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Session 1: Ageing and intergenerational solidarity – setting the stage

Issues of Intersectionality and intergenerational solidarity

Andrew Byrnes
Emeritus Professor of International Law and Human Rights
Australia Human Rights Institute
University of South Wales, Australia

A. Introduction

Intersectionality and intergenerational solidarity are not concepts that often keep company with each other. Intersectionality, a term coined in the context of US discrimination law by legal scholar Kimberlé Crenshaw, but with much earlier conceptual roots in civil rights activism, provided an analysis of how race and gender interact to create specific forms of oppression against African American women. The concept has been extended beyond those types of disadvantage to explore the multiple ways in which individuals' personal and group identities and attributes are the vectors along which discrimination, disadvantage and exclusion occur. It has also been developed in fields other than law, producing a rich body of literature in other areas.

Intergenerational solidarity is also a term of relatively recent origin, though the phenomenon is also longstanding. It seeks to provide a descriptive and at times normative account of social relations focusing on the way in which families and societies structure themselves and treat each other along the axis of age, in particular identifying and explaining the patterns of support between younger and older members and cohorts of the community. In the context of ageing and older persons the concept becomes focused on the ways in which younger generations provide direct and indirect support to older generations, