still flying at an advanced age are likely to have maintained a favourable safety record.¹⁵⁴ Ultimately the “study provides empirical evidence that... the crash rate per million pilot flight hours remains steady” until sixty years of age.¹⁵⁵ Unfortunately data for pilots over sixty was too scarce for results to be conclusive beyond that age.¹⁵⁶

IV. AGE RESTRICTIONS AT NATIONAL LEVEL WITHIN THE EU

A. Age Limits in the UK

Many age restrictions exist at national level in a variety of more commonplace jobs. This was revealed in 2000-2001 when the UK Department for Work and Pensions commissioned a study of ageism arising from minimum and maximum age restrictions across nine sectors and occupations.¹⁵⁷ Evidence suggested that as many as six out of ten British employers preferred “not to recruit staff beyond the age of 35 and that up to 40% of companies admit to practising ageism.”¹⁵⁸ The study was intended merely as a snapshot of key areas but yields impetus for action, largely at the level of the sector and the enterprise. It identified three areas where age may be an issue: (1) the workforce age profile of a sector could be skewed in a particular direction; (2) age restrictions or limitations could be discriminatory and; (3) the “combination of changing demographics... and the current age profile of an industry is one of the reasons for skills and recruitment difficulties being faced by the industry.”¹⁵⁹ Overall the study revealed that despite some justifiable reasons¹⁶⁰ and explicable factors, the combined age profile for all sectors and occupations in the UK is weighted towards workers aged thirty-five through forty-nine, with a steep decline after fifty.¹⁶¹

Five rationales for formal and informal age limitations were identified: legislation, perceptions of age group, economic incentives,¹⁶² features of the industry, and external factors such as pensions and UK IT literacy.¹⁶³ Legislation imposing age restrictions affected fields such as

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 878-879.

¹⁵⁶ *Id.* at 879.

¹⁵⁷ Dept. for Education and Employment, *Occupational Age Restrictions: Summary Report*, <http://www.agepositive.gov.UK/complogos/TESTsummarygraph.doc> (July 2001) (accessed Feb. 20, 2005). The nine sectors and occupations are: Retail; Information, Communicational, and Technology; Law Finance; Transport; Food; Local Authorities; Animal Care; and Medical. *Id.* at 2.

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.* at 3.

¹⁶⁰ Legal age restrictions are an example of a justifiable reason. *Id.* at 7.

¹⁶¹ *Id.* at 4.

¹⁶² Such as the costs of insurance for certain groups. *Id.* at 7.

¹⁶³ *Id.* at 6-10.

aviation, rail transport, road haulage, and medical, with lower age limits and health and safety regulations also impacting younger workers.¹⁶⁴ A key finding of the study was the general lack of age diversity awareness amongst employers and the need to raise it across all sectors.¹⁶⁵ This is not helped by the fact that “many sector representative bodies and employers do not collect data on the age composition of their workforce.”¹⁶⁶ The knock on effect on ability to identify and address age diversity issues is obvious.¹⁶⁷ Another significant finding was that an industry facing recruitment and skill shortages was more willing to address age diversity issues.¹⁶⁸ However, some evidence also exists that sectors not facing such shortages have appreciated the need to address age limitations.¹⁶⁹

B. Age Limits in the Netherlands

A similar impact from age restrictions and a similar age profile has also been felt in other EU Member States. In the Netherlands, for example, workforce participation decreases drastically after fifty-five¹⁷⁰ and people are often regarded as old for recruitment purposes at forty and sometimes even younger.¹⁷¹ In 2000, a Dutch court ruled for the first time that a fixed age limit for dismissal was not justified.¹⁷² This case concerned professional football referees employed by the Dutch Soccer Association (DSA) whose rules required all referees to retire on their forty-seventh birthday.¹⁷³ In exceptional cases, a referee could obtain a one-year extension twice, ultimately retiring at forty-nine.¹⁷⁴ Mr. Uilenberg, a renowned football referee challenged the termination of his contract at forty-nine for age discrimination relying on the Dutch Constitution and the fact that his performance was objectively tested.¹⁷⁵ Referees are tested several times a year in the Netherlands on their physical condition and their knowledge of the rules of football and are observed at every match they referee.¹⁷⁶ The DSA’s defence was that the

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.* at 14, 16.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 13.

¹⁶⁹ *Id.*

¹⁷⁰ LBL, Expertisecentrum leeftijd en maatschappij, *Age Limits in the Labour Market*, <http://www.leeftijd.nl/65plus.html>, 3 (accessed Jan. 28, 2004).

¹⁷¹ *Id.* at 1.

¹⁷² *Id.* at 2; Telephone Interview with Anouk Mulder, LBL Leeftijd (Oct. 6, 2003).

¹⁷³ *Uilenberg/KNVB* 42, Court of Appeal, Amsterdam, Kort Geding (Dec. 13, 2000).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

age limit of forty-six was necessary as when people above that age were injured they took longer to recover.¹⁷⁷ However, they were unable to provide adequate medical evidence to support this argument.¹⁷⁸ The judge ruled for Mr Uilenberg stating that when there is an effective system for measuring individual capabilities and qualities, a general age limit is unnecessary.¹⁷⁹ This decision does not require an employer to establish a system of individual testing; rather a well-functioning system will obviate the need for an age limit.¹⁸⁰

It is also worth noting that age limits for airline pilots have been the subject of litigation in the Netherlands where the retirement age in some Dutch airlines is fifty-six.¹⁸¹ Airline pilots are tested rigorously in the Netherlands but the Dutch companies, KLM and Martinair opted for a different defence to that used by the Dutch Soccer Association, arguing that the retirement age of fifty-six is necessary for personnel reasons, to provide opportunities for promotion for younger pilots by the time they retire.¹⁸² KLM and Martinair have succeeded in objectively justifying the age limit in lower Dutch courts and before the Dutch Supreme Court on this basis.¹⁸³

C. Age Restrictions and the Employment Directive

The legitimacy of various age restrictions will be greatly clarified for all EU Member States with the process of implementing the Employment Directive in national law. Any opportunities allowed by this Directive whether less likely as a GDOQ¹⁸⁴ or more likely as an Article Six justification must be tightly constrained. In the case of the former, the objective must be legitimate and the requirement proportionate. In the case of the latter, the justification enshrined in national law must, within the context of national law, be objectively and reasonably justified, have a legitimate aim, and the means of achieving the aim must

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Telephone Interview with Anouk Mulder, LBL Leeftijd (Oct. 6, 2003).

¹⁸¹ *Leeftijdsonslag KLM-piloot*, District Court, Amsterdam (Jan. 8, 2003) and *Leeftijdsonslag Martinair piloten*, District Court, Haarlem (Nov. 19, 2002), JAR, 2002 nr 17(20-12-2002).

¹⁸² *Id.*

¹⁸³ Telephone Interview with Anouk Mulder, LBL Leeftijd (Oct. 6, 2003, and Jun. 6, 2005). See *Van Pelt and ors. v. Martinair*, No. C03/077HR, Sp. Ct. (Netherlands) (Oct. 8, 2004) and the joined case *Applicant v. KLM*, No. C03/133HR Sp. Ct. (Netherlands) (Oct. 8, 2004). These judgments were handed down before Dutch legislation implementing the Employment Directive came into force. Future retirement ages and age limits will be tested against this new law and may find it more difficult to survive.

¹⁸⁴ According to Zmira Hornstein's review of responses to the UK government's consultation, most responses found very few genuine practical examples of age being a GOR. Hornstein, *supra* n. 64, at annex 3 (2002).

be appropriate and necessary. It is also possible that an apparently neutral criterion for a job could have an indirectly discriminatory effect on older workers, for example a recent degree or qualification that was not available during the educational or early career phase of their life.¹⁸⁵ Such requirements may also have a greater impact on women due to career interruptions for family reasons. It is still possible to justify an indirectly discriminatory provision if it “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”¹⁸⁶ The European Commission’s process of reviewing the Member States new or amended discrimination laws will reveal and sanction national laws and practices including age limits, which conflict with the Directive. Any resulting cases before the European Court of Justice will ultimately help to clarify aims that are legitimate and which means may satisfy the “appropriate and necessary” test.

V. AGEING AND DISCRIMINATION: TIME FOR NEW APPROACHES

A. *The Case for Extending Anti-Discrimination Law Beyond Employment in the US*

The EU has not legislated for age discrimination outside employment. Generally speaking the same is true of the US. However, three American Acts are very helpful to older¹⁸⁷ Americans. The Equal Credit Opportunity Act makes it “unlawful for any creditor to discriminate against any applicant” on the basis of seven grounds, including age.¹⁸⁸ The author understands that a creditor cannot refuse or decrease the amount of credit because of age, cannot refuse to consider retirement income in assessing credit-worthiness, or cancel an account or require re-application because of retirement or a certain age has been reached.¹⁸⁹ Nor can credit be refused or cancelled because the applicant cannot obtain credit life insurance due to age.¹⁹⁰ The Age Discrimination Act of 1975 prohibits age discrimination in programmes that receive financial assistance from the Federal government.¹⁹¹ Finally, while the

¹⁸⁵ See generally Meenan, *supra* n. 59, at 27.

¹⁸⁶ Council Directive 2000/78/EC at art. 2(2)(a)(i).

¹⁸⁷ The author uses the term “older people” in connection with the US in a general sense as the ADEA’s coverage starts at forty for employment and to the best of her knowledge no definition of “age” or “old” is associated with the three Acts here under discussion.

¹⁸⁸ 15 U.S.C. § 1691(a)(1)(2000).

¹⁸⁹ Email from Sally Hurme to Helen Meenan, AARP (Sept. 24, 2003).

¹⁹⁰ *Id.* This would be also very attractive to older European people.

¹⁹¹ 42 U.S.C. § 6101 (2005).

Fair Housing Amendments Act of 1988¹⁹² (FHA) protects persons from discrimination on grounds of disability but not age in nearly every kind of housing and in all stages of the housing process,¹⁹³ including terms and conditions of occupancy and eviction, it has proven very useful for older Americans.¹⁹⁴ This is due to the definition of disability in the FHA, which requires a person to:

- (1) have a physical or mental impairment, which substantially limits one or more major life activities;
- (2) have a record of such impairment or
- (3) be regarded as having such an impairment.¹⁹⁵

Thus the application of stereotypes of health and ability to older people is caught by the Act, which also prohibits enquiries into the nature and severity of a disability.¹⁹⁶ Tenants can however, make a request for a reasonable accommodation at any time.¹⁹⁷ Older people can use disparate impact to establish discrimination if they are disabled or are perceived as such. Under this Act, a person cannot be refused a tenancy because he has a family member with dementia, he cannot be required to produce medical evidence of health or ability to live on his own, or cannot be denied access to communal areas if he has a walker or wheelchair. While this Act is very important for older people it may not assist in cases of “pure” age discrimination where the disability or perceived disability element is lacking, highlighting an area outside employment that may well deserve legal protection from age discrimination in the US.

B. The Case for Extending Anti-Discrimination Law Beyond Employment in the EU: The Situation in the UK

There is a growing body of evidence in EU Member States that age discrimination laws are needed to ensure equality in the provision of goods, facilities and services. Ireland has led the way within the EU by outlawing discrimination outside employment on nine grounds, including age. In spite of awareness-raising and other effects of this coverage, a

¹⁹² 42 U.S.C. § 3604 (2005). Note also the Housing for Older Persons Act of 1995 which allows some age discrimination with regard to housing intended for persons over sixty-five. Pub. L. 104-76, § 1; 109 Stat. 787 (1995).

¹⁹³ 42 U.S.C. § 3604(f)(2) (2005).

¹⁹⁴ See generally Michael Allen & Susan Ann Silverstein, *Preserving Elders' Housing Rights*, 39 Tr. 32 (Oct. 2003) (Discussing the FHA and Elders).

¹⁹⁵ 42 U.S.C. § 3602(h) (2005).

¹⁹⁶ 24 C.F.R. § 100.202(c) (2003).

¹⁹⁷ 42 U.S.C. § 3604(f)(3)(A)(2005).

recent report by the Irish Human Rights Commission found the quality of care in state run residential homes wanting.¹⁹⁸ Deficiencies included a shortage of beds, lack of a complaints procedure or an advocacy service, and inhuman treatment.¹⁹⁹ While accepting that human rights and discrimination are not always synonymous, even though human rights infringements may have a discrimination dimension,²⁰⁰ it is troubling that these findings emerged in an environment where discrimination in the provision of goods, facilities, and services had been outlawed. Meanwhile, in the UK, the voluntary organisation Help the Aged published a study in 2002 that found evidence of age discrimination across seven areas of public policy: education, employment, health, social care, social security, transport, and citizenship and representation.²⁰¹ Examples include the fact that student loans are not available to people who are over the age of fifty at the beginning of their course.²⁰² In employment, six out of ten people made redundant return to work within a year, while only one out of ten people over fifty does.²⁰³ People of all ages returning to work following redundancy face a pay gap of seventeen per cent compared with their last job but those over forty-five experience a twenty-six per cent reduction in pay.²⁰⁴ In health care, older people waited longer for treatment in Accident and Emergency departments and some hospitals were found to be failing even basic standards of nutrition or personal hygiene for older patients which affected not just patients but also their relatives.²⁰⁵

Public transport is particularly important for older people, as it is a source of freedom and access to other services including healthcare. The report highlights the many links involved in making a trip on public transport and that the prospect of only one difficult link in the chain can

¹⁹⁸ Carol Coulter, *Human Rights of Elderly Stressed in Report*, The Irish Times 11 (May 9, 2003); Ita Mangan's report for the Human Rights Commission, *Older People in Long Stay Case* (April 2003) (available at http://www.ihrc.ie/_fileupload/publications/Research_Elderly_In_Institutions_Final_Report_04-2003.pdf).

¹⁹⁹ *Id.*

²⁰⁰ This is certainly the case under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which all EU Member States have signed. It does not yet have a free standing prohibition of discrimination. Protocol 12 to the ECHR, which came into effect on April 1, 2005, now provides a free-standing discrimination provision for the Council of Europe States that have signed and ratified it mending some of the shortcomings of Art. 14 of the ECHR.

²⁰¹ Margaret Simey, Help the Aged, *Age Discrimination in Public Policy A Review of Evidence* 202 (Help the Aged, 2002).

²⁰² *Id.* at 26, 54.

²⁰³ *Id.* at 37.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 114.

cause an older person with some disability to abandon a trip altogether.²⁰⁶ Importantly, it states that there is a real risk of indirect age discrimination arising from failure by transport planners to consider the needs of older people; the mobility and accessibility of older people need to be taken into account by them.²⁰⁷ The areas of transport and healthcare can overlap and older people need to be consulted on the location of hospitals.²⁰⁸ The report highlights the need for planners; transport and health providers to work together so that older people who make up two thirds of hospital patients can easily access the services they need,²⁰⁹ AGE, the older people's platform in Europe, has also carried out recent research in seventeen EU Member States to document evidence of discrimination against older people in accessing goods, facilities and services to help mobilise further debate and action at EU level.

C. Non-Employment Age Discrimination Law in Practice: Ireland

Laws governing age and other forms of discrimination outside employment would constitute one means of improving public services for older people where discrimination exists and help to change attitudes generally. They would improve access to and enjoyment of a wide range of goods, facilities, and services for people regardless of age. This is exemplified by cases brought under the Irish Equal Status Act 2000 (ESA) which commences protection from age discrimination at the age of eighteen and has no upper age limit. Three cases come to mind.²¹⁰ In the first case *Jim Ross v. Royal & Sun Alliance Insurance Plc*,²¹¹ Mr Jim Ross, a seventy-seven year-old, claimed age discrimination when he was refused a car insurance quotation on the telephone because he was over seventy.²¹² The insurance company denied that it operated a discriminatory policy on the grounds of age and claimed that its refusal fell within an exception contained in Section 5(2)(d) of the ESA.²¹³ Under this exception a difference in treatment is permitted if "it is effected by reference to actuarial or statistical data obtained from a

²⁰⁶ *Id.* at 120.

²⁰⁷ *Id.* at 119.

²⁰⁸ *Id.* at 120.

²⁰⁹ *Id.* See *Age Barriers: Older people's experience of discrimination in access to goods, facilities and services*, (December 2004), available at http://age-platform.org/AGE/IMG/pdf/AGE_doc_goods_and_services_2_Dec_2004.pdf

²¹⁰ The second and third cases were also discussed by the author in her paper *Age Discrimination and Elder Law in Europe: Some New Lessons from an Older World*, delivered to the International Session at the NAELA conference (Miami, FL., May 2003).

²¹¹ [2003] DEC-52003-116 (available at <http://www.odei.ie>).

²¹² *Id.* at 2.1. Mr Ross happened to have a seven-year "no claims bonus" at the time of his inquiry. *Id.* at 1.

²¹³ *Id.* at 6.2.

source on which it is reasonable to rely...and is reasonable having regard to the data or other relevant factors.”²¹⁴ The Equality Officer found that the insurance company’s “over 70s” blanket policy did not satisfy the exception, as full details of data supporting the policy were not produced.²¹⁵ Furthermore, it applied the policy on quotations to all persons over seventy without considering all relevant factors in individual requests.²¹⁶ Mr Ross was awarded two thousand Euro for loss of amenity.²¹⁷ The Equality Officer clarified that it would have been possible to justify higher premiums for older drivers based on actuarial data but an outright refusal to give a quotation was unacceptable.²¹⁸ Given the importance of transport for older people, especially in enabling them to access and enjoy other services, this case represents a major victory for Irish elders.

The second case, *Scanlon & Ryan v. The Russell Court Hotel*,²¹⁹ involved two eighteen year old men being refused entry to a New Year’s Eve function at the Vatican Night Club in Dublin.²²⁰ This was despite the fact that they had purchased their tickets in advance and offered to show their passports to the doormen.²²¹ The reason given was that the management was “clamping down on 18 year-olds, as there were too many young people inside already.”²²² Each of the men was awarded one thousand Pounds for discrimination, embarrassment and loss of amenity.²²³ In the third case *J. O’Reilly v Q. Bar*,²²⁴ a seventy-two year-old man and his sixty-eight year-old wife were refused admittance to a trendy Dublin bar where they went to celebrate their wedding anniversary.²²⁵ Mr O’Reilly claimed he had been discriminated against and would have been admitted if he had been in his twenties or thirties and was awarded one thousand Euro.²²⁶ These cases demonstrate a need for young and old people to enjoy their leisure activities too without experiencing age discrimination. The ESA contains some twelve exceptions to discrimination at present including one for private clubs so it is possible for a particular group to establish a women only club for example, helping to make the Act workable.

²¹⁴ *Id.*

²¹⁵ *Id.* at 7.9.

²¹⁶ *Id.*

²¹⁷ *Id.* at 8.3.

²¹⁸ *Id.* at 7.11.

²¹⁹ [2001] DEC-S2001-013 (available at www.odei.ie).

²²⁰ *Id.* at 6.1-6.2.

²²¹ *Id.* at 3.1.

²²² *Id.* at 5.4.

²²³ *Id.* at 8.4.

²²⁴ [2002] DEC-S2002-013 (available at <http://www.odei.ie>).

²²⁵ *Id.* at 1.

²²⁶ *Id.* at 2.1, 8.

D. Promising Developments at EU Level

Some EU Member States already had anti-discrimination laws outside employment prior to adoption of the recent Directives. However, with the exception of Ireland they are usually restricted to a small number of grounds. In an effort to outlaw discrimination in goods and services for areas other than race, the EU has made two attempts to combat sex discrimination in non-employment fields. The first attempt was made in early Summer, 2003 when the European Commission drafted a proposal to ban sex discrimination that would cover fields such as education, welfare, taxation, insurance, media, and advertising.²²⁷ It aimed to tackle the stereotyping of women in the mass media and the use of gender to calculate risk and distinction in fields such as insurance and tax.²²⁸ The proposal, though not officially in the public domain, attracted a good deal of negative publicity across the EU and was vehemently opposed by the media. This appeared to set back efforts to extend anti-discrimination law beyond employment for grounds other than race within the EU, despite some implicit and explicit support for this approach from international and national actors.²²⁹

The second attempt resulted in publication by the European Commission in November 2003, of a Proposal for a Directive implementing equality between men and women in access to and supply of goods and services, which was adopted as a Directive in 2004.²³⁰ The Directive covers direct discrimination, indirect discrimination, harassment, sexual harassment, and instruction to direct or indirect discrimination.²³¹ It applies to access to and supply of goods and services which are available to the public, whether provided by the

²²⁷ George Parker, *EU Targets Sex Bias in Media and Insurance: Ambitious Move To Enshrine "Respect for Human Dignity" Could Force Up Premiums*, *The Financial Times Ltd.* (London) (June 24, 2003).

²²⁸ *Id.* Note the reply of Anna Diamantopoulou, the European Commissioner for Employment and Social Affairs. Anna Diamantopoulou, *Europe Is a Long Way From a Sexism Directive*, *The Financial Times Ltd.* 19 (London) (June 27, 2003).

²²⁹ In the UK for instance, numerous voluntary organizations and others have called on the British Government to outlaw discrimination in goods, facilities, and services as well as employment when responding to the government's consultation on the Employment Directive. See Hornstein *supra* n. 64, at annex 1.

²³⁰ Commission Proposal for a Council Directive Implementing the Principle of Equal Treatment between Women and Men in the Access to and Supply of Goods and Services, COM(03)0657 final (available at http://europa.eu.int/comm/employment_social/news/2003/nov/equality_en.html).

[hereinafter Commission Proposal]; Council Directive 2004/113/EC of Dec. 13, 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [hereinafter Council Directive].

²³¹ Council Directive, *supra* n. 230, at art. 2, 4.

public or private sector.²³² It specifically does not apply to education or to the content of media and advertising.²³³ However, it permits differences in treatment where the goods or services in question are designed and intended exclusively for members of one sex.²³⁴ Member States must ban the use of sex as a factor in the calculation of premiums and benefits in insurance and related financial services in all new contracts, but may decide before 21 December 2007 to permit proposed rate differences if sex is a determining factor in the assessment of risk.²³⁵ The Explanatory Memorandum attached to the Proposal reveals that sex is not the main determining factor for life expectancy, rather other factors such as nutrition habits are more relevant.²³⁶ The Commission believes that “[a]ll insurance is based on the pooling of risk and solidarity... between the insured” and opposes the division of “men and women into different pools [which] leads to an unjustified difference of treatment and a resulting disadvantage for one sex or the other.”²³⁷

It is noteworthy that this Directive requires the Member States to designate “a body or bodies for the promotion, analysis, monitoring, and support... of all persons without discrimination on the grounds of sex.”²³⁸ It also requires them to ensure penalties which may include compensation for the victim; all penalties must be effective, proportionate and dissuasive.²³⁹ Both of these provisions represent a stark contrast to the position of age and other grounds in the Employment Directive. It is not easy to see how differential approaches to the various grounds protected by EU equality law can be maintained indefinitely, especially given the multiple identities of all persons and all older people in particular. This Directive is to be welcomed in its own right and as a potentially positive force for the future extension of similar protection to some or all other grounds covered by EU anti-discrimination law, including age.

VI. OTHER CHALLENGES AND OTHER APPROACHES TO AGEING

In addition to evidence of age discrimination within and outside employment against older people, the impact of this and other challenges on their relatives and carers must also be considered. With a growing

²³² *Id.* at art. 3.

²³³ *Id.* at art. 3(3).

²³⁴ *Id.* at art. 4(5).

²³⁵ *Id.* art. 5.

²³⁶ Commission Proposal, *supra* n. 230, at 6-7.

²³⁷ *Id.* at 7.

²³⁸ Council Directive, *supra* n. 230, at art. 12.

²³⁹ *Id.* at art. 14.

cohort of older people, elder care will affect many more relatives and children who are in the workforce even than at present. Three developments would help to remedy this hardship: 1) outlawing age discrimination in the provision of goods, facilities and services so that older people are best enabled to take care of themselves and enjoy life's amenities for as long as possible 2) increasing awareness of the impact of caring for older relatives in society and in the workforce and strategies to assist carers generally and 3) improving services for older people.

A. The Special Case of Carers

In Britain there are an estimated 5.7 million carers most of whom are spouses who devote on average sixty-five hours of care a week.²⁴⁰ Nearly half of all British carers are employed and one quarter are retired.²⁴¹ Almost two million British carers are older people over the age of sixty.²⁴² Carers experience a range of consequences and older carers have been identified as one of the poorer groups in Britain.²⁴³ Caring can impact on employment through fewer hours of work or moving from full to part-time work.²⁴⁴ Carers are less able to properly provide for their own retirement as their working lives can be interrupted by a period of caring. For women this may mean a second interruption following one for childcare.²⁴⁵ Carers are also prone to experience depression and social isolation.²⁴⁶ While the UK government has done a lot to improve childcare, care for adult dependants needs more focussed attention especially if people are to be encouraged to work for longer.²⁴⁷

²⁴⁰ Help the Aged, *Caring in Later Life: Reviewing the Role of Older Carers* 6 (Help the Aged, 2001) [hereinafter *Caring in Later Life*]. Note also that just under one tenth of these carers are parents caring for an adult son or daughter with a disability. *Id.* The figures in this report are taken from the General Household Survey 1995, which surveyed approximately 18,000 people in Great Britain and extrapolated the numbers across the population. *Id.*

²⁴¹ *Caring in Later Life*, *supra* n. 240, at 14.

²⁴² *Id.* at 6, 10.

²⁴³ *Id.* at 7.

²⁴⁴ *Id.* at 30.

²⁴⁵ In the UK some women receive a state pension of just £46 per week. See Help the Aged *What Do You Expect at Your Age? A Help the Aged Conference on Age Discrimination*, 17 March 2003, 10 (June 2003).

²⁴⁶ *Caring in Later Life*, *supra* n. 240, at 32.

²⁴⁷ See UK's Carer's (Recognition and Services) Act 1995 (C.12) (providing for assessment of the needs of a person for community services and assessment of an individual carer who intends to provide a substantial amount of care on a regular basis. It does not provide for carer's leave from work or payment for caring); S. 57A Employment Rights Act 1996, as amended by the Employment Relations Act 1999 (providing employees with an unpaid right to a reasonable amount of time off work to deal with emergencies involving a dependant.); *cf* Ireland's Carer's Leave Act 2001 (providing for unpaid temporary leave from work on a full-time basis for a period of up to sixty-five weeks while preserving employment rights).

Caring has been identified as a workplace issue at the European level with some studies revealing that a third of employees are caring for an adult.²⁴⁸ The typical profile of an employee caring for another adult in the EU is female, married, and between forty and fifty years of age; although the contribution of men is increasing.²⁴⁹ Women caring for more than ten years were found to “have lower incomes than men carers or short-term carers, and lower accumulation of pension rights,” affecting their financial security in old age.²⁵⁰ Flexibility in the structure of work was identified as particularly important for working carers with the absence of flexibility exacerbating their problems.²⁵¹ The effects of combining work and caring need to be explored and addressed at least at the level of the undertaking, before the older cohort in the European population increases dramatically.

B. An Interconnected Approach Embracing All Areas of Our Lives

Something more needs to be done to explore the link between all areas of our lives that affect our ability to work, plan and care for ourselves and others for as long as possible with dignity. Those who can need to take the utmost responsibility for providing for their own older years in advance. Otherwise lack of financial and other planning, low state pensions, problems with the provision and adequacy of state and local services and unexpected individual longevity may combine to deny them the kind of later years they fully expected. Age discrimination in employment laws will help those who are willing and able to stay in employment for longer than at present and remain financially buoyant. They will also help to change attitudes to older people not just as workers. Given the connection between a person’s health and ability to work, age discrimination laws covering a broad range of goods and services including health would also help a person to stay fit for work for longer or where retired, to require less assistance from relatives, other carers and state services. In the UK, the government has acknowledged discrimination in health and has established a National Service Framework for Older People (2001) (NSFOP) setting standards for health and social services.²⁵² One standard supports the NSFOP’s

²⁴⁸ Judith E. Phillips, *Working and Caring: Developments at the Workplace for Family Carers of Disabled and Older People* 5 (Off. for Off. Publication of the European Communities, 1996).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 9.

²⁵¹ *Id.* at 11.

²⁵² Dept. of Health, *Older People’s Services*, <http://www.doh.gov.uk/PoliceyardGuidance/HealthAndSocialCareTopics/OlderPeoplesServices/fs/en> (Mar. 27, 2001) [hereinafter NSFOP].

requirement that age discrimination be ‘rooted out’ of health and social services:

NHS services will be provided, regardless of age, on the basis of clinical need alone. Social care services will not use age in their eligibility criteria or policies, to restrict access to available services.²⁵³

The NSFOP and its standards are a valuable starting point in raising awareness, providing guidance on and raising the quality of services for older patients. They have as yet no legal force but are badly needed in an effort to even out the quality of service received by older people in the UK as demonstrated below.

C. Improving the Quality of Services for Older People

Older people in the UK often experience poorer quality services than others. One reason for this is that while social expenditure on older people is almost double that spent on families and children, unit costs for older people’s services are typically lower than for younger people.²⁵⁴ This situation contributes to the demands on carers of older people and their ability to work. Moreover, services are strictly allocated in accordance with the resources available.²⁵⁵ Help the Aged runs a free telephone advice service for older people and their carers in the UK, which helps to illustrate this and publishes an annual report based on the calls it receives.²⁵⁶ This report reveals the poor and sometime callous service that some older people experience from health, social services and other state and local services. It raises many issues including the quality of training of the first point of contact within service departments, the lack of empathy and understanding for the needs of older people and their carers, the resources available at the time of the request and a mismatching of supply with sometimes acute demand. They also raise the question at the national and local level, whether more investment is badly needed to cater for the various needs of a growing body of older people and where that money will come from. For example, one caller rang about her eighty-four year-old father who could not take baths

²⁵³ *Id.* at 16 (setting forth Standard One: Rooting out age discrimination).

²⁵⁴ See Dept. Health (UK), *Personal Social Services Expenditure and Unit Costs: England: 2002-2003*, 5 tbl. 1 (gross expenditure), 10 tbl. 6 (unit costs) (Feb. 2004) (available at <http://www.publications.doh.gov.uk/public/sb0402.pdf>).

²⁵⁵ Telephone interview with Gill Heath, Help the Aged, London (Jan. 5, 2004).

²⁵⁶ In 2000, advice workers answered 96,350 calls. Help the Aged, *SeniorLine Report for 2000*, 4 (2000) [hereinafter *SeniorLine Report*].

anymore following hip-replacement surgery.²⁵⁷ She reported contacting the Social Services Department to enquire about having a shower fitted and being told that it would take six months for an assessment by an Occupational Therapist and eighteen months for the work to be carried out. Another caller with an eighty year old mother who had cerebral palsy, arthritis, asthma and vertigo contacted her Social Services Department to seek an assessment of her mother's needs and was told they were unable to offer any services to her mother.²⁵⁸

Examples of hardship are not just restricted to health and social services. A caller who had undergone a sex change operation was treated by the Benefits Agency as still being their birth gender.²⁵⁹ This has massive implications in the UK where at present a woman can claim a state pension at sixty and a man at sixty-five; therefore a man becoming a woman cannot claim their pension until sixty-five.²⁶⁰ The British government however recently enacted the Gender Recognition Act of 2004,²⁶¹ which allows transsexual people to have the rights of their acquired gender.²⁶² Once legally recognised as transsexual they would be given birth certificates in their acquired gender and would be eligible for the benefits and State Pension of that gender.²⁶³ Finally, a recently widowed caller who had lived with her husband in a council property for twenty-five years was told by her Local Authority that she would be evicted because her name was not on the tenancy agreement.²⁶⁴ These few cases may well belie otherwise effective service provision but reveal real, life-altering hardship at the level of the individual older person in need.

D. A New Approach to Life and Work?

Discrimination law is just one tool in combating inequalities in and outside the workplace and helping workers to better prepare for an

²⁵⁷ *Id.* at 13.

²⁵⁸ *Id.* at 10.

²⁵⁹ *Id.* at 26.

²⁶⁰ The state pension age for men and women is in the process of being converged and will be fully equalised by 2020 in the UK.

²⁶¹ *Gender Recognition Act, 2004* Chp. 7 (available at <http://www.legislation.hmso.gov.uk/acts/acts2004/20040007.htm>). This act was in response to the European Court of Human Rights ruling that the UK had breached human rights of two transsexual people, namely the right to private life and the right to marry. *European Convention on Human Rights*, art. 8, 12 respectively. The Court's judgements in the consolidated cases of *Goodwin v. UK*, 35 Eur.H.R.Rep. 18, app. no. 28957/95 (2002); *"I" v. UK*, 36 Eur. H.R.Rep. 53, app. no. 25680/94 (2203) were delivered on July 11, 2002.

²⁶² *Gender Recognition Act, 2004*, chp. 7, art. 9(1).

²⁶³ *Id.* art. 10, 13.

²⁶⁴ *SeniorLine Report, supra* n. 256, at 33.

improved quality of life throughout their life course and particularly in their third and fourth ages. It is necessary but limited in its ability to achieve a change in attitudes and practices and as a factor in improving quality of life and services. Not all problems experienced by older people are caused by discrimination; even those that are will require more than a law that only tackles discrimination once it has occurred at the suit of a lone plaintiff. Novel approaches at the level of the individual and the enterprise can assist in the quest for a fulfilling life lived in dignity.

In 2002, the Geneva Association argued that the gradual retreat of the onset of old age should mould a new design and place for work within the life cycle.²⁶⁵ It suggested that “division of the life cycle into sequential vertical periods - education and training, work and family activities, retirement and leisure - should now give way to a more horizontal arrangement of an individual’s time which allows for a ‘mix’ of concurrent activities and education, that will reflect the changing pattern of life’s phases.”²⁶⁶ This would break with modern conventional approaches to education, family, work and retirement and is to an extent already practised by those who work in conjunction with a return to education or re-training and those involved in lifelong learning. In practice this approach while commendable in view of the challenges ahead and employment realities in many European countries, will suit some more than others. It does represent fresh thinking but may require a shrinking of the time spent at work or a more flexible approach to work to simultaneously pursue all these life activities. In the end it may be more suitable for those who must or wish to extend their working lives to ensure a decent quality of life in old age and for whom it was clearly conceived.

Flexible retirement and flexible working hours are implicitly bound up with this approach. Many actors had already identified them²⁶⁷ as necessary to assist and encourage older workers to stay in work for longer which is necessary in some European countries due to the decimation of many occupational pensions,²⁶⁸ increases in longevity and labour market shortages. At the minimum, they require a so-called tripartite co-operation between society, employers and individuals.²⁶⁹ It would be difficult to envisage a horizontal rather than a vertical approach

²⁶⁵ Genevieve Reday-Mulvey, *When Are We ‘Old’?* 30, *The Four Pillars* 2 (Feb. 2002).

²⁶⁶ *Id.*

²⁶⁷ See e.g., Anna-Stina Elving, *Increasing the Participation Rate of Older Workers in Sweden: The Viewpoint of the Trade Unions*, 29 *The Four Pillars* 4, 5-6 (Aug. 2001); *Older Workers Recommendation*, *supra* n. 52, at 4-5 (pts. 14, 21); Hornstein, *supra* n. 64, at annex 3; *Presidency Conclusions Barcelona*, *supra* n. 64, at 12.

²⁶⁸ E.g., *New £10bn Black Hole in Pensions*, *Evening Standard*, (London) 1, May 22, 2003.

²⁶⁹ See Elving, *supra* n. 267, at 7.

to ageing working without them. The great advantage of flexible retirement and flexible working is that they would facilitate a variety of approaches to work, ageing and retirement. Help the Aged is one UK organisation that already has a successful gradual retirement scheme for its employees.²⁷⁰ It does not operate a retirement age at all, though employees can qualify for its pension scheme at the age of fifty or indeed as late as eighty at present. It also runs courses on retirement preparation and reduces working hours and duties in line with an employee's and the organisations own needs. Admittedly, gradual retirement and flexible working hours could be more difficult for small businesses to manage.

VII. SUMMARY AND CONCLUSION

It is essential to consider ageing and age discrimination from a global perspective. Global and international actors' powers are largely limited to identifying challenges and solutions, establishing recommendations, principles and resolutions by consensus with their member countries. They do not introduce anti-discrimination laws. With the exception of the EU, this is the task of national governments, which have already participated in the adoption of declarations and recommendations on ageing and age discrimination in fora such as the UN and other international organisations. The Director-General of the ILO has cautioned that there is no universal solution for equality at work and discrimination differ country-by-country and group-by-group. The challenges of population ageing, which coincide in many European countries in particular, with other pressures such as the collapse of occupational pensions and changing patterns of individual employment requires a multi-level approach: global, state, regional, the enterprise and the individual. Each actor must play an effective role within the limits of its own mandate. Individuals must where possible develop a high level of responsibility and plan as best they can for an extended life that may increasingly include a longer working life or, a later life encumbered with caring or the need to be cared for. Even where anti-discrimination law is adopted, it has proven necessary but limited in its ability to eliminate discrimination; it is not enough on its own, especially when restricted to an individual litigation model which is only triggered once discrimination has taken place and the victim has decided to sue.

An approach that views the various areas of our lives in an interconnected fashion will help us to live out our extended lives in more comfort and dignity and prepare properly for the challenges of ageing and longevity. This demands an improvement in services received by all

²⁷⁰ Interview with Tessa Harding, Help the Aged (Aug. 2003).

people including older people, which would be assisted by anti-discrimination laws outside employment in the provision of goods, facilities and services. The author firmly believes it is antithetical to outlaw age discrimination in the workplace and to allow the same managers and workers to discriminate in the provision of the goods, facilities and services they supply to the public in the course of their employment. The call to address discrimination beyond employment comes from global and international actors, highlighting this need for older people and from voluntary age organisations that have organised themselves at European and international levels. It is represented on the national level by countries such as Ireland that have already adopted comprehensive laws against discrimination in most areas of life. Arguably, the US could also benefit from anti-discrimination laws for older people outside employment that are tailored to its own needs and influences, despite the useful possibility to rely on a disability approach under the Fair Housing (Amendments) Act 1988. In the end, our solutions to the challenges of population ageing will not suit everyone but may provide a marker for countries in developing and developed worlds alike. Whatever paths we take must suit the reality of our national and individual situations. While solutions to ageing and age discrimination are needed for employees they must not be restricted to this group. Such an approach fails to cater for the fact that all areas of our lives are increasingly interdependent, work is just one area of life and not everyone is a current or former employee.

FROM NATIONAL TO INTERNATIONAL ELDER LAW

*Israel Doron**

I. INTRODUCTION

Since I did not know who the sender was, I was unsure whether to open the e-mail message. I always hesitate before opening a message from an unknown sender, for fear that it may contain a virus or simply be spam. It soon became clear that this message was similar to others I had received in the past. It was a request from a man in his sixties living in Florida. Several years ago a court in Florida had appointed him as his father's guardian. His father, a Polish-born Jew who had immigrated to the United States in the 1930s, had been widowed several years previously. For many years he had lived close to his eldest son and helped to bring up his grandchildren to the best of his ability. As a religious Jew, the father had often spoken of his desire to die in the Holy Land, and had even visited Israel several times when younger. The son and his wife, whose children had grown up and left home, had decided to migrate to Israel. They wanted to bring the father, who was the son's ward, together with them. I was asked for help and legal advice: Was the guardian legally entitled to decide that his father should immigrate to Israel? Did he need the permission of the court in Florida to make such a decision? What would his status be vis-à-vis his father after his immigration to Israel? Would the courts and legal authorities in Israel acknowledge him as his father's guardian on the basis of the appointment in Florida, or would it be necessary to make a fresh application for guardianship according to Israeli law?

This story is only one example of the wide variety of contemporary international legal problems that concern older people and those who care for them.¹ The story served as a stimulus for the development of the thesis advanced in this article: that there is a need for the development of the international dimensions of elder law.

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¹ E.g. Cynthia Sharp Myers, *Jurisdictional Issues in Interstate and International Guardianships*, 12 Elder L. Rep. 3 (Nov. 2000) (analyzing several U.S. cases that illustrate problems arising from the lack of standard practices in interstate and international guardianships).

II. THE CASE FOR INTERNATIONAL AND GLOBAL ELDER LAW

In the past two decades the subject of older people and the law has advanced considerably. In the United States, it has grown from an almost unknown area of the law to become an acknowledged branch of academic legal study, with its own organizations and professional associations, and it is taught in academic courses and various clinical frameworks.² Outside the United States, as well, there has been an increasing awareness of elder law.³ However, most of this diverse progress has taken place at the national level, thus far. At the international level, elder law has attracted little attention, almost to the point of neglect. For instance, in the major articles describing and analyzing elder law there is virtually no mention of its international aspect,⁴ while the articles that do deal with this aspect admit that the subject has historically not received the attention it deserves.⁵

The aim of this article, therefore, is to argue that the time has come to begin developing the various features of elder law that relate to international law. This means that the dialogue on elder law should branch out in different directions that share an international and global view of the field. This dialogue should embrace the different aspects of international legal practice, including public, private, and comparative international law.

The argument for developing a dialogue on questions of law and aging at the international level has four elements (Figure 1). As can be seen in the figure, the four elements represent the possible points of contact between law and aging.

² Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 *Elder L.J.* 1, (2002) (updating the previous article and arguing that elder law is evolving into "later life planning") [hereinafter Frolik, *Redux*]; Lawrence Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 *Elder L.J.* 1 (1993) (defining "elder law" and summarizing the status of the field in the United States) [hereinafter Frolik, *Developing Field*]; Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 *Hastings L.J.* 683 (1991) (summarizing U.S. aging trends and the multiple challenges these present to the legal system).

³ See generally Marie Beaulieu & Charmaine Spencer, *Older Adults' Personal Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects* (Law Commn. of Canada 1999), <http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer.asp> (last updated June 25, 2002) (treating comprehensively the subject of the title); Israel Doron, [*The Fifth Commandment: Issues in Law and Aging*] (Dorot 2001) (examining the law in Israel as it affects elderly people); *The Law and Elderly People* (Aled Griffiths & Gwyneth Roberts eds., 2d ed., Routledge 1995) (examining the law in the United Kingdom as it affects elderly people).

⁴ E.g. Frolik, *Redux*, *supra* n. 2 (focusing on elder law in the United States).

⁵ Edward Gordon, Panel Remarks, *Aging: A New Human Rights Concern* (Apr. 9, 1987), in 81 *Am. Socy. Intl. L. Procs.* 164, 164 (1990).

Figure 1: The Four Elements of the Argument
for International Elder Law

AGING LAW	Non-Aging	Aging
Non-Legal	1. Globalization	2. Global aging
Legal	3. Legal Globalization	4. International elder law

Each of the boxes, or "squares," in Figure 1 reflects a set of issues according to intersection of law, aging, and globalization.

- Square 1. Issues relating neither to law nor to aging: the phenomenon of globalization.
- Square 2. Issues relating to aging but not to law: global aging.
- Square 3. Issues relating to law but not specifically to aging: the globalization of law.
- Square 4. Issues relating both to law and to aging: the need for elder law at the international level.

As I will argue below, four sets of the issues together lead to the conclusion that the discussion of elder law needs to be raised to the level of international law.

III. SQUARE ONE: GLOBALIZATION

In this section I will show briefly why the realities of the modern and postmodern world make it necessary to consider the social and legal reality in which old people live on an international and global level, and not only at the level of the individual nation. At this stage of the argument, I will not discuss questions relating to old age or law as such, but view them as a part of the much wider phenomenon of globalization.

The term *globalization* is undoubtedly complex, unclear, inexact, and ambiguous. As Ian Clark points out: "The concept of globalization is as contested as it is popular: as it still bears the birthmarks of its multi-disciplinary paternity, it is virtually impossible, amongst the myriad accounts and interpretations, for the would-be synthesizer to discern a simple meaning or referent

for the term.”⁶ The only generally accepted statement that can be made about it is that there is no consensus as to its exact meaning, content, or extent. Nonetheless, it is possible to discern a number of trends or processes whose common denominator is the decreasing importance of the local or national in determining the behavior of the individual.

At the highest level of generalization, there is something close to a consensus that globalization "refers both to the compression of the world and the intensification of consciousness of the world as a whole."⁷ It is possible to derive many varied definitions from this generalized interpretation. One among many is that globalization is:

the process of increasing interconnectedness between societies such that events in one part of the world more and more have effects on peoples and societies far away. A globalized world is one in which political, economic, cultural and social events become more and more interconnected.... In each case, the world seems to be "shrinking," and people are increasingly aware of this.⁸

In this connection, one central trend is the development of a great variety of technologies in different fields. In transportation, for instance, this is expressed in

the tremendous acceleration and cost reduction of the transport of passengers, goods and data. Today, large portions of the population can afford long distance travel, and the soaring growth rates of international civil aviation tell us that many people make effective use of that opportunity. Similar processes have occurred with regard to the worldwide transport of goods.⁹

In his book *Future Shock* Alvin Toffler underlines the dramatic significance of such technological change:

⁶ Ian Clark, *Globalization and International Relations Theory* 34 (Oxford U. Press 1999).

⁷ Roland Robertson, *Globalization: Social Theory and Global Culture* (Sage 1992).

⁸ *The Globalization of World Politics* 7 (John Baylis & Steve Smith eds., 3d ed. Oxford U. Press 2004).

⁹ Jürgen Basedow, *The Effects of Globalization on Private International Law*, in *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* 1-10 (Kluwer Intl. 2000).

Never in history has distance meant less. Never have man's relationships with place been more numerous, fragile and temporary.... Figuratively, we "use up" places and dispose of them in much the same way that we dispose of Kleenex or beer cans. We are witnessing a historic decline in the significance of place to human life. We are breeding a new race of nomads, and few suspect quite how massive, widespread and significant their migrations are.¹⁰

Another key trend is the development of mass communication and data-transport technology. International journalism, the Internet, telephones, television, and satellites have transformed the concept of communication. They have turned the citizens of the whole world into a single audience that is the target of a great many sources of information. The ability to transfer tremendous quantities of electronic data to remote parts of the world within seconds has brought about a qualitative change in economic, social, and political thinking. The development of the Internet, which affords access to information from different lands and cultures, making geographical frontiers almost meaningless or irrelevant, has added another dimension to the process of globalization:

In cyberspace, the frontiers dividing the surface of the globe into states have virtually no meaning. With a small computer, everybody on earth can send his or her messages in a second to enormous numbers of people throughout the world without being checked or controlled by his or her government or any other state. The power of states to control the ideas, sentiments and behaviors of its citizens will considerably diminish in cyberspace.¹¹

The development of communications has also led to the phenomenon known as globalization through global convergence, or the Fukuyama thesis: the contention that the liberal-democratic worldview has become kind of global norm, such that no alternative ideology can compete with the "sovereignty of the people."¹²

This state of affairs has implications for our subject even though it has no direct connection with law or aging. As all human societies become more alike, the dimensions of aging and of the law will also become more similar until eventually, they merge together.

¹⁰ Alvin Toffler, *Future Shock* 69 (Bodley Head 1970).

¹¹ Shinichiro Hayakawa, *Private Law in the Era of Internet*, in *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* 27-33 (Kluwer Intl. 2000).

¹² Francis Fukuyama, *The End of History and the Last Man* 45 (Free Press 1992).

Every such merger obliges us, even today, to think at an international level, recognizing that the national level is losing its importance in the global world and will continue to do so. The line between "national affairs" and "international affairs" is blurring. Jan Scholte has distinguished between what he regards as three conceptions of globalization: cross-border, open-border, and trans-border relations (the last of these refers to the processes by which national borders are not so much crossed or opened as transcended).¹³

The foregoing indicates that, even without reference to the law or a deep analysis of globalization in its many dimensions, globalization forces us to consider international legal questions related to aging. Human existence is such that the significance of one's place of residence, place of birth, age, or citizenship is gradually losing its importance, and the human condition is becoming merged into the global and international reality.

IV. SQUARE TWO: GLOBAL AGING

As we begin the twenty-first century, population aging is poised to emerge as a preeminent worldwide phenomenon. This phenomenon is complex, and has various social, political, and economic dimensions.

A. Demography

The world's population aged sixty-five and over has been estimated to be 420 million in mid-2000 and was growing at the rate of over 795,000 people per month.¹⁴ Lowered fertility, improved health, and increasing longevity have resulted in an expansion in the elderly population throughout most of the world in terms of both absolute number and proportion.¹⁵ This trend is evident not only in the developed countries of Europe and North America, where there are high absolute numbers of elderly people, but also in developing countries, which are repeating the trend of the developed world with rates of natural population growth falling off sharply.¹⁶

The number of elderly residents is growing in virtually all countries.¹⁷ Developed and developing nations differ in that the former have relatively high shares of people sixty-five and over, whereas the latter are experiencing the fastest growth in elderly populations. Over three-quarters of the global increase in the elderly

¹³ Jan Aart Scholte, *Global Capitalism and the State*, 73 *Intl. Affairs* 427, 430-431 (1997).

¹⁴ Kevin Kinsella & Victoria A. Velkoff, *An Aging World: 2001*, 7 (U.S. Census Bureau Series P95/01-1, U.S. Govt. Printing Off. 2001)

(available at <http://www.census.gov/prod/2001pubs/p95-01-1.pdf>).

¹⁵ *Id.* at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 9.

population between July 1999 and July 2000 took place in the developing world.¹⁸ But it should be noted that global and regional figures can hide significant localized differences in population — aging trends.¹⁹ For example, when one compares international data on fertility rates, the rates of increase of the older population, or even rates of institutionalization within a specific timeframe, one realizes that the global phenomenon of aging is very diverse. So, while the world is aging, it is doing so in different ways in different places.

B. Migration

The significance of world-wide aging is not confined to the number or proportion of older persons in the world or in a given country or region. Migration is another important aspect of the phenomenon. In a sense, migration can be subsumed under the category of globalization: the ease with which people can move over the face of the earth, along with the technology and differentials in the labor market that make migration and remigration possible, is also connected in part with globalization. However, the residential mobility of the elderly has become established as a characteristic of the aging world in particular. The range of special interests, research approaches, and data sources now used to study the migrations undertaken by older people is impressively diverse.

The first notable social phenomenon at the international level is the aging of immigrants in their adopted countries. Young people from developing countries who migrated to developed nations in the 1950s and 1960s are today old people in these countries. Thanks to aging of former immigrants in their adopted lands, elderly populations are becoming much more culturally heterogeneous. As a result, these countries have to cope with problems previously unknown, particularly in relation to multi-culturalism and the need to establish special cultural-sensitive social services for the aged.

Another interesting aspect of aging at the international level is the phenomenon of return migration at an advanced age. People who migrated to developed countries at working age in search of employment, return to their country of origin in order to live out their final years in the place of their birth and their "natural" environment. Often, they live on the pension that they acquired in the host country; and, sometimes, they have accumulated pension rights in the land of their birth. Examples include the return of British pensioners born in Malta or the Caribbean Islands to their homeland, or the return of U.S. pensioners to Canada or Finland.²⁰ Here, too, the complex of

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 9

²⁰ Anthony M. Warnes, *The International Dispersal of Pensioners from Affluent Countries*, 7 *Intl. J. Population Geography* 373, 385 (2001); see also Margaret Byron & Stephanie Condon, *A Comparative Study of Caribbean Return Migration from Britain and*

rights and other aspects of returning to one's homeland at an advanced age create special problems and raise political issues.²¹

A particularly interesting phenomenon of aging with an international dimension is "distant caring." This is not simply adult children caring for their aging parents from a distant city or village. Today, this term in an international context also refers to adult children who have migrated to developed countries and who are obliged to bear the burden of informal care for aging parents who remained in the land of their birth. Thus, for example, young Indians who have migrated to England are liable to find themselves responsible for their elderly parents in India. Such care, though it may seem impossible, may embrace a variety of activities ranging from sending money by post, and frequent telephone calls or journeys back to India, to the wife's return to care for the old family member. Here, too, this phenomenon creates special and complex problems, at the social and legal level alike.

A different aspect of distant caring is the reunion of families. In these cases, to solve the problems created by distant caring, the young members of the family who migrated for economic reasons send for their aging parents to join them. This import of aging family members, who are dependent on their children for care and the implementation of their rights, creates an elderly segment of the population with many special social problems in a country where they are, in effect, complete foreigners.²²

Another phenomenon, perhaps the best known in the sphere of national and international migration of the elderly, is migration at retirement age. A well known example is the migration of retirees within the United States to warm states such as Florida and California.²³ In recent years, however, this phenomenon has developed to a significant degree at the international level, too. The most prominent examples are of elderly Canadians migrating to Florida, or Northern Europeans migrating to Spain, Portugal, or

France: Towards a Context-Dependent Explanation, 21 *Transactions British Inst. Geographers* 91 (1996) (available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=retrieve&db=pubmed&dopt=Abstract&list_uids=12157818).

²¹ See generally Eleanor Palo Stoller & Charles F. Longino, Jr., "Going Home" or "Leaving Home"? *The Impact of Person and Place Ties on Anticipated Counterstream Migration*, 41 *Gerontologist* 96 (2001) (presenting an empirical study showing that ties with children and community tend to influence whether elders will move back to their country of origin).

²² Russell King, Anthony M. Warnes & Allan M. Williams, *International Retirement Migration in Europe*, 4 *Int. J. of Population Geography* 91 (1998).

²³ For a survey of the reasons for migration of the elderly see generally Russell King, Tony Warnes, & Allan Williams, *Sunset Lives: British Retirement Migration to the Mediterranean* (Berg 2000) (concerning Europeans); Charles F. Longino, Adam T. Perzynski, & Eleanor Palo Stoller, *Pandora's Briefcase: Unpacking the Retirement Migration Decision*, 24 *Research on Aging* 29 (1992) (Americans); Allan M. Williams, Russell King, & Tony Warnes, *A Place in the Sun: International Retirement Migration from Northern to Southern Europe*, 4 *European Urb. & Regl. Stud.* 115, 127-130 (1997) (Europeans).

Greece.²⁴ Here, too, there arise a variety of political issues, as well as complex economic and social phenomena.²⁵ Thus, for instance, international migration of the elderly leads to the flow and transfer of economic resources from the mother country to the host country. This raises many legal questions, such as: Is the right to an old-age pension valid when the pensioner ceases to be a resident of the mother country and migrates to a foreign land?²⁶ How is the right to health care put into practice, and to what extent does health insurance in the country of emigration cover the cost of health care in the host country?²⁷ And the simple but fundamental question: Is the migrating pensioner entitled to vote in the country of which he is a citizen when he is living abroad?

Finally, it should also be mentioned that in various Western countries elder care has adopted an "international face," in that it has become a popular field of work for foreign workers. On the one hand, there is the foreign worker, who is compelled by want in his country of origin to leave his home and family and seek a living in an affluent country; and on the other hand, there is the elderly individual in the well-off country, who can provide housing, food, and full-time work for the worker and receive from him or her services on a twenty-four-hour basis. The needs of these workers and the needs of the elderly in affluent countries have given rise to a global trend in this field, where a significant part of elder care is actually foreign.²⁸

²⁴ In 1999 some 814,000 British retirees received their pensions in more than two hundred countries outside the U.K. Almost a quarter lived in Australia, followed by Canada, the United States, and the Irish Republic. Smaller fractions were found all over the world: in Mediterranean Europe (e.g., Spain, Portugal, and Italy), Africa (e.g., Zimbabwe and Nigeria), Asia (e.g., India and Yemen), and elsewhere. Warnes, *supra* n. 20, at 379, 380 tbl. 3.

²⁵ King, *supra* n. 22, at 104-109.

²⁶ The most developed network of agreements among national social security agencies for making payments to their citizens abroad is that of the member states of the Council of Europe. Council of Europe, *European Convention on Social Security* E.T.S. 78 (Dec. 14, 1972), (available at <http://conventions.coe.int/treaty/en/Treaties/html/078.htm>); see also Council of Europe, *Supplementary Agreement for the Application of the European Convention on Social Security* E.T.S. 78A (Dec. 14, 1972), (available at <http://conventions.coe.int/treaty/en/Reports/html/078A.htm>). Additionally, key Regulation 1408/71 concerns social security for migrant workers. Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. 1971 O.J. (L 149) 2, (available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31971R1408&model=guichett). The regulation, along with elaborations in hundreds of decisions by the European Court of Justice, has benefited millions of expatriate workers and pensioners. For a summary of proposals for simplifying social security coordination in the European Union see Eberhard Eichenhofer, *How to Simplify the Co-ordination of Social Security*, 2 *European J. Soc. Sec.* 231 (2000). Finally, bilateral agreements between the United States and other nations that coordinate old age, survivors, and disability benefits may be found at The Social Security Administration's Office of International Programs, *International Agreements*, http://www.ssa.gov/international/totalization_agreements.html (accessed July 1, 2004).

²⁷ See e.g. Elias Mossialos & Willy Palm, *The European Court of Justice and the Free Movement of Patients in the European Union*, 56 *Intl. Soc. Sec. Rev.* 3 (2003) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=416630) (analyzing European Court of Justice decisions on the health policies of European Union members).

²⁸ Bracha Ben-Zvi, *The Globalization of Nursing Care*, *Haaretz C2* (Sept. 9, 2002).

C. Global Policies

The demographic, social, and economic dimensions of the aging world have placed the issues discussed thus far on the world political stage.²⁹ In the early 1980s the United Nations (UN) launched a concerted effort to deal with issues concerning the expanding elderly population.³⁰ In 1982, the UN's World Assembly on Aging, which brought together delegates from 124 nations, adopted a resolution that resulted in the Vienna International Plan of Action on Aging (the Vienna Plan).³¹ This important document, endorsed by the United Nations General Assembly,³² details various measures that should be taken by member states to assist and protect the rights of older persons in the fields of housing, social welfare, family, income security, unemployment, and education.³³

In 1991, the General Assembly issued the United Nations Principles for Older Persons, which are grouped into five categories — independence, participation, care, self-fulfillment, and dignity³⁴ — and correspond to the rights listed in the International Convention on Economic, Social and Cultural Rights (ICESCR).³⁵ The General

²⁹ The following summary of United Nations activity on aging, through text accompanying note 32, *infra*, is derived from Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 Am. U. Intl. L. Rev. 915, 947-951 (2003).

³⁰ *Id.* at 947. As one participant in a panel discussion on aging and human rights commented

The first discussion at the United Nations of the status of the aging came in the form of a draft resolution put forward by Argentina in 1948, but that resolution remained on the agenda for a long time without action. In 1969, Malta requested that an item entitled "The Question of the Elderly and the Aged" be included on the agenda of the General Assembly, but that, too, was not acted upon for a number of years. . . . In 1978, the issues of the aged gained the attention of the United Nations in the form of the funding and scheduling of the World Assembly on the Aging that was held in Vienna in 1982. . . .

Gordon, *supra* n. 5, at 164 (1990).

³¹ Rodriguez-Pinzon & Martin, *supra* n. 29, at 947 (referencing United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, U.N. Programme on Ageing, *Vienna International Plan of Action on Ageing* (adopted by the World Assembly on Aging, Vienna, Austria, July 26-Aug. 6, 1982), <http://www.un.org/esa/socdev/ageing/ageipaa.htm> (last updated Jan. 25, 2003) (also available at <http://www.unece.org/ead/pau/age/berl/ipaa.pdf>).

³² United Nations, *Question of Aging*, G.A. Res. 37/51, U.N. GAOR, 37th Sess., U.N. Doc. A/Res/37/51 (1982) (available at <http://www.un.org/documents/ga/res/37/a37r051.htm>).

³³ Rodriguez-Pinzon & Martin, *supra* n. 29, at 947 (referencing *Vienna International Plan of Action on Ageing*, *supra* n. 31, at pt. III).

³⁴ *Id.* at 948 (referencing United Nations, *Implementation of the International Plan of Action on Ageing and Related Activities*, G.A. Res. 46/91, U.N. GAOR, 46th Sess., 74th Plenary Meeting, annex, at ¶¶ 1-18, U.N. Doc. A/Res/46/91 (1991) (available at <http://www.un.org/documents/ga/res/46/a46r091.htm>)).

³⁵ *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1496th Plenary Meeting, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (available at http://www.unhcr.ch/html/menu3/b/a_ceschr.htm).

Assembly in 1992 adopted global targets on aging for 2001,³⁶ and issued a Proclamation on Ageing, which promoted national initiatives on aging and designated 1999 as the International Year of Older Persons.³⁷

In April 2002, the United Nations held its Second World Assembly on Aging, in Madrid. One hundred fifty-nine national delegations, adopting the Madrid International Plan of Action on Ageing, 2002 (the Madrid Plan), called for protecting rights and freedoms of the older population worldwide.³⁸ Rodriguez-Pinzon and Martin summarize the Madrid Plan as follows:

The Madrid Plan includes recommendations aimed at implementation and follow up. At the national level, the plan places the primary responsibility with national governments. At the international level, the United Nations Department of Economic and Social Affairs is responsible for facilitating and promoting the plan, the regional commissions are responsible for translating the plan into regional action plans, and responsibility for follow-up and review rests on the Commission for Social Development. However, the Madrid Plan failed to call for the development of a specific instrument that would afford protection to the elderly. . . .³⁹

In recent years various other UN specialized agencies, especially the International Labor Organization (ILO) and the World Health Organization (WHO), have also given attention to the problem of aging. For example, the ILO has developed standards for preventing discrimination against older workers in employment, social security, and retirement.⁴⁰ In April 1995 the WHO launched a

³⁶ *Implementation of the International Plan of Action on Ageing: Integration of Older Persons in Development*, G.A. Res. 47/86, U.N. GAOR, 47th Sess., 89th Plenary Meeting, at para. 2, U.N. Doc. A/Res/47/86 (1992) (available at <http://www.un.org/documents/ga/res/47/a47r086.htm>). For details see United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, *Short Guide for Setting National Targets on Ageing*, <http://www.un.org/esa/socdev/ageing/aagetarg0.htm> (last updated Jan. 15, 2003).

³⁷ Rodriguez-Pinzon & Martin, *supra* n. 29, at 948-949 (referencing United Nations, *Proclamation on Ageing*, G.A. Res. 47/5, U.N. GAOR, 47th Sess., 42d Plenary Meeting, annex, at ¶¶ 2-3, U.N. Doc. A/Res/47/5 (1992) (available at <http://www.un.org/documents/ga/res/47/a47r005.htm>)).

³⁸ *Id.* at 949 (referencing United Nations, Second World Assembly on Ageing, *Report of the Second World Assembly on Ageing: Madrid Political Declaration and International Plan of Action 2002* 5, U.N. Doc. A/CONF. 197/9, U.N. Sales No. E.02.IV.4 (Apr. 8-12, 2002) (available at <http://www.un.org/esa/socdev/ageing/waa/>)).

³⁹ *Id.* at 950 (referencing United Nations, *Report of the Second World Assembly on Ageing*, *supra* n. 38, at 39-42).

⁴⁰ International Labour Office, *Older Workers Recommendation, 1980*, ILO Doc. R162 (June 23, 1980), http://www.ilo.org/public/english/employment/skills/recomm/instr/r_162.htm

program on aging and health to respond to the public-health challenges of population aging. Focusing on healthy aging rather than "the elderly," the program incorporates "database strengthening, dissemination of information, advocacy, community-based programs, research, training, and policy development."⁴¹

Various regional communities and organizations have also initiated policies specifically dedicated to aging populations. The Council of Europe, for example, acknowledging that the aging of the population is among the recent profound changes of modern world, has included various specific recommendations for policy and legislation in this field. The European Union has also directly addressed the issue of ageing.⁴² One outcome of regional action in Europe was the development of The Older Person's Charter of Standards, produced by the European region of the International Association of Gerontology.⁴³ This charter includes ten fundamental standards of care and rights, in such fields as communication and information, health promotion, drugs and medicines, transport, health problems, illness, recovery and rehabilitation, discharge from hospital, day hospitals, respite care, community and social services, and changing homes.⁴⁴

Even if the picture just presented is not complete and many of the variegated phenomena connected with the aging of human society have not been discussed,⁴⁵ aging is nevertheless a recognized international phenomenon that cuts across national boundaries. As I have shown, aging has specific international aspects that affect people of different countries as they grow old in different locations all over the world. Nations grappling with common social problems are conscious of the need for international cooperation as they develop common social policies on aging. It is fair to say that a legal

(last updated Mar. 21, 2002); see also Rodriguez-Pinzon & Martin, *supra* n. 29, at 950-951 (identifying various ILO documents affecting the working elderly).

⁴¹ World Health Organization, *Ageing: A Public Health Challenge* (World Health Org. Fact Sheet No. 135, 1998), <http://www.who.int/mediacentre/factsheets/fs135/en/> (accessed May 11, 2005).

⁴² In 1999 the Commission of the European Communities published an important document entitled *Toward a Europe for All Ages — Promoting Prosperity and Intergenerational Solidarity* 221 (1999) (available at http://64.233.183.104/search?q=cache:znjknfitxbsj:europa.eu.int/comm/employment_social/soc-prot/ageing/com99-221/com221_en.pdf+towards+a+europe+for+all+ages&hl=en). For a description of the various regional activities in Europe relative to the aged see Nicole Delperee, *European Social Policy for the Elderly*, in *Aging: Culture, Health, and Social Change* 119, 119-145 (David N. Weisstub, David C. Thomasma, Serge Gauthier & George F. Tomossy eds., Kluwer Academic 2001).

⁴³ International Association of Gerontology, *Older Person's Charter of Standards*, <http://www.iag-er.org/page.jsp?id=14> (accessed May 11, 2005).

⁴⁴ *Id.*

⁴⁵ In economics, for example, the aging of the human population has many significant implications, at the international as well as the national level. The international flow of capital has been dramatically influenced by the different pace of aging in different societies. See Axel Boersch-Supan, Alexander Ludwig, & Joachim Winter, *Aging and International Capital Flows* (Natl. Bureau Econ. Research Working Paper No. w8553, 2001) (abstract available at <http://www.nber.org/papers/w8553>).

view of aging on the national level alone, ignoring its international aspects, is no longer possible.

V. SQUARE THREE: LEGAL GLOBALIZATION

The spread and substantial growth of legislation and litigation at the international level in recent decades is a well-known phenomenon that is taking place with no special reference to the question of old age. The proliferation of tribunals and increase in case loads is unprecedented. Many legal disputes are now pursued simultaneously or consecutively in multiple fora, on both the national and international levels.⁴⁶

The most fundamental change toward the internationalization of law took place after World War II, together with what may be called "the revolution of human rights." Until World War II, international law was a normative system that regulated the relationships between states. The state was the central subject of international law; a sovereign entity that regulated its internal affairs independently and made decisions about the legal questions associated with the people who lived in it on the assumption that no other state had the right to deal with its internal affairs.⁴⁷ International law did not deal directly with the individual or the defense of his or her rights, for the individual's interests were protected by the state.

After World War II, international law underwent a revolution. The establishment of the United Nations (UN), the content of its statutes, the obligations undertaken by its member states, and the complex of conventions on human and citizen rights that were implemented, constituted a fundamental change from the state of affairs before the creation of the UN. In the framework of their international legal obligations most of the states of the world accepted the obligation to honor and defend the human rights of their inhabitants. They also accepted the possibility that external bodies, acting or reacting in response to requests by individuals or organizations, and not only by states, might enforce the state's obligations in the sphere of human rights.

As such, the conceptual barrier of sovereignty was breached in public international law after World War II, and the language of human rights became international and universal. The international community has frequently reaffirmed the universality, indivisibility, interdependence, and interrelatedness of all human rights, whether

⁴⁶ Campbell McLachlin, *Reflections from the Practice of International Litigation*, in *International Law* 17 (Malcolm D. Evans ed., Oxford U. Press 2003).

⁴⁷ Yaffa Zilbershatz, *Hamishpat habeinleumi bamishpat hahukati* [*The Role of International Law in Israeli Constitutional Law*], 4 *Mishpat Umimshal*, 47 (1997); see also Malcolm N. Shaw, *International Law* 29-30, 178-181 (3d ed., Grotius Publications 1991) (brief history of international law; state vs. individual as subject of international law).

civil, political, economic, social, or cultural.⁴⁸ Every person is entitled to them by virtue of being a human being.⁴⁹ It may even be said that

[r]ights have become a part of the international-law landscape to the point that they may have been constitutionalized. . . . This constitutionalization may reflect the migration of some element of community to a global level, at least with respect to the definition of rights [] . . . [and] in the sense of "imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights."⁵⁰

It seems, therefore, that today in many countries, international public law and the influence of the norms of customary international law on local laws and judicial decisions have become increasingly important. The accumulation of experience in various countries indicates that the influence of norms from international law on the manner in which a nation's laws are framed, on the way in which its courts interpret them, and on the readiness of the courts to apply the principles of international law directly to the national law are on the increase.⁵¹

Individuals, organizations, and states use international law to make changes that advance the rights of the citizen at the local level. They do so in various ways — for example, through the supervisory and informational machinery of international organizations, such as the UN Committee on Economic, Social and Cultural Rights (CESCR), which is the supervisory body of the ICESCR.⁵² Domestic

⁴⁸ E.g. United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/24 (Part I) ¶ 5 (June 25, 1993), 32 I.L.M. 1661 (early declaration of these characteristics of human rights); The Asia Pacific Forum of National Human Rights Institutions, *Conclusions of the 12th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asian-Pacific Region*, (Doha, Qatar, Mar. 2-4, http://www.asiapacificforum.net/activities/international/un_asia/twelfth_conclusions.htm (accessed July 1, 2004) (example of one of many documents reaffirming this set of rights).

⁴⁹ See e.g. Asian Human Rights Commission, *Universality and Indivisibility of Rights in Asian Charter*, sec. 2.2, http://www.ahrchk.net/charter/mainfile.php/eng_charter/56/ (last updated Nov. 15, 2001).

⁵⁰ Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 Stan. L. Rev. 1999, 2021-2022 (2003) (citing Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* 3 (Michel Rosenfeld ed., Duke U. Press 1994)).

⁵¹ Zilbershatz, *supra* n. 47.

⁵² *International Covenant on Economic, Social and Cultural Rights*, *supra* n. 35. The CESCR has the ability to review a signatory nation's compliance with the ICESCR and issue an opinion. Although such an opinion is not legally binding, "it has important political and diplomatic dimensions and provides a useful means for [a country's] non-governmental organisations (NGOs) and others to promote improved compliance domestically." Dianne Otto & David Wiseman, *In Search of 'Effective Remedies': Applying the International Covenant on Economic, Social and Cultural Rights in Australia*, 7 Australian J. Human Rights 5, n. 1 (2001) (available at <http://ssrn.com/abstract=270908>).

courts might interpret a nation's constitution or legislation in ways consonant with international conventions on the rights of the citizen.⁵³

Judicial and professional systems are undergoing a process of "judicial globalization."⁵⁴ On the professional level, there is evidence of the internationalization of the practice of law. This trend is expressed in different ways: large law firms with offices all over the world,⁵⁵ legal practices with websites in different languages aimed at an international clientele,⁵⁶ and legal education programs that emphasize international dimensions of the law.⁵⁷

Finally, judicial globalization can be seen in the courts. In many countries the courts permit themselves to take into account the decisions of courts in other countries, judges from different countries meet for the face-to-face exchange of views and attitudes concerning common legal questions, attempts are made to avoid contradiction or incongruity between legal decisions, and constitutional courts learn from the experience of other constitutional courts. Judges, litigants and lawyers are coming to understand that they inhabit a legal world wider than their local or national one.⁵⁸

In short, there is today no area of the law — and, in particular, no area that relates to human rights or claims to improve humanity's social condition — that can afford to ignore the international dimensions of the law. In this sense, discussing elder law in terms of international law is no more than a sign of normalization and maturation, processes that eventually take place in every branch of the law.

⁵³ See Bruce Porter, *Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights*, 15 J. of L. & Soc. Policy 117, pt. III.A. (2000) (available at <http://www.equalityrights.org/cera/docs/poverty.htm>) (examining the extent to which Canadian law conforms to international human rights obligations and providing examples of pertinent court cases); Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 Monash U.L. Rev. 87 (2003) (analyzing the High Court of Australia's recent use of international law in interpreting Australia's Constitution).

⁵⁴ See Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Intl. L. 1103, 1104 et seq. (2000) (analyzing five categories of judicial interaction: "relations between national courts and the European Court of Justice . . . ; interactions between the European Court of Human Rights and national courts; the emergence of 'judicial comity' in transnational litigation; constitutional cross-fertilization; and face-to-face meetings among judges around the world").

⁵⁵ E.g. Günter Müller Stewens & Jens Drolshammer, *Managing the International Law Firm: Nuisance or Necessity*, in *The Internationalization of the Practice of Law* 203 (Jens Drolshammer & Michael Pfeifer eds., Kluwer Law Intl. 2003). b

⁵⁶ E.g. Marc Lauritsen, *Lawyering for Tomorrow — Technology and the Future of International Law Practice*, in *The Internationalization of the Practice of Law*, supra n. 55, at 411.

⁵⁷ E.g. Tony M. Fine, *The Globalization of Legal Education in the United States*, in *The Internationalization of the Practice of Law*, supra n. 55, at 329.

⁵⁸ Slaughter, supra n. 54, at 1124 (concluding that courts will be looking to, for example, World Trade Organization law as interpreted by WTO panels and "crafting their own national compromises between the conflicting demands of national legislation and international treaties. . .").

VI. SQUARE FOUR: INTERNATIONAL ELDER LAW

The previous sections of this article have demonstrated that the need to develop international elder law stems from various sources not necessarily directly related to law or aging. We now turn to a direct discussion of the issue. Unlike women⁵⁹ or children,⁶⁰ to whom the international community has given international bills of rights, there is as yet no comprehensive international convention devoted to the rights of the elderly.⁶¹ With no international instrument tailored to its particular needs, the older population remains a vulnerable group. The whole field of international law and aging has been largely neglected compared to other social groups.⁶²

Nevertheless, a distinct field of international elder law has begun to emerge within the broad framework of existing international law. There is evidence that limited, yet important, developments at various levels of international law are beginning to address the international legal need.

A. Public International Elder Law

The starting point for any discussion on the status and rights of older persons on the level of public international law is the acknowledgment, just noted, that there is no international legal covenant tailored to the particular needs of the older population. When the rights of the elderly are mentioned in international covenants, they are usually presented as part of rights that apply fully to all members of society.⁶³ Despite this relative legal vacuum,

⁵⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. Res. 34/180, GAOR 34th Sess., 107th Plenary Meeting, Annex, U.N. Doc. A/34/46 (1979) (available at <http://www.unhchr.ch/html/menu3/b/1cedaw.htm>); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 54/4, GAOR 54th Sess., annex, U.N. Doc. A/Res/54/4 (1999) (available at <http://www.un.org/womenwatch/daw/cedaw/protocol/>).

⁶⁰ *Convention on the Rights of the Child*, G.A. Res. 44/25, GAOR 44th Sess., 61st Plenary Meeting, annex, U.N. Doc. A/Res/55/25 (1989) (available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>); *Optional Protocol on the Involvement of Children in Armed Conflicts*, G.A. Res. 54/263, GAOR 54th Sess., 97th Plenary Meeting, annex I, U.N. Doc. A/Res/54/263 (2001) (available at <http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm>); *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, G.A. Res. 54/263, GAOR 54/263, GAOR 54th Sess., 97th Plenary Meeting, Annex II, U.N. Doc. A/Res/45/263 (2001) (available at <http://www.unhchr.ch/html/menu2/dopchild.htm>).

⁶¹ United Nations, Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *The Economic, Social and Cultural Rights of Older Persons* ¶ 1.13., CESCR Gen. Comment 6 ¶ 1.13 (1995) (available at <http://www.unhchr.ch/tbs/doc.nsf/0/482a0aced8049067c12563ed005acf9e?OpenDocument>).

See also Rodriguez-Pinzon, *supra* n. 29, at 917, 1007-1008 (noting that "there is no specific international body with the mandate to focus on the rights of the elderly").

⁶² Philip Alston, Panel Remarks, *Aging: A New Human Rights Concern* (Apr. 9, 1987), in 81 Am. Socy. Intl. L. Procs. 164, 177 (1990).

⁶³ See e.g. Rodriguez-Pinzon & Martin, *supra* n. 29, at 953 (referencing the *International Covenant on Economic, Social and Cultural Rights* (*supra* n. 35)).

however, a number of international instruments, such as the International Covenant on Civil and Political Rights⁶⁴ and the ICESCR,⁶⁵ "recognize specific rights of all persons and are clearly applicable to older persons as citizens of signatory states."⁶⁶ The CESCR has placed special emphasis on examining signatories' reports on their application of the ICESCR to older persons and has identified provisions within the covenant that are specifically relevant to the older population.⁶⁷ For example, in light of the broad language of Article Nine of the ICESCR, which provides that signatories "recognize the rights of everyone to social security,"⁶⁸ the CESCR has recommended that

States parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.⁶⁹

Regionally as well, there have been various developments, on both the treaty and judicial levels. On the treaty level one can point, for example, to Article Seventeen of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) which states that every person has a right to certain safeguards in old age.⁷⁰ Or one can point to Article Eighteen of the Banjul Charter on Human and Peoples' Rights, which guarantees that the elderly will have the right to special safeguards consistent with their own needs.⁷¹

⁶⁴ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1496th Plenary Meeting, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

⁶⁵ *International Covenant on Economic, Social and Cultural Rights*, *supra* n. 35.

⁶⁶ Rodriguez-Pinzon & Martin, *supra* n. 29, at 917.

⁶⁷ United Nations, Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *supra* n. 61, at ¶ 3.14.

⁶⁸ *International Covenant on Economic, Social and Cultural Rights*, *supra* n. 35, at art. 9.

⁶⁹ United Nations, Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *supra* n. 61, at ¶ 5.30. One criticism of this level of "protection" is that economic, social, and cultural rights are expressed as aims, not rights as such. See Rodriguez-Pinzon & Martin, *supra* n. 29, at 918.

⁷⁰ Rodriguez-Pinzon & Martin, *supra* n. 29, at 919, 943 (citing *Organization of American States: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)* (Nov. 14, 1988), art. 17, O.A.S.T.S. 69, 28 I.L.M. 156).

⁷¹ *Id.* at 919, 1004-1005 (citing *Banjul Charter on Human and Peoples' Rights* art. 18, ¶ 4 (Jun. 27, 1981), 21 I.L.M. 58, 60 (1982)). For additional examples see Rodriguez-Pinzon & Martin, *supra* n. 29, at 919.

On the judicial level, in a number of instances, international monitoring committees or judicial tribunals have constructed or actively interpreted international treaties, covenants and declarations in broad terms to advance the rights of the older population. Rodriguez-Pinzon and Martin summarize *Wessels-Bergervoet v. The Netherlands*, as an example of this phenomenon.⁷²

[The] petitioner complained that the reduction of her pension was the result of discriminatory treatment. The petitioner's husband received an old-age pension under Dutch legislation. The government reduced his pension because during the time when he was working in Germany and receiving insurance under the German social security system, he did not have insurance under the Dutch system. The petitioner also received an old-age pension, which the government reduced on the same basis as her husband's. In this case, the court held that the difference in treatment, based solely on the fact that the petitioner was a married woman, was not an objective and reasonable justification and therefore constituted a violation of Article 1 of Protocol No. 1 and Article 14 of the [European] Convention [on Human Rights].

Another example can be found in a recent case decided by the European Union's (EU's) highest court: a decision that EU pensioners traveling in member states other than their home country have the right to medical treatment with costs borne by the home country.⁷³ The Court of Justice of the European Communities wrote that a Greek pensioner treated for a chronic heart complaint while traveling in Germany should have been recompensed by his own country.⁷⁴ The court added that such treatment is not to be "limited solely to cases where the treatment provided has become necessary because of a sudden illness" but should also include cases of "a pre-existent pathology of which [the patient] is aware, such as chronic illness."⁷⁵

⁷² *Id.* at 929 (describing *Wessels-Bergervoet v. Netherlands*, App. No. 34462/97, 2002-IV Eur. Ct. H.R. ¶¶ 11, 54 (June 4, 2002) (available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc=en; search Application Number; enter 34462/97>))

⁷³ Case C-326/00, *Idryma Koinonikon Asfaliseon (IKA) v. Vasileios Ioannidis*, 2003 E.C.R. I-1703 (available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-326%2F00&datefs=2003-02-25&datefe=&nomusuel=&domaine=&mots=&resmax=100>).

⁷⁴ *Id.* at ¶ 55.

⁷⁵ *Id.* at ¶ 41. For other examples of international judicial tribunals' decisions promoting the rights of older persons see Rodriguez-Pinzon & Martin, *supra* n. 29, at 925 et seq.

Other international bodies and organizations also contribute to the developing field of legal rights of older persons on the international level. For example, the International Labor Organization (ILO), in various conventions, has addressed specific issues relating to the older population, such as minimum standards of social security,⁷⁶ and old age benefits.⁷⁷

B. Private International Elder Law

Private-law problems arising from factual situations connected with more than one country are commonplace in the modern world. As described above,⁷⁸ in a globalized and aging world, older persons travel, move, and migrate from one country to another for a variety of purposes and contemplated or actual durations. To achieve reasonably satisfactory resolutions to the private-law problems to which such multi-country factual situation give rise, legal systems have adopted special rules that form the legal discipline known as conflict of laws and private international law.⁷⁹ Like any other rule in a country's private law, its rules of conflict may be harmonized with those of other countries by means of international treaties.

Although international private law is relevant to the aging population in various respects, perhaps the most common area is that of wills and inheritance. This area, which regulates the allocation of property after a person's death and the degree to which the person is free to decide what will happen to that property, raises many legal questions at the international level. A relatively simple question is whether the country within whose boundaries the person's property is found should honor a will made in a different country. An example of a more complex issue is the status of a will that was drawn up in one country and signed in another, and whose provisions are required to be carried out in a third country. Such questions can only receive a legal solution by means of private international law.

Every legal system is free to define its own legal responses to questions like these. On the international level, however, there are a number of conventions that attempt to establish standardized practices in those areas of private international law applicable to the

⁷⁶ International Labour Organization, *Social Security (Minimum Standards) Convention* (June 28, 1952), ILO. Doc. C102, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C102> (accessed July 1, 2004).

⁷⁷ International Labour Organization, *Invalidity, Old-Age and Survivors' Benefits Convention* (June 29, 1967), ILO. Doc. C128, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C128> (accessed July 1, 2004).

⁷⁸ *Supra* nn. 21-29 and accompanying text.

⁷⁹ See generally Peter Stone, *Conflict of Laws* 1-8 (Longman 1995).

elderly. These conventions were drawn up by the Hague Conference on Private International Law, an organization comprising fifty-six member nations.⁸⁰ The purpose of this body is to unify the rules of private international law⁸¹ by drafting multilateral treaties known as Hague Conventions.⁸² Some of the conventions deal specifically with legal issues of concern to older persons: testamentary dispositions,⁸³ international estate administration,⁸⁴ succession to estates,⁸⁵ and Trusts.⁸⁶ There is also the Fourth Report of the Private International Law Committee, which provides a universal basis in this field and was adopted by many countries around the world and incorporated into their legal systems.⁸⁷

An important recent development in this field is the Convention on the International Protection of Adults, which "applies to the protection in international situations of adults who, by reason of impairment or insufficiency of their personal facilities, are not in a position to protect their interests."⁸⁸ The convention "aims to shield the vulnerable members of society by determining which state — that of their citizenship or of their current residence — may assert jurisdiction over them."⁸⁹ While not explicitly stated, it is clear that this convention is of "significant, if not primary, relevance to the elderly."⁹⁰

According to the convention, it is the adult's country of habitual residence that has the jurisdiction to take measures for protecting the adult's person and property.⁹¹ However, as Fagan notes, the convention recognizes some exceptions, such as the jurisdiction to take emergency or temporary measures of protection.⁹²

⁸⁰ Aimee R. Fagan, *An Analysis of the Convention on the International Protection of Adults*, 10 *Elder L.J.* 329, 337 (2002).

⁸¹ Hague Conference on Private International Law, *Statute of the Hague Conference on Private International Law*, <http://hcch.net/index.en.php?act=conventions.text&cid=29> (entered into force July 15, 2004).

⁸² Fagan, *supra* n. 80, at 337.

⁸³ Hague Conference on Private International Law, *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, http://www.hcch.net/index_en.php?act=conventions.text&cid=40 (Oct. 5, 1961).

⁸⁴ *Convention Concerning the International Administration of the Estates of Deceased Persons*, http://www.hcch.net/index_en.php?act=conventions.text&cid=83 (Oct. 2, 1973).

⁸⁵ *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, http://www.hcch.net/index_en.php?act=conventions.text&cid=62 (Aug. 1, 1989).

⁸⁶ *Convention on the Law Applicable to Trusts and on Their Recognition*, http://www.hcch.net/index_en.php?act=conventions.text&cid=59 (July 1, 1985).

⁸⁷ Private Int'l. L. Comm., *Formal Validity of Wills, Fourth Report of the Private International Law Committee* (1958). See also Stone, *supra* n. 79, at 374 (noting that thirty-eight countries have incorporated the Report into their legal systems).

⁸⁸ *Convention on the International Protection of Adults*, art. 1, ¶ 1, <http://www.hcch.net/e/conventions/text35e.html> (Jan. 13, 2000); see generally Paul Lagarde, *Convention of 13 January 2000 on the International Protection of Adults, Explanatory Report*, <http://www.hcch.net/index.en.php?act=conventions.text&cid=71> (Jan. 5, 2000).

⁸⁹ Fagan, *supra* n. 80 at 331.

⁹⁰ *Id.* at 339.

⁹¹ *Convention on the International Protection of Adults*, *supra* n. 88, at art. 1, ¶ 5.

⁹² Fagan, *supra* n. 80, at 340-341 (citing *Convention on the International Protection of Adults*, *supra* n. 88 at art. 10, ¶ 1; art 11, ¶ 1).

The actual protective authority is broad, and includes "the determination of incapacity and the institution of a protective regime," "the placement of the adult in an establishment or other place where protection can be provided," and "the authorization of a specific intervention for the protection of the person or property of the adult," including matters such as "a surgical operation or the sale of an asset."⁹³ Most importantly, the convention makes it possible to respect (within certain limits) legal documents such as advance directives, living wills, and durable powers of attorney, so that the wishes of older persons will be honored in case of incapacity, even outside their own country.⁹⁴

C. Comparative International Elder Law

"Globalization brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact."⁹⁵ Naturally, this trend also encourages the development of comparative elder law. It should be noted that comparisons between legal systems widen horizons. Comparative research enables us to consider legal solutions that our own system has not contemplated, to weigh the advantages and disadvantages of our own system against those of other systems discovered in the course of research,⁹⁶ and to better understand our own system. The ability to identify an identical lineage, or similar basic principles, helps us single out the universal cornerstones of the legal system and interpret the law better on the basis of wider knowledge.⁹⁷ The knowledge of foreign systems of law enables us to provide solutions for clients who encounter legal difficulties in foreign countries. Finally, comparative research makes possible dialogues between societies and, to a certain extent, encourages international cooperation and mutual understanding.⁹⁸

At the present time, unfortunately, there exists little literature in the field of elder law that makes use of comparative methodology. There is, therefore, much room for development — with respect to the

⁹³ *Id.* at 341 (citing Lagarde, *supra* n. 88, at 31; see also *Convention on the International Protection of Adults*, *supra* n. 88, at art 3).

⁹⁴ *Id.* at 347 (analyzing the success or failure of the convention in achieving this goal).

⁹⁵ David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 *Tul. L. Rev.* 949, 950 (2001).

⁹⁶ See generally A. Haris, *Why and How Should One Teach Comparative Law in Israel?*, 25 *Iyunei Mishpat* 443 (2001) (Hebrew); Michael Bogdan, *Comparative Law* (Kluwer Academic 1994); *Comparative Law: Cases, Text, Materials* (Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog & Edward M. Wise eds., 6th ed., Found. Press 1998); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans., Clarendon Press 1998).

⁹⁷ Haris, *supra* n. 96; see generally Bogdan, *supra* n. 96, at 28-32; Peter de Cruz, *Comparative Law in a Changing World* 21-22 (2d ed., Cavendish Publ. 1999) (describing how the judges of the European Court of Justice draw upon their experience from various traditions to resolve legal issues that present themselves in this international forum).

⁹⁸ Haris, *supra* n. 96. See also Cruz, *supra* n. 97, at 24-26 (encouraging the use of "common core research" to discern the "highest common factor of substantive law" across international legal systems).

general advantages just enumerated, as well as at a more advanced level: the ability to use the comparative method to discern and analyze social aspects of old age at deeper levels.

One example of a long-known use of comparative law is legal reform. Legal systems have always been learnt, or simply copied. It is natural, in any process of legal change, to make a comparative examination of what is happening in the field in the outside world.⁹⁹ It would likewise be natural that in the field of elder law, in which there is a constantly growing demand for legal change and reform of existing laws, one should turn to comparative international law for solutions.

Despite the very limited amount of comparative research in elder law thus far, a slow increase has recently become discernible. There is detailed research in elder guardianship,¹⁰⁰ family responsibility,¹⁰¹ long-term care for old people,¹⁰² and the right to a dignified death.¹⁰³ The increasing awareness of the importance of comparative international law has also affected education and professional training. For example, the National Academy of Elder Law Attorneys (NAELA) founded in 1988, has organized comparative international panels in several of its professional conferences.¹⁰⁴ As another example, in 2003 the Wake Forest University School of Law offered a course in Italy devoted entirely to the comparative aspects of elder law.¹⁰⁵

The studies and activities mentioned above have implications for social and legal policy, and they give us a deeper understanding of the field, as well as the ability to forecast possible developments in the future. The recognition of the importance of the international aspects of elder law will intensify the use of the tools of comparative law in the future and enable the field to develop with the aid of international cooperation.

⁹⁹ Cruz, *supra* n. 97, at 20-21 (providing several examples of nations' engaging in comparative studies and borrowing of foreign laws).

¹⁰⁰ See generally Israel Doron, *Elder Guardianship Kaleidoscope: A Comparative Perspective*, 16 *Intl. J. L., Policy & Fam.* 368 (2002) (comparing guardianship law reform internationally).

¹⁰¹ See generally Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 *Marq. L. Rev.* 401 (2002) (comparing major nations' filial responsibility laws).

¹⁰² See generally A. Glendinning, M. Schunk & E. McLaughlin, *Paying for Long-Term Domiciliary Care: A Comparative Perspective*, 17 *Ageing & Soc.* 123, (1997).

¹⁰³ Traci R. Little, *Protecting the Right to Live: International Comparison of Physician-Assisted Suicide Systems*, 7 *Ind. Intl. & Comp. L. Rev.* 433 (1997) (comparing physician-assisted suicide in the Northern Territory, Australia; the Netherlands; and Oregon, United States); see also Peter de Cruz, *Comparative Healthcare Law* ch. 18 (Cavendish Publ'g. 2001) (summarizing and comparing advance-directive and physician-assisted suicide laws in several countries).

¹⁰⁴ National Academy of Elder Law Attorneys, <http://www.naela.org/> (accessed June 30, 2004).

¹⁰⁵ Wake Forest University Comparative Law Summer Program, <http://www.wfu.edu/users/palmitar/LawSchoolPrograms/Venice-Summer-Program/Brochure2003/Academic-life.html> (accessed June 30, 2004).

VII. CONCLUSIONS AND RECOMMENDATIONS

Elder law is still in a state of formation and maturation, and in many countries it is still in its infancy. There are many countries where it has to justify its existence and contend with the most basic of questions: "What is elder law?" Is it a specialist field, or an academic branch in its own right? Is it based on the target population (the old, their families, and their careers) or on the substantive legal matters with which it deals (health law, poverty law, estate planning)?¹⁰⁶ These questions are complex, and legal systems must confront them and find answers to them.

Nonetheless, reality often dictates the areas in which development takes place without any necessary connection with academic or professional progress. In this article, I have maintained that today the conjunction of at least four different factors obliges anyone who deals with aging, law, and the formulation of legal policy with regard to the elderly to look beyond the bounds of the nation. Today's reality shows that in the area of aging and the law "the rights of elderly persons have not yet received the international legal attention they deserve."¹⁰⁷ One purpose of this article has been to point out the many different factors that are moving the field of elder law in a new and exciting direction: that of international law.

The extension of elder law into international law holds great promise. It will make possible new areas of cooperation. It will release great creative potential and will allow for the formulation of legal solutions that have hitherto been impossible. It proffers a vision of old age in the perspective of universal law, crossing frontiers and uniting cultures. Finally, it is an expression of the "maturation" of the field of elder law, in the wake of many other fields that, at one stage or another, have undergone a process of internationalization.¹⁰⁸

The ability to realize this vision in practice is dependent primarily on the ability to create consciousness of the need to do so. As such, one key purpose of this article has been to promote understanding among those who work in elder law of the need to raise their sights from the local to the international level. Only understanding, consciousness, and internalization of the need to bring about a change in thought will eventually bring about the required

¹⁰⁶ See generally Frolik, *Redux*, *supra* n. 2, at 3-4 (arguing that the focus of the practice of elder law in the United States has evolved from poverty law and Medicaid to "late life legal planning").

¹⁰⁷ Rodriguez-Pinzon & Martin, *supra* n. 29, at 917.

¹⁰⁸ See generally Adair Dyer, Lecture, *The Internationalization of Family Law* (U.C. Davis Sch. L., Davis, Cal., Nov. 7, 1996), in 30 U.C. Davis L. Rev. 625 (1997) (describing the development of international norms in family law); Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 Ind. L. Rev. 1457 (2001) (concerning the "international human right to health").

reforms. The following are several suggested guidelines for the future.

A. Increased International Cooperation

The international aspects of elder law cannot be developed without international cooperation. This must be promoted at various levels and in different contexts. Thus, for instance, at the academic level, cooperation between scholars at academic research centers the world over is a natural development. This can take place in a number of ways: joint research projects, exchange of scholars, conferences and workshops, and a whole host of academic activities. The same applies to the professional level as well.¹⁰⁹ There is already a great deal of international cooperation among lawyers, so it is reasonable to suppose that they will expand this cooperation to find legal solutions to the international problems of their elderly clients. Such cooperation should take place both among individual lawyers or law firms, and among professional organizations. Professional organizations, which are today more involved and active in matters of elder law than in the past, should increase the degree of their international cooperation and should educate and encourage professional cooperation among lawyers as individuals.

In this connection, it should be noted that rising importance of nongovernmental organizations (NGOs) heralds a fundamental change in international law. Although gerontological organizations conduct a lively and dynamic international dialogue,¹¹⁰ in the field of elder law, cooperation and dialog between NGOs is extremely limited.¹¹¹

Only recently have a number of organizations taken it upon themselves to develop international contacts. For instance, NAELA,¹¹² a U.S. professional organization of lawyers who specialize in elder law, has opened its ranks to lawyers from outside the United States, and has organized sessions dealing with international aspects of elder law in a number of conferences. AARP

¹⁰⁹ See generally Gerber, *supra* n. 95, at 955 (noting that "[g]lobalization . . . changes the relationships between legal professionals in ways that influence the processing and transmission of legal information").

¹¹⁰ See e.g. International Association of Gerontology, *welcome* <http://www.sfu.ca/iag/> (accessed June 30, 2004); International Federation on Ageing, <http://www.ifa-fiv.org/en/accueil.aspx> (accessed June 30, 2004).

¹¹¹ In many countries there already exist associations and NGOs that promote the law as an instrument for social change among the old. In the United States, the Legal Counsel for the Elderly gives legal aid to old people in need on behalf of AARP. See generally <http://www.aarp.org/lce/> (accessed June 30, 2004). The Advocacy Centre for the Elderly in Toronto, Canada, and Law in Services of the Elderly in Israel serve similar functions. See generally <http://www.advocacycentreelderly.org/index.htm> (last updated June 19, 2004) and <http://www.elderlaw.org.il> (*select* English) (accessed May 11, 2005). These organizations work on the local level, and have scarcely any international cooperation between them.

¹¹² National Academy of Elder Law Attorneys, *supra* n. 104 at <http://www.naela.org/>.

created a page dealing with international elder law policy on its website, and has initiated an e-mail distribution list for those interested in the subject.¹¹³ Because of the importance of NGOs for the advancement of matters of elder law, it is important that these organizations communicate at the international level, and become even more conscious of their ability to use international law in order to protect the rights of the old people with whom they are concerned.

B. International "Legislation"

As noted previously, there is a major lacuna in international law: the absence of a charter of rights for the older population. There is no justification for the fact that, whereas other underprivileged groups have been granted internationally recognized charters of rights, the elderly have no such document bearing obligatory legal validity. This is a badge of shame for all those who are active in the field of elder law; it is in part the expression of inactivity and the lack of consciousness of the need for international action to promote the rights of the elderly. It may be that the most important challenge in international elder law is the framing of an international charter that defines the fundamental rights of old people the world over. Such a document, in addition to its obligatory legal status, would have great educational, symbolic, and political value and would serve to advance the rights and improve the status of the elderly the world over. Moreover, international and regional organizations should publish papers, covenants, and detailed international agreements as a basis for the specific rights of the elderly. The creation of such legal instruments would bring about change throughout the field of elder law at both the national and the international levels.

¹¹³ AARP Global Aging Program, *Policy & Research for Professionals in Aging*, <http://www.aarp.org/international/> (accessed June 30, 2004).

CASES THAT CROSS BORDERS

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Many problems can arise when someone becomes mentally incapacitated in another country, or is incapable at home, but has immovable¹ or movable property elsewhere that needs to be safeguarded, managed, or dealt with. The solutions are few but the problems will become compounded and more commonplace as our societies become more mobile. Part of the answer can be found within the interaction of private international law and adult guardianship law. Practitioners in all countries will be required to have a better understanding of the basic rules that can come into play when they are faced with cases that cross international borders.

This article reviews some of the available principles, conventions, laws, and practical considerations that may guide practitioners and courts in dealing with cases that require making decisions on behalf of an individual with diminished capacity when those decisions involve issues, property, or parties cross international borders. International controversies over where an incapacitated person should be placed, who should provide care or serve as guardian, who can make medical decisions, or who should have control over funds are destined to arise on a frequent basis. The Hague Convention on the International Protection of Adults,² although not yet in force, can provide guidance on ways courts can cooperate in sorting out jurisdiction and coordination in multinational cases. Private international law principles that govern a court's jurisdiction over movable and immovable property in other countries may be applicable. Two cases that delve into heart of these contentious issues are examined below for the lessons learned. Practical considerations for litigants and jurists when faced with complex international cases are offered.

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¹ In private international law, immovable property is property that physically cannot be moved, in particular land and things attached to land, such as buildings. Essentially, movable property is anything that is not immovable. Joseph H. Beale, *A Treatise on the Conflict of Laws* § 208.1 (Baker, Voorhis & Co. 1935).

² *Convention on the International Protection of Adults* (concluded Jan. 13, 2000), 39 I.L.M. 7, also available at http://www.hcch.net/index_en.php?act=conventions.text&cid=71.

In theory, international litigation in the guardianship courts should be governed, first, by any international agreement relating to the property and affairs of mentally incapacitated people; second, in the absence of such agreements, by any reciprocal agreement between the territories involved;³ and third, absent either of the foregoing, by the general principles of private international law and domestic law.

In practice, domestic courts exercising an adult guardianship jurisdiction usually have extremely wide discretion, in which their paramount concern is the welfare and best interests of the person concerned. The principles of private international law tend to be applied only in so far as they are not inconsistent with that person's welfare and best interests.

I. THE HAGUE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

Although at present there is no international agreement relating to the affairs of people who lack capacity,⁴ on January 13, 2000 the Hague Conference on Private International Law⁵ adopted a Convention on the International Protection of Adults.⁶ There are distinctions among the adoption of a convention by the Conference, its signing and ratification by member states, and its entry into force. By signing a convention, a contracting state expresses in principle its intention to become a party to it. By ratifying a convention, a state

³ For example, in England and Wales the Mental Health Act 1983 sets out the reciprocal arrangement in relation to Scotland and Northern Ireland. The Mental Health Act of 1983, § 110 (Eng. & Wales). See also Robert Gordon & Simon Verdun-Jones, *Adult Guardianship Law in Canada* 4-65-4-66 (Carswell, 1992) (regarding reciprocal arrangements within Canada); Brian Porter & Mark B. Robinson, *Protected Persons and their Property in New South Wales* 100 (The Law Book Co. Ltd. 1987) (regarding reciprocal arrangements among New South Wales, Victoria, Queensland, South Australia, and New Zealand).

⁴ A Convention Concernant l'Interdiction et les Mesures de Protection Analogues was signed at The Hague on July 17, 1905 by Austria-Hungary, France, Germany, Italy, Netherlands, Poland, Portugal, Romania, and Sweden, most of which have or had Civil Law systems based on Roman Law. This Convention was subsequently denounced by France (1916), Sweden (1962), Hungary (1973), Netherlands (1977), and Germany (1992).

⁵ The Hague Conference on Private International Law (Conférence de La Haye de Droit International Privé) was instituted in 1893 to work for the progressive unification of the rules of private international law. Currently there are sixty-four member states, including Australia, Canada, the United Kingdom, and the United States of America. For further information, visit the Conference's website www.hcch.net.

⁶ See generally Paul Legarde, *Hague Conference on Private International Law*, Explanatory Report for the Convention on the International Protection of Adults (Jan. 5, 2000), available at <http://www.hcch.net/doc/exp135e.pdf> (last visited May 10, 2004); Keith Baker, *Convention of January 13, 2000 on the International Protection of Adults*, Estate Planning 4 (Sept. 2000). All documents pertaining to the development of the Convention, including the working documents and minutes of the Conference are contained in the *Proceedings of the Special Commission with a Diplomatic Character of September – October 1999*, Permanent Bureau of the Hague Conference on Private International Law (2003) [hereinafter *Proceedings*]. For the history of the convening of this conference, see Adair Dyer, *Note on the Protection of Incapacitated Adults*, Preliminary Document No. 14 of September 1996, in *Proceedings*, at 37-45.

places itself under a legal obligation to apply it. A convention finally enters into force when three instruments of ratification have been deposited with the Dutch Ministry of Foreign Affairs.

The Conference adopted the Convention, which means that the delegates who participated in the drafting of the document agreed to the document,⁷ but that is only the preliminary step in the Convention's having any force as law. The Hague Convention of January 13, 2000 on the International Protection of Adults has been signed by three states—the Netherlands, France, and the United Kingdom—but none of them has yet ratified it.⁸ It follows, therefore, that it has not yet entered into force. But, despite its current status, it is worth briefly considering its provisions, because they represent a recent expression of the comity of nations, or spirit of international courtesy and co-operation, which itself is one of the tenets of private international law.

The Convention applies to “the protection in international situations of adults⁹ who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.”¹⁰ Its objects are:

to determine which state's authorities have jurisdiction to take measures for the protection of the person or property of the adult;

to determine which law is to be applied by these authorities in exercising their jurisdiction;

to determine the law applicable to the representation of the adult;

to provide for the recognition and enforcement of such measures of protection in all contracting states; and

⁷ Delegates represented Germany, Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, Republic of Korea, Croatia, Denmark, Spain, United States, Finland, France, Ireland, Italy, Japan, Luxembourg, Morocco, Norway, Netherlands, Portugal, Romania, United Kingdom, the Slovak Republic, Sweden, Switzerland, and the Czech Republic. *Proceedings*, *supra* n. 6, at 150-152.

⁸ The Hague Convention of Jan. 13, 2003, on the International Protection of Adults was signed by the Netherlands on Jan. 13, 2000, by France on July 13, 2001, and by the United Kingdom on Apr. 1, 2003. *Convention on the International Protection of Adults*, *supra* n. 2.

⁹ For the purposes of this Convention an adult is a person who has reached the age of eighteen years. *Convention on the International Protection of Adults*, *supra* n. 2, at art. 2, para. 1. A separate Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children was adopted by the Hague Conference on Oct. 19, 1996. *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (Oct. 19, 1996), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70.

¹⁰ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 1. This definition covers cases of partial and temporary incapacity.

to establish such co-operation between the authorities of the contracting states as may be necessary in order to achieve the purpose of the Convention.¹¹

The terms of the Convention recognize that there are a variety of steps, called measures that states can take for the protection of the person or property. These measures include:

The determination of incapacity and the institution of a protective regime;¹²

The placing of the adult under the protection of a judicial or administrative authority;

Guardianship, curatorship and analogous institutions;

The designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult;

The placement of the adult in an establishment or other place where protection can be provided;

The administration, conservation, or disposal of the adult's property; and

The authorization of a specific intervention for the protection of the person or property of the adult.¹³

Recognizing in this mobile society that a person may have connections between and among many states and that questions will invariably arise as to whether any particular state has jurisdiction to take action over a particular issue, the Convention sets out protocols for determining whether a state has the jurisdiction to take any of the stated measures. Within the United States, principles of in rem and in personam jurisdiction are applied to determine whether a particular court may assume jurisdiction over a matter, and most frequently call upon a determination of where the subject of the case is domiciled or where property is located. The Convention carefully avoids using the term "domicile", but recognizes that the judicial or administrative

¹¹ *Id.* at art. 1, ¶ 2.

¹² A "protective regime" would encompass a broad, but not specifically defined, array of interventions to provide for the protection of the adult.

¹³ *Id.* at art. 3.

authorities of a particular state may need to become involved if the incapacitated adult:

is one of its nationals,¹⁴ or
is habitually resident there,¹⁵ or
is physically present there,¹⁶ or
has property located there.¹⁷

Lively debate occurred among the members of the special commission that drafted the convention as to which of these states should have jurisdiction.¹⁸ One group of delegates (including the United Kingdom) preferred a concurrent, non-hierarchical jurisdiction among relevant states. Another group favored the jurisdiction of the habitual residence, with the consent of that state's authorities required before any other state could intervene. Eventually a compromise was reached. Although the Convention gives priority to the state in which the person is habitually resident,¹⁹ the authorities of the state of which the person is a national have concurrent but subsidiary jurisdiction which may be exercised only until the authorities of the state of habitual residence have assumed jurisdiction.²⁰

When a person's habitual residence cannot be ascertained, and in all cases of emergency, the authorities of the state in which the person is present have the same jurisdiction as if he were habitually resident there, with the authorities of the state in which he or she is a national exercising a concurrent, subsidiary jurisdiction.²¹ The state having jurisdiction may, if it considers it is in the interests of the adult, request the authorities of another state to take protective measures in respect of the person or property.²²

The term "habitual residence" by design is not defined in the Convention. While this lack may be facially troubling to American lawyers accustomed to precise statutory definitions of pivotal terms, in international law it is a term of art devoid of precision. As Professor Paul Legarde, Reporter for the Hague proceedings on incapacitated adults, explained, "despite the important legal consequences attaching to it, [the term] should remain a factual concept. Any definition of habitual residence could have the perverse

¹⁴ *Id.* at art. 8, ¶ 2(a).

¹⁵ *Id.* at art. 8, ¶ 2(b).

¹⁶ *Id.* at art. 8, ¶ 2(c).

¹⁷ *Id.* at art. 9.

¹⁸ U.K. Lord Chancellor's Department, *Hague Conference on Private International Law: Draft Convention on the Protection of Adults*, a consultation paper CP3/99, ch. II, art. 27, Apr. 1999, available at http://www.scotcourts.gov.uk/forms/draft_2.htm (last visited May 10, 2004).

¹⁹ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 5.

²⁰ *Id.* at art. 7.

²¹ *Id.* at art. 6, ¶ 2, art. 10, ¶ 1.

²² *Id.* at art. 8, ¶ 1.

and unpredictable effect of putting in question the interpretation of this expression in the very numerous other Conventions in which it is used.”²³

Regarding the applicable law that a court with jurisdiction should apply in these international cases, the main provision is that the authorities of the contracting states should apply their own law when exercising their jurisdiction as determined above. However, in exceptional circumstances they may “apply or take into consideration the law of another state with which the situation has a substantial connection.”²⁴

Although a separate international convention governs agency,²⁵ this convention addresses the choice of law issues that may arise when an adult has executed a durable power of attorney (called in the convention a “power of representation”).²⁶ The drafters had in mind the situation in which an adult, while having capacity, has voluntarily selected an agent but later becomes incapacitated. In most European states the agency ends with the onset of the adult’s incapacity. In contrast, in common law countries like the United Kingdom and the United States, powers can be made durable, or enduring, authorizing the agent to continue to act past the principal’s incapacity. Thus, a conflict of laws is likely to develop when a durable power of attorney executed by an American needs to be interpreted in France. That power of attorney “conferred by an American having his or her habitual residence in Paris, is ineffective and remains so if this American transfers his or her habitual residence to New York.”²⁷ Under the convention, if an adult has granted a power of attorney to be exercised when he or she becomes incapacitated, the existence, extent, modification, and extinction of the power are governed by the law of the state of the adult’s habitual residence at the time of the grant, unless he or she has expressly designated in writing that the law of another state should apply.²⁸ This recognizes that the American principal in Paris can, and must, choose New York law, for example, if the principal wishes the agent to act after the principal’s incapacity.

The Hague Convention on International Protection of Adults does not resolve the question of whether health care decisions may be delegated, in large part because there are differences in law and culture particularly with regard to the concept of informed consent. Under American law, the doctrine of informed consent grants

²³ Legarde, *supra* n. 6, at art. 5, ¶ 1.

²⁴ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 13, ¶ 2.

²⁵ *Hague Convention on the Law Applicable to Agency*, concluded Mar. 14, 1978, available at <http://hcch.net/e/conventions/text27e.html> (last visited May 10, 2004).

²⁶ For a discussion of comparative laws on powers of attorney, see Eric Clive, *Report on Incapable and Other Vulnerable Adults*, *Proceedings*, *supra* n. 6, at 17-18.

²⁷ Paul Legarde, *Report of the Special Commission* (September 3 to 12, 1997), in *Proceedings*, *supra* n. 6, at 117.

²⁸ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 15, ¶ 1.

patients control of their medical care. This doctrine is rooted in a 1914 opinion in which Judge Cardozo stated: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."²⁹ Building on a number of prior Supreme Court decisions, most notably *Griswold v. Connecticut*³⁰ and its finding of a penumbra of specific privacy guarantees in the Bill of Rights,³¹ the landmark case of *In re Quinlan*³² presumed that the right of privacy was "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances."³³ The Supreme Court has assumed that the United States Constitution grants "a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."³⁴ Some state constitutions specifically protect the right of privacy, interpreted to include the right to refuse medical treatment.³⁵ Other states have codified the need for informed consent.³⁶ Clearly, competent patients in America have the right and an expectation that they will be asked to provide informed consent prior to the delivery of health care services.

Likewise, patients who are incapacitated and unable to give informed consent are protected by the informed consent doctrine. They do not lose their independent right of choice but do need to have that right asserted on their behalf by a surrogate.³⁷ The selection of the surrogate can occur one of three ways. A court as a guardian may appoint the surrogate decision maker. The patient, while competent, may delegate health care, end-of-life, termination of treatment, and other types of medically necessary decisions to another, called a health care agent or a proxy. To avoid the complexity of the court guardianship process, most states have established a statutory priority of surrogates on whom health care providers can rely for certain end of life decisions if the patient has not previously indicated health care preferences or selected an agent.³⁸ In the United States, the delegation of treatment decisions, made through written proxies or through statutorily devised family consent schemas, is accepted law and medical practice.

Delegation of health care consent was a particularly complex issue for those who participated in the Hague negotiation. At the first level of difficulty, patient autonomy in health care decision-making and informed consent are not as well recognized in many other

²⁹ *Schloendorff v. Soc. of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

³⁰ 381 U.S. 479 (1965).

³¹ *Id.* at 484.

³² 355 A.2d 647 (N.J. 1976).

³³ *Id.* at 663.

³⁴ *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261, 279 (1990).

³⁵ See e.g., Ariz. Const. art. 2, § 8; *Rasmussen by Mitchell v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987).

³⁶ See e.g., Fla. Stat. § 766.102 (2004).

³⁷ *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

³⁸ Charles P. Sabatino, *10 Legal Myths About Advance Medical Directives*, available at <http://www.zarcrom.com/users/alzheimers/amd-01.html> (last visited May 10, 2004).

countries. At the second level is the concept of an individual's being able to delegate to another that right, independent of court involvement, using basic precepts of common-law agency. The delegates struggled with how to be able to accommodate the personal delegation of a right that patients in other countries do not have. Participants from England, Scotland, Germany, and Australia joined the U.S. delegation in proposing the recognition of authority of individuals to devolve health care decision-making. However, because of legal and cultural differences, the delegates left the language of the Convention ambiguous enough so that the laws and practices of the contracting states could be accommodated.

The need for such ambiguity can be seen in the issue of the sterilization of incapacitated adults. In Australia, for example, a tribunal must first approve any type of sterilization of an incapacitated adult. Thus, a person could not be brought to Australia with the expectation of receiving sterilization on the authority of a self-selected proxy without the review of the tribunal. The question raised by the delegates was whether an incapacitated Australian could be taken to a country where sterilizations are performed without the mandatory review.³⁹

Once a state with appropriate jurisdiction has taken recognized measures to protect an adult, such measures are to be recognized by operation of law in all Contracting States,⁴⁰ and all are bound by any findings of fact.⁴¹ Measures taken in one state may be enforced and registered in another state,⁴² without review of the merits of the measure.⁴³

A hallmark and guiding principle of the convention is to foster cooperation between states in the protection of adults. Articles 28 to 37 require the contracting states to co-operate with one another by designating a central authority to provide information about their law and services relating to incapable adults, and to assist in the implementation of protective measures.⁴⁴ The central authority may be considered as a hub to facilitate communications and mutual assistance between the authorities of different states.⁴⁵ To this end, a central authority may issue a certificate that indicates the capacity to act as a guardian or an agent and the extent of the powers conferred to that individual.⁴⁶

Another complex issue that poses problems with the implementation of the Hague Convention is the establishment of a

³⁹ *Proceedings*, *supra* n. 6.

⁴⁰ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 22.

⁴¹ *Id.* at art. 24.

⁴² *Id.* at art. 25, ¶ 1.

⁴³ *Id.* at art. 26.

⁴⁴ *Id.* at art. 28, 37.

⁴⁵ Legarde, Explanatory Report, in *Proceedings*, *supra* n. 6, at 439.

⁴⁶ For a model certificate, see Work. Doc. No. 90, in *Proceedings*, *supra* n. 6, at 198-200.

“central authority.” The United States is not unique among the Contracting States within the Hague Conference in having sub-jurisdictions—states—that have their own statutes that govern incapacity and surrogate decision-making. Several Articles in the Hague Convention deal with federal clauses concerning the application of the Convention in the nations whose legal systems are not unified. These clauses have become customary in Hague Conventions.

The intent of the Hague Convention is to regulate international conflicts between authorities and laws with respect to the protection of adults. A contracting state in which a different system of law applies in a specific area may, if it wishes to, refer to the Convention’s rules to resolve a conflict. In the United States, for example, the Uniform Probate Code’s Uniform Guardianship and Protective Proceedings⁴⁷ chapters do not spell out procedures for recognition, jurisdiction, transfer, or cooperation, and the framers of that code might well consider adapting some of the Hague Convention provisions to accomplish cooperation.

Within the United States, the concept of a central authority raises many implementation difficulties. With no federal law and with fifty states and the District of Columbia having different laws on jurisdiction, guardianship, durable powers of attorneys and health care powers of attorney, practitioners face barriers and uncharted territory in handling cases that cross state borders.⁴⁸ There is little guidance and scant uniformity in resolving which state court has jurisdiction to hear a guardianship case when guardianship petitions are pending in more than one state.⁴⁹ Likewise, there is little agreement or even mention in the state laws as to the recognition of a guardian’s authority to act in another state.⁵⁰ Only a handful of states have created procedures to transfer a case from one jurisdiction to another when the ward could be better cared for in another location.⁵¹

⁴⁷ Unif. Guardianship & Protective Proc. Act (1997).

⁴⁸ The American Bar Association Commission on Law and Aging maintains state law charts that illustrate the diversity among state code provisions. ABA, *Health Care Decision-Making Authority: Health Care Agents vs. Court Appointed Guardians*, <http://www.abanet.org/aging/path> Legislative Updates, search Guardianship (accessed May 10, 2004).

⁴⁹ Under the most recent version of the Uniform Guardianship and Protective Proceedings Act (UGPPA), the second-in-time court “may” transfer the proceeding if satisfied that the transfer is in the best interest of the ward or protected person. Unif. Guardianship & Protective Proc. Act § 207(a) (1997). Only Colorado and Minnesota have adopted this procedure. Col. Rev. Stat. § 15-14-107(a) (2004); Minn. Stat. Ann § 524.5-107(a) (West 2004).

⁵⁰ Thirty-nine states have some process for the out-of-state conservator to acquire recognition of authority to deal with property issues in a second state, usually only if there is no local conservator or pending proceeding. This may simply entail filing copies of the order and bond in the second jurisdiction where the property is located; other states may require more formal proceedings to obtain local appointment. Only thirteen states extend some recognition to foreign guardians to make person care decisions. Sally Hurme, *Mobile Guardianships: Partial Solutions to Interstate and International Issues*, 17 *Probate & Property* 51, 53 (2003).

⁵¹ Ten states have established procedures to transfer a case to a new jurisdiction when the ward has, or needs to be, relocated. Both the UGPPA and the National Probate Court Standards

II. PRIVATE INTERNATIONAL LAW

In the absence of an international agreement such as the Hague Convention, the practitioner may have to refer to provisions of a special reciprocal agreement between two or more territories (usually having a close geographical proximity). Without the convention or bilateral agreement, recourse is to the general principles of private international law.

The landmark case, *Didisheim v. London and Westminster Bank*,⁵² illustrates the application of the general principles of private international law. In *Didisheim*, the English High Court, applying the general principles of private international law, held that the authority of a foreign curator to deal with property in England belonging to a mentally incapacitated person will be recognized as of right, if:

The property in England is movable;
 No proceedings have been taken, or are proposed to be taken, for the appointment of a curator (guardian of property) in England;
 The incapacitated person is not domiciled in England;
 His or her title to the property in question is clear;
 The curator has been validly appointed abroad, and
 The curator has full title and authority, according to the law of the foreign state, to sue for and get in movable property in England.⁵³

The position is different if the property is immovable. In a Canadian case, *Re Forrest Est.*⁵⁴ it was held that, even though the rights conferred on a curator by a court of the ward's domicile (in that case Scotland) are entitled to worldwide recognition in respect of movable property, they do not extend to immovable property outside the state of domicile.⁵⁵ Accordingly, it is almost always necessary to bring proceedings for the appointment of a curator in the territory in which the immovable property is situated in order to deal with that property.

offer similar recommendations for transfer procedures that try to smooth the transfer to another jurisdiction, eliminate unnecessary litigation costs, and ensure that the new jurisdiction takes over monitoring responsibilities. *Id.* at 54; see e.g. Minn STAT. § 524.5-107(b) (2004); Commn. on Natl. Prob. Ct. Stands., National Probate Court Standards (Natl. Ctr. for St. Cts. 1993). The Wisconsin Supreme Court has adopted the National Probate Court Standards on interstate jurisdiction, in the absence of applicable state law. *In Re Guardianship of Jane E.P.*, 700 N.W.2d 863, 2005 Wisc. LEXIS 343.

⁵² *Didisheim v. London and Westminster Bank*, [1900] 2 Ch 15. In *Didisheim*, the curator was appointed in Belgium with authority to marshal the assets of an incapable adult's estate who was domiciled and resident in Belgium. *Id.* at 18.

⁵³ *Id.*

⁵⁴ *Re Forrest*, [1961] 30 D.L.R. (2d) 397.

⁵⁵ *Id.*

A. English Case Law: *In re S.*

The extent to which a foreign curator or guardian has powers over the body and person—as distinct from the property and finances—of a mentally incapacitated adult is more problematic. In England in 1994 and 1995, the Court of Protection, the High Court, and the Court of Appeal were presented with a particularly difficult and acrimonious case. The litigation was subsequently reported as *In re S.*,⁵⁶ and is worth considering in detail not only because it is an up-to-date and comprehensive statement of English domestic law on contentious cross-border cases from a distinguished judge who has an interest in mental incapacity,⁵⁷ but also because it contains a number of useful, practical tips on how matters of this kind might be handled in future by practitioners and by the court.

Kurt Schwitters (1887-1948) was a painter, sculptor, and poet based in Hanover, Germany.⁵⁸ Following the inclusion of his work in the Nazi Degenerate Art Exhibition in 1937, he fled with his son from Germany to Norway. In April 1940 the Nazis invaded Norway, and Schwitters was compelled to escape once again—this time to England, where initially he was interned with other German nationals in a detention camp for enemy aliens. On his release in October 1941, he and his son moved to London and, in 1945, to the Lake District, where he remained until he died on January 8, 1948. His talents were generally unrecognized during his lifetime, and he lived in relative penury, selling portraits at £3 or £4 a time or merely for a cup of coffee, but in recent years he has been acclaimed as one of the towering giants of twentieth-century art.

Kurt Schwitter's son, Ernst ('S.'), was born in Germany on November 16, 1918. In 1945 Ernst married a Norwegian woman, Lola, who gave birth to their only child, Bengt, in 1947. Upon his father's death in 1948, S. inherited a large and potentially valuable art collection,⁵⁹ and he himself pursued a successful and lucrative career as a photographer, which took him on assignments all over the

⁵⁶ *In re S. (Hospital Patient: Foreign Curator)* [1996] Fam. 23, [1995] 3 W.L.R. 596.

⁵⁷ The Rt. Hon. Lady Justice Hale, formerly Brenda Hoggett QC, is the author of *Mental Health Law* (4th ed. Sweet & Maxwell 1996). She was a law reform commissioner from 1984 to 1993, and from 1989 supervised the Law Commission's project on mentally incapacitated adults and decision-making, leading to the publication of its final report, *Mental Incapacity*, in 1995. She was appointed to the High Court in 1994, and Court of Appeal in 1999. In Oct. 2003 The Rt. Hon. Lady Hale was the first woman to be appointed to the Appellate Committee of the House of Lords, the highest court in the United Kingdom.

⁵⁸ The identity of the parties involved in *In re S.* was thinly disguised in the law reports, but entered the public domain in a television documentary, *The Works*, which examined the ongoing litigation in Norway for control of Kurt Schwitters' work among his family, the Norwegian government, and Marlborough International Fine Arts, the New York-based gallery which he appointed in 1963 as his selling agent. *The Works* (BBC2 Oct. 31, 2002) (TV Series).

⁵⁹ In the television documentary, *The Works*, it was suggested that there are approximately 700 unsold pieces of Kurt Schwitters' work languishing in warehouses around the world, valued at £30,000,000 in today's art market prices. *Id.*

world. His wife, who suffered from ill health and was unable to accompany him on his travels, remained in Norway with their son.

In 1989, S. met an English woman, Katie Ashley ('Mrs. A.'), who thereafter accompanied him on his excursions overseas. In 1991 she gave up her job, and he bought her a house in Leicester, which was registered in her name. During the following year, he gave her a power of attorney over one of his Swiss bank accounts. S. usually returned home to his wife and son in Norway after his travels, but in February 1993 he decided to move in with Mrs. A. in England instead. The members of his family, quite naturally, were deeply upset and extremely suspicious of Mrs. A.'s motives. Mrs. A., in turn, was of the opinion that S.'s relationship with his wife and son had completely broken down.

On September 16, 1993, shortly after returning to England from a trip to Greenland, S. suffered a massive stroke, which completely paralyzed the right side of his body and severely impaired his ability to communicate. He was admitted to a private hospital in Leicester and was visited regularly by Mrs. A., sometimes as often as twice a day. However, the consultant geriatrician who had overall responsibility for his care had been advised that he should take his instructions from S.'s next of kin.

In June 1994, the doctor decided that S. no longer needed hospital treatment and that he should be transferred to a nursing home. The doctor discussed this with the family, as next of kin, and in September 1994 they were offered a place in a nursing home near Oslo, Norway. On Saturday, September 10, S.'s son arrived at the hospital with an ambulance, having chartered a private jet to take him back to Norway. Although the doctor was aware of the son's intentions, the matron and hospital staff were not, and S. himself was in no condition to express any preference or to resist any course of action that his son proposed. Because there was no formal discharge documentation, the matron insisted that S. should sign a self-discharge form before he and his son departed. On reflection, she was sufficiently concerned to call the police, who intercepted the ambulance on its way to the airport and got in touch with Mrs. A.'s legal advisers. They sought and obtained an injunction from a High Court judge over the telephone, restraining the son from removing S. from England. S. was then returned to the private hospital. Mrs. A. then applied to the Family Division of the High Court for a declaration (temporary restraining order) that it would be unlawful to remove S. from the jurisdiction because it was not in his best interests. The preliminary issues for decision were: (a) whether the court had power to grant the injunction, (b) whether it had the

jurisdiction to grant the declaration sought, and, if so, (c) whether Mrs. A. had the locus stand to apply for such a declaration.⁶⁰

The case came before Mrs. Justice Hale on September 23, 1994. She held that: (a) the court had the power to grant an interlocutory injunction to prevent a patient's removal in order to preserve the present position pending the hearing of the applicant's originating summons; (b) the court had the power under its inherent jurisdiction to make a declaration specifying the place where medical treatment was to be administered, provided that the proposed course of action was in the patient's best interests; and (c) considering Mrs. A.'s relationship with S. over the past five years, their common home together for six months before his stroke, the access he gave her to the funds which financed his care, and the concern she had shown by her regular and frequent visits to the hospital, Mrs. A. had sufficient interest in the matter to launch the proceedings in her own name.⁶¹ S.'s wife and son appealed to the Court of Appeal, which heard their appeal on February 13 and dismissed it on March 2, 1995.⁶²

In the meantime, on September 24, 1994, an adult guardianship court in Norway appointed a guardian—Mrs. Tone Bjørn—for S., and in May 1995 she was granted leave to become a party to the proceedings in England, where the court had yet to decide on the proposed removal of S. to Norway. Mrs. A.'s application for a declaration was heard before Mrs. Justice Hale from July 3 to July 10, 1995. On the issue of the English court's jurisdiction, Mrs. Justice Hale held that the court "undoubtedly has jurisdiction to decide upon the legality of any proposed action in relation to the care of S."⁶³ The appointment of a curator or guardian in the country of the incapable person's nationality or domicile, even if that appointment was valid under the laws of that country, did not displace the jurisdiction of the English court to determine what course of action was in the best interests of the person concerned.⁶⁴

The court also noted, however, that in the absence of any international agreement relating to the case of mentally incapacitated adults, the court should consider the comity of nations in approaching the question of what would be in the best interests of such a person in the future, not only in relation to his assets, but also in relation to his person.⁶⁵ The court then stated that courts "should start from the assumption that it would be better for a person in the position of S. to

⁶⁰ *In re S. (Hospital Patient: Court's Jurisdiction)* [1995] Fam. 26, *29, [1995] 2 W.L.R. 38.

⁶¹ *Id.* at *30-34.

⁶² *In re S. (Hospital Patient: Court's Jurisdiction)*, [1995] Fam. 1, *2.

⁶³ *In re S. (Hospital Patient: Foreign Curator)*, [1996] Fam. 23, *30.

⁶⁴ *Id.*

⁶⁵ *Id.* at *31.

be returned to his country of domicile, the burden of proof being on those who asserted to the contrary.⁶⁶

On the facts, and taking into account all the relevant circumstances, including as far as was known S.'s own wishes and intentions before he suffered his incapacitating stroke, the court determined that it was in the best interests of S. that he return to Norway. The plaintiff's application was therefore refused and a declaration made in favor of the validly appointed foreign curator.⁶⁷ When deciding what was in S.'s best interests, Mrs. Justice Hale said:

When this case first came before me, there was some doubt about whether or not S. had sufficient understanding to be able to decide whether he wanted to stay in England or return to Norway. When someone has lost his powers of verbal communication it is particularly important to discover whether or not he has also lost his powers of comprehension. Otherwise the risk of unwittingly invading the patient's rights of self-determination is high. But the medical evidence is unanimous. In addition to global aphasia, or loss of language, he has also lost a great deal, although by no means all, of his powers of comprehension and of thought. Although he can feel and communicate pleasure and pain, no one now suggests that he has the degree of understanding necessary to be able to decide for himself.

. . . The truth is, as pointed out by the Official Solicitor, that both sides in this case have an interest in the money. Both too have an interest in the man. The wife has demonstrated this through nearly 50 years of marriage, which have included caring for her husband in sickness as well as in health. The son has demonstrated this by looking after his mother and enabling his father to go on his travels. He has been supported by his parents but only at a very modest level, way below that at which the plaintiff has been supported. His relief that, despite the estrangement between them, his last conversation with his father had been the beginnings of reconciliation was plainly sincere.

⁶⁶ *Id.*

⁶⁷ *Id.* at *33.

However, the one person who is undoubtedly independent and motivated only by the concern for S. himself is Mrs. Bjørn. I obviously have to give very great weight indeed to her perception of what will be best for him. She has seen the people and places and I have not. She has her suspicions of the plaintiff's [Mrs. A.] motives but she also recognizes that there were problems with the family. She would keep a very careful eye on the situation in the nursing home. She would also be prepared to help the plaintiff to visit S., which would obviously be a great deal easier for the plaintiff than it would be for the wife in reverse. She has a continuing responsibility to safeguard every aspect of her client's welfare.

She clearly has the knowledge and experience to do so. I conclude, therefore, that of all the individuals involved, Mrs. Bjørn is the one who is the best suited to make decisions on S.'s behalf in the few months which remain to him.⁶⁸

As of this writing, S. is still alive in a nursing home in Norway, still unable to communicate, and currently embroiled in a continuing saga of litigation in the Norwegian courts over the ownership and control of his late father's works. In effect, the English court recognized the appointment by the Norwegian court of a neutral Norwegian guardian, and after independent consideration of the best interests of S., permitted his removal from England, where he had been living for the past five years, to Norway.

The case of S. raises an intriguing question: If the Hague Convention had been in force, what would have been the determination of S.'s habitual residence? Would it have been in England where S. had been residing for the most recent five years with his paramour, or in Norway where he had maintained his family for fifty plus years? Mrs. Justice Hale, applying the concept of domicile, found that S., although living in England, had not changed his domicile from Norway, and now did not have the capacity to do so. She also found that England had jurisdiction based on S.'s presence in England.⁶⁹ Applying the Convention's regime of primary jurisdiction to the state of habitual resident and concurrent, but subsidiary jurisdiction to other states, if England were the state of habitual residence, it would have primary jurisdiction to determine the appropriate placement for S. If the source of England's

⁶⁸ [1996] Fam. 23, *32-33.

⁶⁹ *Id.* at *29, 31.

jurisdiction were present, under Article 11, England could take temporary measures of territorial effect only in England to protect S., if those measures were compatible with measures already taken by Norway, as the state of S.'s habitual residence, and after notifying Norwegian authorities. England's protective measures would lapse as soon as Norwegian authorities had taken their own measures to protect S.⁷⁰ Thus, England could temporarily determine appropriate placement in England, but would need to take into consideration measures taken in Norway, such as appointment of a Norwegian guardian, and England would lose jurisdiction once the Norwegian guardian stepped in and removed S. to Norway. It would appear that Mrs. Justice Hale's route, reasoning, and result are the same as would have been obtained had she been applying the Convention.

B. Florida Case Law: In re Guardianship of Walpole

In re Guardianship of Walpole,⁷¹ which also dates from 1994, involved the interaction of Florida law and English law. The American court, unlike the British court in *In re S.*, kept jurisdiction at home. Brian David Walpole was born mentally retarded in the United Kingdom in 1944, and later immigrated with his mother to Florida. In 1979, they were involved in an automobile accident, in which his mother died and Brian was seriously injured. Brian's estate was comprised of two parts: \$305,000 as compensation awarded for the personal injuries he had sustained in the accident, and \$264,000 as his interest in a trust fund administered by the First Union National Bank, which had been set up under his late mother's will. The bank was also the guardian of his property, and therefore administered both accounts. At some stage, Brian's uncle moved him to the United Kingdom without the knowledge of the judicial or administrative authorities in Florida.⁷²

The Public Trustee of England and Wales, who had been appointed by the Court of Protection as Brian's receiver under the Mental Health Act 1983, petitioned to terminate the guardianship in Florida. Florida law provides that:

When the domicile of a resident ward has changed as provided in § 744.2025, and the foreign court having jurisdiction over the ward at his new domicile has appointed a guardian and that guardian has qualified and posted a bond in an amount required by the foreign court, the guardian in this state may file his final report and close the guardianship in this state.

⁷⁰ *Convention on the International Protection of Adults*, *supra* n. 2, at art. 11.

⁷¹ *In re Guardianship of Walpole*, 639 So. 2d 60 (Fla. 4th Dist. App. 1994).

⁷² *Id.* at 61.

If an objection is filed to the termination of guardianship in this state, the court shall hear the objection and enter an order either sustaining or overruling the objection.⁷³

The probate court found that it was in Brian's best interest for the funds to remain in the United States under the management of a single Florida institution. The court cited the potential for miscommunication if two financial entities, one in Florida and the other in the United Kingdom, each managed a portion of the estate. The public trustee appealed, contending that termination of the guardianship would allow the funds to be closer to Brian and would reduce administrative costs and taxation.⁷⁴

Dismissing the Public Trustee's appeal, the appeals court said:

[It] is clear that the statute affords the trial court discretion in making the decision to terminate the guardianship, because it contemplates that objections [as to administration of the guardianship] could be filed and the court would hear the objections and either sustain or overrule the objections. The statute does not create a presumption that the guardianship must be terminated upon a change of domicile of the resident ward.

In most cases, we would contemplate that once the requirements of the statute are fulfilled, termination of the guardianship would be appropriate when the domicile of the ward has changed. The paramount consideration is the welfare of the ward and his or her best interest. We agree that absent a showing of good cause, termination should be permitted. However, when countervailing considerations are brought to the court's attention, these countervailing considerations must be weighed, and in the end, a decision as to whether the termination of [the Florida] guardianship would serve the best interest of the ward should be reached by the probate court. . . .

The probate court here had various factors, which it weighed both for transfer and against transfer. The probate court's findings support a showing of good cause for the funds to remain in Florida under the

⁷³ Fla. Stat. § 744.524 (1991).

⁷⁴ *Walpole*, 639 So. 2d at 62.

administration of a single financial entity. The fact that the Public Trustee is a governmental office, apparently akin to our Department of Health and Rehabilitative Services, places it in a different category than a private person, close family friend, or a private institution. If the ward, through a guardian ad litem, favored the transfer, that might have affected our ultimate decision. [original footnote 2: If the ward . . . ultimate decision] The Public Trustee has pointed to no instance where the present guardian of the property has either mismanaged or improperly managed the guardianship monies.

Accordingly, we affirm the decision of the probate court.⁷⁵

Applying by hindsight the provisions of the Hague Convention, it would seem clear that Brian was a habitual resident of England. Although his mental and legal incapacity may have precluded his ability to change his domicile, the Florida court acknowledged that he was no longer a Florida resident. Unlike the personal guardianship focus of *In re S.*, Brian's case solely revolved around property issues. The English Public Trustee as guardian of the person was seeking to terminate the bank's authority over Brian's trust and guardianship funds to facilitate payment for Brian's personal care in England. Florida's jurisdiction under the Convention would be based on the property (in rem) jurisdiction of Article 9. It grants states "where property of the adult is situated [to] have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by authorities having [habitual residence] jurisdiction."⁷⁶

In *Walpole, In re S.*, and the Convention, sorting out the conflicting contentions of international parties revolves around the individual court's determination of what would be in the best interests of the incapacitated adult. This was shown in the Florida court's need to be satisfied that any proposal for the future management of a ward's financial affairs elsewhere is in his or her best interests, before it relinquishes jurisdiction. In several cases the English Court of Protection continues to oversee the management of the finances of people who are habitually resident and domiciled elsewhere—usually in third world countries—because it is concerned about the absence of an adequate protective regime there for the

⁷⁵ *Id.* at 62-63.

⁷⁶ *Convention on International Protection of Adults*, *supra* n. 2, at art. 9.

administration of the property and finances of mentally incapacitated adults.

III. PRACTICAL CONSIDERATIONS

Guardianship cases that cross boards involve myriad practical and legal issues that practitioners and courts must address. The absence of the ratification of the Hague Convention does not preclude cases with international issues from coming before the courts today, as seen in the contentious cases of *S.* and *Walpole*. These practical considerations can be seen in the following discussion which is based on the personal experience of the Honorable John Kirkendall in handling a complex international guardianship case. This case involved a German national who was severely injured in an automobile accident while studying in the United States. When her American fiancé was appointed guardian of her person and conservator of her personal injury award, her German mother contested the appointment and sought to move the daughter back to Germany.

A. Citizenship/Immigration Status of Foreign-National Proposed Ward

The attorney for the proposed ward, or guardian ad litem, must investigate and confirm the citizenship and immigration status of the proposed ward. This would include locating the passport and determining if it is valid and contains any necessary entry visas. If the proposed ward has more than one passport, is there dual or another form of citizenship? Immigration issues may include whether the proposed ward has a green card or necessary work authorization and whether there have been any violations of entry or work status. If so, these ancillary issues may require referral to an immigration attorney.

B. Role of Foreign Consulate/Embassy and United States State Department

In all court matters involving a foreign national, that country's consulate or embassy may need to be involved. Court rules may require notification of the consulate about the proceedings. A state bar directory may contain information about how to contact the appropriate officials at the nearest embassy or consulate. Typically there will be an individual officer charged with the responsibility to assist nationals with legal cases and proceeding brought before United States courts. The court will need to verify that the appropriate consular notification and contact has been made before

proceeding with the case and establish any channels of communication between the court and the consulate or embassy. The attorneys will need to verify the type of assistance the consular official will provide to the litigant. The court should consider whether it would serve the best interests of the proposed ward to consult with an attorney knowledgeable in areas of the law relating to consular assistance for individuals is arranged.

The court should also consider whether the United States State Department should be informed of the proceeding. This would require identifying which “desk” of the State Department handles matters involving citizens of the home country of the proposed ward.

C. Controlling Law

A preliminary matter to be briefed and decided is the controlling law of the proceedings. Is there a treaty, convention, or covenant relevant to the proceedings and that has been entered into and signed by the United States and the country of citizenship of the Proposed ward? The Hague Convention on the International Protection of Adults may also offer guidance, if not authority, on how to proceed with the case.⁷⁷ Other international conventions relating to agency, trusts, and probate should also be consulted.⁷⁸ Federal statutes or case law may also be relevant.

In addition to the controlling state laws, the laws of the foreign country should be researched and referenced. Foreign law is not generally within judicial knowledge, and has to be proved as a matter of fact. Usually it will be necessary to adduce expert evidence from suitably qualified witnesses—either experienced practitioners or academic lawyers—from the country concerned. The nature and formality of the evidence will differ according to whether the matter is litigious or not, but even in non-contentious cases it should generally set out a summary of the law, practice and procedure in the foreign state so far as it is relevant to the matter that actually needs to be determined by the court. For example, in *In re .S.*, Mrs. Justice Hale commented:

In this case I have received expert evidence on Norwegian law from Professors Fleischer and Thue and from Mrs. Berit Stokke. I accept that (i) Mrs. Tone Bjørn was validly appointed under Norwegian law if the patient was domiciled in Norway according to the Norwegian concept of domicile at the time of her appointment; (ii) that her powers

⁷⁷ See generally *Convention on the International Protection of Adults*, *supra* n. 2.

⁷⁸ All Hague Conventions on Private International Law can be researched at www.hcch.net.

under Norwegian law include the power to decide where S should live; (iii) that she also has power to protect his interests anywhere in the world; and (iv) that she has a duty to act in his best interests, although she must also consult his family, and is subject to the control of the court of protection which appointed her.⁷⁹

D. Assessing the Capacity of the Proposed Ward

Care must be taken to be linguistically and culturally sensitive in assessing the capacity of the proposed ward. The assessment must take into account the language in which the proposed ward is best able to comprehend and communicate. Persons with certified knowledge of that language should be available to provide assistance with all communications and must be able to provide translations that do not reflect the viewpoint, attitudes or opinions of the translator.⁸⁰ The translator must also have knowledge of the proposed ward's native culture. The professionals involved in evaluating capacity must also reflect active and knowledgeable consideration of language and cultural differences or difficulties. If the medical record relevant to the determination of capacity lack cultural sensitivity, an independent professional evaluation of capacity should be made in a way that that takes possible language and cultural differences into account.

E. Statement of Wishes by the Proposed Ward

Similar care must be taken to elicit the proposed ward's wishes and understanding of rights in the proceedings. If the proposed ward does not easily communicate in English, an experienced translator will again be necessary to help the proposed ward make a reliable statement. A fellow citizen of the ward's home country, friends, family member or care taker may further need to be recruited to aid in communicating the ward's wishes.

An independent professional evaluation may need to be made to establish or report on the reliability of the statement of wishes as communicated via a third party.

The wishes and feelings of an incapacitated person are a particularly significant factor in deciding whether a course of action is in his or her best interests. For example, in *In re S.* the judge spoke of the importance of assessing the patient's comprehension in view

⁷⁹ *In re S. (Hospital Patient: Foreign Curator)* [1996] Fam. 23, *30.

⁸⁰ The communication issues in Judge Kirkendall's case were compounded by the fact that the proposed ward's head injury made it difficult for this native German speaker to orally communicate in any language.

of the high "risk of unwittingly invading [his] right of self-determination,"⁸¹ and in *Walpole*, the judge suggested that, if there had been evidence that Brian Walpole favored the transfer of his funds from Florida to England, the court would probably have respected his wish.⁸²

F. Best Interests of the Proposed Ward Relating to Placement

With most international personal guardianship cases, the controversy before the court will relate to where the incapacitated person will receive the best care. The proposed ward's wishes as to placement must be taken into account, if those wishes can be ascertained. As illustrated in S.'s case, efforts were made, but were unsuccessful, to determine in which country S. wanted to live.

When the court must decide placement, practitioners must garner the best available evidence as to the proposed ward's wishes. Preferably, this would be through the proposed ward's own statements. If this is not possible due to the proposed ward's condition, recommendations by the attending physician or care professionals should be obtained. The court will need to know about residence, care and treatment options available both locally and in any proposed alternative jurisdiction. At some point in many cases, the attorneys will need to submit a care plan, describing the medical and social needs of the incapacitated person, and proposing how those needs will be met and funded in the foreseeable future. Information about care options in the other jurisdiction could be obtained from friends or family members, or through the assistance of the consulate or embassy.

Of course, the opposing party seeking transfer to another jurisdiction may be counted on to offer the merits of care that would be provided elsewhere. To determine the care that would be in the best interest of the proposed ward, the court will need to be fully informed as to existing and proposed care. Both parties should expect to provide evidence about the qualifications and availability of existing and receiving physicians or care professionals, as well as existing and receiving residential, treatment or care facilities. Practitioners would be wise to present expert evidence of any applicable American or international standards regarding residence, care, and treatment options for persons with the medical condition or disability experienced by the proposed ward. Can or will the attending physician issue an order of transfer of care, if necessary? What transportation arrangements need to be made, such as air ambulance, and what are the costs of such transportation? If transfer

⁸¹ *In re S. (Hospital Patient: Foreign Curator)* [1996] Fam. 23, *31.

⁸² *Walpole*, 639 So. 2d at 63 n. 2.

is approved, the court will have to identify the individual responsible for making the transportation, medical, and residential arrangements.

Evidence about the funding for care must also be presented. What are the potential sources of payment for the residence, care, and treatment of the proposed ward? Trust funds, insurance, public benefits, or private funds are potential options. The existence and size of the proposed ward's estate should be evaluated, including any arrangements for the management of that estate. Has a guardian of the estate been appointed in another jurisdiction, and if so, has that guardian been brought into this litigation? If there is a trust, does it allow for support and maintenance and is the trustee involved in this litigation? But the mere existence of the funds may not necessarily mean that those funds will be available in another jurisdiction. For example, will any responsible insurer or payor of benefits continue to provide payment in the event that the residence, care, and treatment are transferred to another jurisdiction? Public benefits available in the United States, such as Medicaid, Medicare, or Supplement Security Income, would not be available to the individual in another country. However, the proposed ward may be eligible for public medical assistance in the new jurisdiction, but eligibility requirements should be verified. Private medical insurance or tort settlement insurance may also not be available, or may require litigation to enforce any obligation. There may also be technical and procedural requirements that must be met before the responsible insurer or payor of benefits will provide payment for residence, care, and treatment in another country. This may include a regular report or evaluation of the proposed ward required to be made to the responsible payor to continue payments. The insurer may have requirements regarding the language of the report, professional qualifications of the reporter, and proof of credentials or accreditation of facilities. Other details include arranging for transmission of payment in a way that meets the requirements of the payor given possible differences in foreign banking regulations and practices and/or the accounting practices of a foreign receiving facility. Again, assistance from the consulate or embassy, a lawyer practicing in the other country, or an attorney knowledgeable in insurance law, or law relating to payment of benefits may be required.

G. Dampening Hostilities

Contentious and costly litigation over the appropriate care of and caregivers for the ward is inevitably counterproductive to the best interests of the ward. All participants should be open to possible ways to minimize the potential cost of such disputes in terms of time, money, and negative impact on the best interests of proposed ward. Mediation or facilitation may be a suitable means to resolve the

dispute. The court may also find it appropriate to reduce costs by issuing an advisory opinion stating the factual and legal issues needing resolution, crafting an order providing for even-handed distribution among the parties of relevant materials and information, or agreeing to rely upon statements of experts in resolving the dispute.

To defuse contention, the court may find it in the best interests of the ward to issue an advisory opinion setting forth guidelines on the rights enjoyed in the proceedings by the litigants, and the duties owed by all parties to the proposed ward and/or the court. Foreign litigants may not understand—for cultural or linguistic reasons—the American court system or laws and may need assistance from legal counsel. If the foreign litigant has not retained counsel, it may be necessary for the court to order the litigant to obtain counsel who has knowledge of the language and cultural of that party and to consider whether such representation be paid from the ward's estate.

To preserve the status quo in a contentious case involving the removal of an incapacitated person from one country to another, or where there is a potentially fraudulent transfer of his or her assets, the ward should consider applying for an injunction pending a formal determination as to which country has jurisdiction, as in *In re S*.

Cooperation and communication between jurisdictions is an overriding principal of private international law. Judges should consider enlisting the assistance from a member of the court of the foreign judiciary having potential or existing jurisdiction in the home country. The consulate or embassy may be of assistance in identifying the appropriate court and facilitating that connection. With due consideration of any ethical issues raised by ex parte communication, language barriers and costs, establishing a means, perhaps by fax, conference call or email, to communicate and transmitting information may ease the appropriate resolution of the international issues. Obtaining certified translations of pertinent documents, cases or statutes may be necessary, and payment for such services must be obtained. In Judge Kirkendall's case, the insurance company arranged for the German judge to travel to the United States for a judicial exchange of information.

H. Appointment of a Guardian or Conservator for the Proposed Ward

Once the court has determined that the proposed ward is incapacitated and needs the assistance of a guardian or conservator, the court must determine who is the most appropriate individual or entity to serve. The proposed ward's wishes or statements as to preferred guardian or conservator must be taken into account, as well

as any statutory prioritization of who should be appointed. If no evidence of the ward's preference is available, the court must examine the ward's ties to friends and family members, particularly if there is contention over who should be appointed. In international cases when the determination of who should serve may be inseparable from the issue as to where the ward will reside, the ward's ties to the local and foreign countries, culture and language must be gauged. For example in Judge Kirkendall's case the resolution of the controversy between whether the American fiancé or the German mother should be guardian was intertwined with whether the ward would receive better care in the United States or in Germany.

IV. CONCLUSION

The preamble to the Hague Convention on the International Protection of Adults describes—rather well—the objectives we are all trying to achieve in handling guardianship cases with multinational issues expeditiously and courteously. It says:

The States signatory to the present Convention ... [wish] to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults, [recall] the importance of international co-operation for the protection of adults, and [affirm] that the interests of the adult and respect for his or her dignity and autonomy are to be the primary considerations.⁸³

As the cases and issues discussed in this Article suggest, the need for international cooperation in the protection of adults in ways that respect dignity and autonomy is increasingly pressing.

⁸³ *Convention on the International Protection of Adults*, *supra* n. 2, Preamble.

ISSUES FACING OLDER AUSTRALIANS: LEGAL, FINANCIAL AND SOCIETAL

*Sue Field**

I. INTRODUCTION

This paper addresses a number of the key issues affecting older Australians. It may well be argued that issues such as health, income, accommodation, and access to justice are issues not peculiar to older persons, but to the majority of a population. However, this paper demonstrates that the above named issues take on a degree of urgency as we age and live longer than our forebearers.

We live in a dynamic changing environment and the generation known colloquially as “baby boomers,” which refer to those persons born between 1946 and 1964, who have, unlike Dickens’ characters, enjoyed only “the best of times.”¹ They have lived through a period of economic growth, enjoyed comfortable life styles, and spent rather than saved. Baby Boomers have not, in Australia, lived through a world war, a great depression, invasion of our shores, or diseases such as smallpox or the plague.

We have, however, aged unexpectedly!

Having been caught unawares, we are now confronted with the above issues and insufficient time to address them to our satisfaction; hence the urgency previously referred to.²

II. DEMOGRAPHICS

Australia’s population at December 2003 was 20,000,000.³ Approximately 12% of these persons are over the age of 65 years.⁴

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¹ Charles Dickens, *A Tale of Two Cities* 1 (Penguin Books 2003).

² It should be noted that while the emphasis in this paper is on “baby boomers,” older retirees, who have experienced more stringent times, have a different attitude toward savings and, it would appear, “inheritance.”

³ Australian Bureau of Statistics, *Population Trends & Estimates*, 32309.0.55.001 — *Population, Australian States and Territories — Electronic Publication*, <http://www.abs.gov.au/ausstats/abs@.nsf/c1061106eOc3442fca2568b5007b861d/27b4386f05aab9cca256ca6007f070f!OpenDocument> (May 27, 2004).

However this figure is expected to rise dramatically to 18% of the population by the year 2021 and a staggering 26% by the year 2051.⁵ At the same time, the percentage of the working population (those persons between the ages of 15 to 64) is estimated to fall to under 60%.⁶ In other words, the taxes of less than 60% of the population are expected to provide for more than 40% of the population.

Australia's ageing population can be attributed to a number of factors. These factors include increased longevity (as a result of advances in medical technology), healthier lifestyles, improved living conditions, and, in many cases, a less strenuous working life than earlier generations. Parallel with the increase in longevity has been the decline in birth rates (a subject well beyond the scope of this paper).

Life expectancy in Australia is one of the longest in the world. It is estimated that a female born in Australia between the years 1997 and 1999 can expect to live to 82 years of age and a male, born within the same period, to the age of 76 years.⁷ However, these figures are not representative of all Australians. Indigenous Australians continue to have a markedly lower life expectancy than the remainder of the Australian population.⁸

The impact of this growing number of "older persons" will be felt as the "baby boomers" enter into retirement, which many do as early as 55 years of age. The first of these "boomers" have therefore already entered retirement, and the effects of these changing demographics are only just beginning.

III. EXPECTATIONS

The expectations of this ageing population are quite different to those of its parents. As a result of the "good life" enjoyed by so many "baby boomers", this cohort has an expectation that, notwithstanding their advancing years, baby boomers' lives will continue to be comfortable. They expect to enjoy good health, continue to work in a job of their choice until they choose to retire, enjoy the comforts associated with a pleasant home, and an income which enables them to lead a lifestyle commensurate with that experienced throughout their

⁴ Australian Govt., Dept., of Health and Ageing, *National Strategy for an Ageing Australia, An Older Australia: Challenges and Opportunities for All*, <http://www.ageing.health.gov.au/foia/agepolicy/nsaa/nsaabk4.htm> (updated Nov. 15, 2002) [hereinafter *National Strategy*].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

working lives. Underpinning all these expectations is the belief that they will continue to live in a society that values them as individuals and affords them access to justice.

However, as mentioned earlier, this group has been noted for its ability to spend, rather than save. This factor, combined with the unexpected arrival of “old age” and changes in the economy, is creating a situation that is far from their expectations.

Not only, have people in this cohort spent rather than saved, they have also married and divorced at a rate not previously experienced in our society. According to the Australian Bureau of Statistics, at the last census in 2001 there were 15.4 million people 15 years of age and over.⁹ Of this number, 1.1 million were divorced persons, a figure increased by 172% since 1981.¹⁰ Furthermore, statistics reveal that in 2002, 31% of men re-entering marriage already had children from a previous marriage and a similar percentage of women (33%) also had children from an earlier marriage.¹¹

This increase in multiple partners/relationships has created a previously unknown social situation of extended families and parental obligations (both social and financial) that are often beyond the capabilities of many income earners. It is worthy of note at this stage that the issues associated with these extended families continue after death with many wills the subject of disputes by the disgruntled “children” of an earlier marriage.

IV. EMPLOYMENT AND AGE DISCRIMINATION

It is interesting to note that age discrimination is not usually encompassed under the umbrella of elder law, though its exclusion is difficult to understand. This is particularly so due to the implications, upon an ageing population, of “forced” retirement of persons in their early fifties.

A. Government incentive

Age discrimination is, however, alive and well in Australia, albeit covertly. Older workers are not generally valued, notwithstanding much government rhetoric on the subject. Recent media releases from the government advocate older workers remaining in the workforce and

⁹ Australian Bureau of Statistics, *Vital Statistics, 3310.0 Marriages and Divorces, Australia*, [http://www.abs.gov.au/Ausstats/abs@nsl/b06660592430724fca2568b500768619/cc563e8b7ca238eOca256de9007100f9! Open Document \(Aug. 2, 2002\).](http://www.abs.gov.au/Ausstats/abs@nsl/b06660592430724fca2568b500768619/cc563e8b7ca238eOca256de9007100f9! Open Document (Aug. 2, 2002).)

¹⁰ *Id.*

¹¹ *Id.*

gradually phasing down their full-time hours to a part-time basis.¹² The theory behind this being, that whilst still employed, the worker is contributing to superannuation and thereby increasing his or her savings and reducing the strain on the government coffer, once eligible for the age pension. To induce older persons to remain in the workforce, the government has introduced a number of employee related incentives. For example, one such incentive is to give those persons eligible to receive the age pension a tax-free bonus of up to \$29,102.00 if they remain in the workforce.¹³ As a further incentive to employees to remain working past the date they can access their superannuation,¹⁴ the government will remove the work test on who can contribute to superannuation for anyone who is under the age of 65 years.¹⁵

While commendable in theory, in practice there is no financial incentive for an employer to retain the services of an older employee when a younger person, or a casual, can be employed for less money. The shortsightedness of this argument is readily apparent. Yet until such time as government introduces a financial incentive for employers, older persons will remain undervalued and out of work. In fact, it is estimated that the average unemployed worker (looking for work) in the 55-69 year age bracket is out of work for approximately 105 weeks.¹⁶

B. State Government Initiative

In Queensland, the state government has attempted to address this situation by introducing a wage subsidy in the sum of \$4,400.00 for employers who employ a person over the age of 45 years.¹⁷ While there are several criteria that may limit the plan in practice, it is a positive initiative on the part of one government.¹⁸

¹² Peter Costello, *The Commonwealth Treasurer, 2004 Press Releases, A More Flexible and Adaptable Retirement Income System*, <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/011.asp> (Feb. 25, 2004).

¹³ Centrelink, Department of Human Services, http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_pbs.htm (accessed August 9, 2005).

¹⁴ Currently, employees can access their superannuation at 55 years of age.

¹⁵ Costello, *supra* n. 12.

¹⁶ Unemployment Among Older Workers Snapshot 2004, <http://www.mission.com.au/cm/resources/documents/shapshopunemployment.pdf> (accessed August 9, 2005).

¹⁷ Queensland Govt., *Mature Workers Wage Subsidy Experience Pays*, http://www.trainandemploy.qld.gov.au/client/jobs_careers/gfjp/experience/htm (updated May 14, 2004).

¹⁸ *Id.*

C. Legislation

While most states and territories have anti-discrimination legislation, the *Age Discrimination Act 2004* (Cth), aims “to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education . . .”¹⁹ It is to be hoped that the introduction of this legislation will encourage employers to retain older employees in the workforce, thereby placing a practical application on the government rhetoric in this area.

V. INCOME

One of the most pressing needs facing our population is what these baby boomers will live on during their retirement. The i.c. government’s concern in this respect is worth noting verbatim:

A touch-stone of a civilised society is that it values and provides support for older people in recognition of their past and present contribution and respects their right to dignity as they live in old age. Adequate retirement income is essential, at least to alleviate poverty. The comfort and security of older people has always been intrinsically linked to the economic success of the community.²⁰

A. Age Pensions

At the present time, males can receive the age pension at age 65 and women at age 61 (though this is to be progressively increased to equal the male age).²¹ It should be noted that the full age pension is now \$476.30 per fortnight for a single person and \$397.70 per fortnight each for a couple.²² Pensions are not an automatic entitlement because they are income and asset tested.²³ There are some supplements that are available to those persons who meet certain criteria. For example, these may relate to rent assistance and pharmaceutical benefits, to name a few.

¹⁹ *Age Discrimination Act* §3 (a) (Aus. 2004) (Cth).

²⁰ *National Strategy*, *supra* n. 4.

²¹ Centrelink, Department of Human Resources, http://www.centrelink.gov.au/internet/internet.nsf/payments/qual_how_agepens.htm (accessed Aug. 9, 2005).

²² *Id.*

²³ Many people, depending upon their assets/income, do in fact receive part pensions.

Of those persons who are eligible to receive the age pension the uptake is approximately 80%.²⁴ Only 20% are able to support themselves.²⁵

B. The Current Situation

A recent report highlights not only the attitudes of Australians to retirement but also the actual situation.²⁶ The report demonstrates that there is a real divide between those persons who have been in a position, during their working lives, to accumulate savings and superannuation and those who have not been as fortunate.²⁷ This divide emphasises the fact that many retirees are faced with a retirement that is far from the idyllic life style that they have imagined, and indeed, retirement is not an issue that they gave serious consideration to during the “halcyon” days of their working lives.²⁸

The report notes that the annual personal income for people in the age group 50–69 (in full time employment) during the 2002–2003 period was \$52,500.²⁹ The report further states that financial advisors work on the premise that a retired person needs 65% of his or her pre-retirement income to live on comfortably during retirement; based on the above, this figure equates to \$34,000.³⁰ However, in reality, many younger retirees are “making do” with an income derived from superannuation, of between zero to \$10,000 per annum.³¹ The assumption in the report is that many of these younger retirees may have been forced into retirement as a result of their age³². The report also notes that the income of the 55-59 years of age cohort increases dramatically³³ and then declines again, suggesting that the

²⁴ *Id.*

²⁵ *Id.*

²⁶ Simon Kelly, Carol Farbotko & Ann Harding, *The Lump Sum: Here Today, Gone Tomorrow*, 7AMP.NATSEM Income & Wealth Rep. (Mar. 2004) (available at <http://www.amp.com.au/ampnatsemreports>).

²⁷ *Id.* It should be noted that compulsory employer contributions to superannuation for most employees only began in 1992.

²⁸ *Id.* at forward. In fact, an earlier NATSEM report states that it is for those “people aged between 50 and 64—who are now either retired, preparing for retirement or living in denial.” Simon Kelly & Ann Harding, *Live Long and Prosper?* 2 AMP.NATSEM Income & Wealth Rep. 1 (May 2002) (available at <http://www.amp.com.au/ampnasemreports>).

²⁹ Kelly, *supra* n. 26.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Although the government is supportive of older persons in the workforce, this supportive attitude has not extended to employers.

³³ *Id.* This increase is thought to be due to the fact that superannuation can be accessed at 55 years of age. *Id.*

superannuation may well have been “used up” by paying off debts and the mortgage on their homes.³⁴

C. *Superannuation*

Although superannuation has been a part of the Australian work ethos for many years, employer contributions to superannuation have been in force for just over ten years. Therefore, those employees who relied solely on the minimum compulsory superannuation contributions (currently at 9% of gross income) do not have access to the substantial sums that a fortunate few workers have on retirement. It is estimated that the average superannuation for those persons in the 50-69 year age bracket is only \$83,000.³⁵

Women are even more disadvantaged than men. It has been estimated that by 2019, the average superannuation for a female will be \$77,000.³⁶ However, at 2000 it was a mere \$27,400,³⁷ a difference generally attributed to a fractured work history (usually as a result of marriage and children) and lower incomes than their male counterparts. While these figures are not representative of all females in the workforce, they are, however, indicative of long term social issues associated with the growing number of single females attempting to support themselves in their working lives and then reduced to “genteel poverty” in their retirement.

D. *Intergenerational Transfer of Wealth*

Without adequate retirement income, can the “baby boomers” rely on inheritance from their parents (the generation who did live within their means and save for the proverbial “rainy day”)? It would appear not.

Research has demonstrated that the wealth of the nation is very unevenly divided. In fact, although it is estimated that “the wealthiest 20% of baby boomer parents may be able to leave their kids a windfall inheritance of more than \$1 million,” 20% of baby boomers “will

³⁴ *Id.* at 10.

³⁵ *Id.* at 6.

³⁶ Ross Clare, ASFA Research Centre, *Women and Superannuation*, Jul. 2001, <http://www.superannuation.asn.au/policy/women&super.pdf> (accessed Aug. 9, 2005).

³⁷ Australian Bureau of Statistics, Australian Social Trends 2002, *Income and Expenditure-Sources of Income: Employee superannuation*, <http://www.abs.gov.au/AusStats/abs@nsf/0/a3832d7771e0b03aca256bcd0082730c?OpenDocument> (accessed Aug. 9, 2005).

probably inherit very little or nothing at all.”³⁸ The remaining baby boomers fall “in between.”

It is believed that the issues associated with this intergenerational transfer of wealth, related to the following key issues

- uneven distribution of wealth in Australia
- generation skipping (will the money be left to the boomers?)
- changing attitudes towards bequests
- the possibility that the parents might spend it during their lifetimes
- the escalating costs of medical and care services for older people³⁹

If the above research proves correct, then many baby boomers are destined for disappointment, not to mention impecuniosity.⁴⁰

With a generation of spenders rather than savers and the fact, as mentioned earlier, that many baby boomers will be retiring with insufficient financial resources to fund their own retirement accommodation, lack of funds is a major issue for many retirees. This is particularly so for those persons who have rented accommodation during their working lives or who, at retirement, still have not finalised their mortgage repayments and remain indebted to a financial organisation.

These retirement incomes or lack thereof, beg the question, “Where do these people live?”

VI. ACCOMMODATION

It is traditional in Australia for people to own their own homes. That is, they may have a mortgage, but they are in the process of purchasing a dwelling, rather than renting one.⁴¹ Figures indicate that as of the August 2001 Census, over two-thirds of Australian households either owned their own home or were buying it.⁴²

³⁸ Simon Kelly & Ann Harding, *You Can't Rely on the Old Folks' Money*, 5 AMP.NATSEM Income & Wealth Rep. 7 (June 2003) (available at <http://www.amp.com.au/ampnatsemreports>).

³⁹ *Id.*

⁴⁰ This research merely confirms a growing trend in the USA. See generally Jagadeesh Gokhale & Laurence J. Kotlikoff, *The Baby Boomers' Mega-Inheritance Myth or Reality?* Economic Commentary (Oct. 1, 2000) (highlighting the same issues).

⁴¹ There is some government supported rental housing, though with the pressures placed on such housing, it may well be in the future that demands are so great that private rental villages will take over what has previously been the domain of government.

⁴² Australian Bureau of Statistics, *Australian Social Trends, Housing Arrangements: Home Ownership Across Australia*,

Unlike many cultures, Australians have not traditionally lived as extended families under one roof. Typically, baby boomers left “the family home” before they entered into a domestic relationship of their own. Parents have continued to live in “the family home,” in some situations downsizing into a smaller home or apartment, but often remaining in a home that would comfortably accommodate a larger family. In many cases, the family home constitutes the majority of, if not entire, assets of the older person. With increases to the cost of living, many older persons find that they do not have sufficient disposable income to live comfortably or to maintain their properties at an optimal level. So what choices do older people have in respect of their living conditions?

A. Reverse Mortgages

The introduction of reverse mortgages, sometimes known as Seniors Access Home Loans, is a relatively new phenomenon in this country. At the time of writing, less than a handful of financial institutions offer this service, although the number is increasing.⁴³ In effect, a homeowner over the age of sixty-five years can borrow an amount equal to a percentage value of his or her home. The percentage varies according to the institution and the age of the borrower, but may be as high as 35% of the value of the property. Neither the principal nor the interest is payable until the borrower dies, sells the home, or moves into another form of accommodation.

In theory, the concept is ideal for those homeowners whose assets are linked to their accommodation. The release of funds allows the homeowner to enjoy a life style commensurate with that experienced during his or her working lives.

However, there are a number of cautions to be exercised and legal and financial advice is essential before entering into these arrangements. With the longevity experienced by those in developed countries, there is a very real concern that the homeowner may outlive the equity he or she still holds in the family home. Should the homeowner have to sell the property to move into an aged care facility,

<http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2196bc82f7e8aled7c7ca256d39001bc35f!> Open Document (June 3, 2003).

⁴³ However, Centrelink (the i.c. government agency that is responsible for pensions, amongst other social issues) does offer a Pension Loans Scheme. One of the criteria is that the person or his or her partner must own real estate in Australia of sufficient value to secure the Pension Loans Scheme debt. Australian Govt., Centrelink, *Who Can Get A Pension Loan?* <http://www.centrelink.gov.au/internet/internet.nsf/ea369a1335df87bcca2569890008040elc19a9752611a0ca256dbe00163e26!> Open Document (last modified July 23, 2004).

there may be insufficient funds available to pay the accommodation bond of a low care facility or meet the accommodation charges associated with a high care facility. Furthermore, should the homeowner decide to move into a leasehold retirement village, there may well be a shortfall in the money required for the lease.

Pressure may also be exerted on the homeowners by their children not to enter into such an arrangement. One of the reasons that children may not wish their parents to avail themselves of this form of financing is the perception, which is indeed real, that the diminished equity in the home would equate to a decrease in their anticipated inheritance.

As the concept is new in Australia, there is little evidence to support or condemn the long-term effects of reverse mortgages.⁴⁴

B. The Ubiquitous "Granny Flat"

In some instances, children may persuade their aged parents that the ideal situation would be for the parents to sell their own home and place funds into a new home purchased in conjunction with the "children" or else extend the "children's" home to incorporate a self contained flat for either or both of the parents. It is common in either instance for the title of the property to remain in the name of the "children."

The problems associated with this transfer of money, without an associated transfer of title, are all too obvious. What happens when the "children" divorce, relationships in the extended family breakdown, or the care required by the parent becomes rather more than the "children" expected? The answer is, of course, that the parent loses his or her money and the resultant breakdown in family relations is inevitably irretrievable.

C. Family Agreements

Arrangements such as the above are usually associated with best intention agreements that the "children" will care for the parent in exchange for the injection of funds into the home. While family agreements are commonplace in the United States of America and

⁴⁴ See Veronica Sheen, Dep. Dir. Council on the Ageing (Australia), Presentation, *Home Equity Conversion: Getting the Policy Right and Getting the Product Right for Older Australians* (Changing Needs, Growing Markets. Conf., Feb. 18, 2002) (copy available at <http://www.cota.org.au>).

Canada, as with reverse mortgages, “formal” family agreements are not common in Australia.

Whilst it is not possible to contract out of one’s responsibilities, pursuant to the relevant “Succession” Acts, it is possible to draw up a document that will adequately reflect the intentions of the parties. The existence of such documents, at least, gives an indication of what the responsibilities of each party consist of and the implications for the parties if such responsibilities are not performed. Extreme caution should be exercised by practitioners who draw up such agreements to ensure that independent legal advice is sought by the family members who are not the client, and it is essential when preparing the document that the full assets and duties of the parties are disclosed. Once again, it is advisable to obtain financial advice prior to entering into such transactions.

D. Retirement Villages

As mentioned earlier, as older people age their reliance on assistance often increases. It is common to hear older people state that the reason they moved out of the family home and into a retirement village is because they could no longer continue the maintenance and upkeep on their property.

Retirement villages are designed and marketed for couples who are 55 years of age and older. They cater to persons with varied incomes and lifestyles. At the extreme luxury end, they resemble resorts, with all the amenities commensurate with such a lifestyle. At the lower end of the economic scale, they are more humble in aspect and in the facilities that they offer. What they generally have in common though is a resident population who have paid a considerable portion of their life savings (including the income received from the “family home”) to lease a dwelling which, with some minor exceptions, can only be inhabited by a person or persons over the age of 55 years.⁴⁵

The retirement village industry is heavily regulated in each state/territory. Calculations regarding expenditure (while living in the village) and exit fees must be available prior to the residents signing the contracts.⁴⁶ The Public Information Documents are lengthy, can be complicated, and financial and legal advice is recommended.⁴⁷

However, as can be seen from the discussion of income above, not everyone, at retirement, is in the financial position to live in a home

⁴⁵ Although there are some free-hold villages, most villages are leasehold.

⁴⁶ *E.g. Retirement Villages Act*, § 45 (Qld. 1999).

⁴⁷ *E.g. id.* at § 13, 74.

they own or move into a retirement village that attracts an entrance fee. The emergence of what is known as “rental retirement villages” is one commercial solution to this problem.

Rental retirement villages are villages, usually for persons over the age of 65 years who do not have sufficient funds to live in the commercial rental market, their own home, or a retirement village. The usual scenario is that the person pays 85% of his or her pension and 100% of any rental assistance that he or she may be entitled to. In exchange, the person signs a residential tenancies lease. The payment of monies usually entitles the person to accommodation in a small villa situated within a retirement complex. In some situations food and personal care services may be provided.

In Queensland, the rental retirement village sector is heavily regulated, with separate legislation addressing accommodation and accreditation aspects of the “village.” The growth of the rental village market is in direct proportion to the growing needs of those older persons who have not had the opportunity, or foresight, to provide for their own retirement. Based on current projections on the numbers of older persons, and their income, it would appear that this is one industry the growth of which is assured.

E. Aged Care Facilities

There is a growing trend for older persons, who require assistance with their activities of daily living, to remain within the community (rather than move into what was previously known as “a nursing home”). Government “packages” are designed to assist older persons in maintaining their independence for as long as possible.⁴⁸

However, notwithstanding the community support, there are occasions when a person has no alternative but to permanently reside in an aged care facility.

Although there are some free standing facilities (known as unfunded facilities), most aged care facilities receive Commonwealth subsidies. Commonwealth legislation and some state legislation regulate the aged care industry. Standards must be adhered to and if a facility fails to meet the requisite standards, sanctions can be applied by the government and funding for new places may not be available.

While there is no bond required for an incoming resident to a high care facility, the same cannot be said for persons entering a low care facility. The amount of the entry bond is calculated by means of a strict

⁴⁸ These packages are also means tested, though persons with sufficient income can “buy in” the services of community care providers.

formula taking into consideration the assets of the person. However, funded facilities must offer a certain number of “concessional” places for persons who do not have the financial means to pay the accommodation bond.

It is estimated that while 32% of persons over the age of 85 years live in aged care facilities, this number is reduced to 4% of those persons aged between 65-84 years of age.⁴⁹ This figure may well change as our longevity increases, and in some cases, our bodies outlive our minds and there is no option but to enter institutionalised care.

VII. HEALTH

Old age does not equate to poor health. However, as one ages there is an increased likelihood of physical and mental impairment. Statistics in 1995 revealed that 90% of older persons had experienced a recent illness and a staggering 99% stated that they had at least one health condition that was chronic.⁵⁰

Australians do have a safety net with government subsidies, such as bulk-billing,⁵¹ pharmaceutical benefits, assistance to war veterans and their spouses, and government funded hospitals. But with a disproportionately large percentage of older persons in the community, the cost to the government to continue to provide the high standard of health care that Australians have come to expect is of concern.⁵²

VIII. SUBSTITUTE DECISION-MAKING

As with a will, there is no legal requirement that a person appoint an attorney pursuant to legislation. However, in the interests of self-determination and ease of affairs, it does make life simpler if an attorney has been appointed to take care of the needs of a person should he or she become incapacitated.

A. Legislation

All states and territories in Australia have legislation governing the power of a person (usually known as the “donor” or “principal”) to

⁴⁹ Australian Bureau of Statistics, 4109.0 *Older People, Australia: A Social Report*, <http://www.abs.gov.au/Ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/3be24blcb70dcaelca2568a90013941e!> Open Document (Nov. 15, 1999).

⁵⁰ *Id.*

⁵¹ Not all medical practitioners will bulk bill, and there may well be a considerable short-fall for the patient to pay themselves.

⁵² In addition, it is well beyond the scope of this paper.

appoint another person/s (usually known as the “donee” or “attorney”) as his or her attorney.⁵³ That is, a person who can do for the donor anything that the donor can lawfully do for himself or herself. There are some obvious exceptions. For example, an attorney cannot vote on behalf of a person in a government election; he or she cannot marry on behalf of a person; nor can an attorney write a will or revoke the actual power of attorney. Powers of Attorney can be either “general” or “enduring.” In the case of the former, the power is revoked once the principal no longer possesses capacity.⁵⁴ In the case of the latter, the powers granted in the document will continue after the principal has lost capacity.⁵⁵

Depending upon the state/territory if a person loses capacity and has not previously appointed a financial attorney, then that person’s financial affairs are managed by a government body. In Queensland, for example, it is the Public Trustee, and in New South Wales it is the Protective Commissioner. In the absence of an enduring instrument, Applications can be made to a Guardianship Tribunal (or similar nomenclature) for an appropriate person to be appointed to administer the incapacitated person’s financial affairs.⁵⁶ As a general rule, the person appointed is usually a family member, though the relevant Tribunals certainly have within their power the right to appoint a government body.

B. The Instruments

The instruments relating to substitute decision making will vary from state to state. In Queensland, the Powers of Attorney Act, 1998 (Qld) addresses both financial and personal/health matters.⁵⁷ The donor of the power can stipulate when he or she would like the donee’s power to come into effect and limitations can be placed upon the powers of the attorney.⁵⁸ Obviously, the power of the attorney to make decisions relating to the donor’s health and personal matters cannot come into effect until the donor has lost capacity.⁵⁹ Pursuant to the legislation in some states, the principal can make an advance health directive which

⁵³ E.g. *Powers of Attorney Act*, (Qld. 1998).

⁵⁴ E.g. *id.* at § 18(1).

⁵⁵ E.g. *id.* at § 33(3).

⁵⁶ E.g. *id.* at § 150(1).

⁵⁷ However, in New South Wales, for example, the Powers of Attorney Act, 2003 (NSW) only addresses financial matters. For personal and health matters, one must seek recourse to the Guardianship Act 1987 (NSW).

⁵⁸ *Supra* n. 53.

⁵⁹ Should a person lose capacity without having appointed an attorney, then in Queensland, for example, the legislation provides for a “statutory health attorney” who is chosen from a designated priority list. *Powers of Attorney Act supra* n. 53 at §§ 62, 63.

would then take precedence over an enduring power of attorney, for health matters or the statutory health attorney.⁶⁰

The legislation also requires that the principal sign the instrument in front of an “eligible witness,”⁶¹ and that such a witness includes a lawyer.⁶² It is a further requirement that the witness sign a statement to the effect that the principal appeared to understand the implications of what he or she was signing.⁶³

The legislation also requires that should the principal wish to revoke the instrument, then he or she must possess the requisite mental capacity to do so.⁶⁴

C. Determining Capacity

This issue of the mental capacity of the donor is often used as an argument for or against the appointment of the attorney, depending upon the conflict that has arisen over the powers contained in the document. Solicitors working in the area of elder law need to be mindful that the witnessing of such an instrument is not to be taken lightly, because they can, and have been, called upon to justify their decision that the principal possessed the requisite capacity. It is therefore expedient that practitioners familiarise themselves with instruments such as Capacity Questionnaires, which can then validate their assumption that the client did possess the requisite mental capacity to sign the relevant documentation.

D. Record of Powers of Attorney

As the instruments do not have to be registered, unless they are to be used for dealings in property matters, there is no accurate record of the number of powers of attorney in existence in this country.

E. Abuse

Although the attorney must act in the best interests of the principal, the attorney can, and in many cases has, defrauded the principal of his or her savings. By the time many of these instances of fraud reach the relevant tribunal or court, the money has been spent and the principal is left impecunious and without the means to redress the

⁶⁰ *E.g. id.* at §§ 35, 36.

⁶¹ *Id.* at § 44(3)(b).

⁶² *Id.* at § 31(1).

⁶³ *Id.* at § 44(4)(b). This statement forms part of the instrument.

⁶⁴ *Id.* at § 47 (1).

situation. An examination of cases before the courts and tribunals indicates that abuse of the powers granted under an enduring instrument is becoming increasingly more common. However, in making that statement, the author is mindful of the fact that without knowing how many powers of attorney are in existence, it is statistically impossible to state exactly how widespread the issue of financial abuse of older persons really is.⁶⁵

IX. LEGAL NEEDS

A. Elder Law in Australia

Notwithstanding the issues already canvassed above, recognition that older persons have specific legal needs is also a factor that has gone largely unnoticed. However, in the last few years there has been a growing awareness amongst some legal practitioners that there are issues of particular relevance to older persons. This recognition has led to the emerging speciality known as “elder law.”

Although elder law has been a speciality in the United States of America and Canada for some years, the area is still in its infancy in Australia. At the time of writing, elder law at the University of Western Sydney (UWS) remains the only Centre specialising in elder law in Australia, and until recently the UWS was the only law school, in the country, offering the subject within the undergraduate law program. There are still no post graduate programs available that encompass the legal needs of older persons.

B. What Are the Legal Needs of Older Persons and How Are They Met?

While the law does not generally differentiate between those who are older or younger, as we age there are some needs which become more pressing. These needs may be compounded by the above-mentioned societal changes, such as divorces, remarriages, or repartnering and the resultant extended families. Furthermore, the longevity referred to earlier requires a reassessment of one’s financial status to ensure that “the money” lasts for the lifetime of the retired person.

⁶⁵ Included within the ambit of abuse, is the fact that many older persons are “encouraged” by their children to act as guarantors, particularly in the area of home purchase and business investments. See generally Juliet Cummins, *Guaranteeing Someone Else’s Debts*, http://www.uws.edu.au/download.php?file_id=955&filename=lawreformsubmission1.pdf&mimetype=application/pdf (accessed July 30, 2004) (discussing, in detail, this issue).

It is obvious then that the interweaving and complexity of these needs require in-depth knowledge of legislation as it pertains to social security, accommodation, estate planning and administration, and substitute decision making. Coupled with the legal knowledge required is an ability to understand that older people may often have different values and expectations from their younger counterparts. For this reason, some practitioners may consider that older persons are more “time consuming.” However, many older persons may prefer an “older” practitioner who they believe will understand their needs and also appreciate a legal practitioner who will attend to them in their home environment. Patience, understanding, and time are the virtues required by those practitioners who choose to work in elder law. Equally important then are the skills required to meet the latter social expectations of this growing client group.

In advising older clients, the practitioner must be cognizant, not to mention proficient, in the areas of law described above. However, the responsibility to the client does not end with knowledge of the law. Rather, it encompasses a broad understanding of the psychosocial issues surrounding the client’s visit. For example, are any of the following questions foremost in the mind of the practitioner when they see an elderly client for the first time:

- Is the transfer of the parent’s property to the “child” a hidden family agreement?
- Is the client capable of giving instructions without the assistance of the kindly neighbour or solicitous “child”?
- Does the client actually know the extent of his or her assets?
- Has the client given consideration to the need for an enduring power of attorney?
- Does the client have a will, is it recent, and does it reflect the current state of his or her affairs (keeping in mind the complexity of the extended families)?
- Has the client given consideration to his or her accommodation needs?

Unfortunately many solicitors do not consider these, or numerous other questions when advising elderly clients.

C. Legislation

Australia has a federal system of government. While legislation relevant to taxation, social security, family law, and high and low care

aged facilities is the responsibility of the Commonwealth government, estate planning, substitute decision making, and retirement village accommodation (to name but a few) is state based. As with any legislation, no one act stands alone, and this appears particularly so with legislation pertaining to aged care facilities and retirement villages. The myriad of legislation, both state and commonwealth, regulating the “aged care industry” is a minefield for the inexperienced and unwary practitioner. The current paucity of educational courses encompassing this issue has yet to be addressed.

D. Access to Justice

It is mooted, by the author, that access to justice is rhetoric and not reality. This is particularly so in respect of older persons. The above discussion of income highlighted the discrepancies between the “haves” and the “have-nots” in Australian society.

How does an older person, with an annual income of \$10,000 afford the services of a legal practitioner? Unlike private health funds, or the Government Medicare, which provide a rebate for visiting a medical practitioner, there are no rebates for visiting a lawyer! When one considers that “the average lawyer” charges \$200 per hour, a first visit is beyond the financial capabilities of an older person. It is argued that the costs associated with the preparation of a will are well beyond the means of the average older person. However, can they afford not to have a solicitor prepare a will, examine a residential aged care agreement or a retirement village contract, or advise on the transfer of a property or the pitfalls associated with a family agreement? The probability then that the average older person can afford to engage in litigation is low. Many family situations which require legal advice pass by in ignorance or because of lack of finances to consult a professional.

Unlike some universities in the United States of America, at this stage there are no student pro-bono legal clinics to assist older persons’ access to justice. Although in some states there are limited clinics that provide legal assistance to the less affluent older person, these are not common in all states and territories. As such, the older person, without recourse to money, does not generally have access to justice.

X. CONCLUSION

Is it all “doom and gloom”? This obviously depends on which side of the divide one finds oneself. However, there are a number of

viable options which can assist the older, impecunious person to access justice:

- Increasing the number of undergraduate courses addressing the issue of elder law is a vitally important step, and one would argue, long overdue.
- University based clinics (such as those found in the United States of America) staffed by students and supervised by experienced practitioners would have a great impact in addressing one aspect of access to justice.
- Increasing the awareness amongst legal practitioners of the growing demand for services by older persons. This awareness, coupled with government incentives to law firms that would be prepared to provide pro-bono services to the elderly, may perhaps increase the number of practitioners prepared to act for older, less affluent clients.
- Industry or government sponsored community courses, addressing the legal needs of the elderly, will at least empower many people to ask the right, and often difficult, questions not only of their legal practitioners (if they can afford one) but also of the government.

For many baby boomers those “many years from now” have almost arrived and all too many are asking the questions “Will we still be needed and will we still be fed when we are 64?”⁶⁶ Hopefully solicitors and the rest of the legal profession can begin to help answer this and many other age-related questions for their ageing clients.

⁶⁶ John Lennon, & Paul McCartney, *When I'm 64*, Sgt. Pepper's Lonely Hearts Club Band, (EMI Records Ltd. 1967).

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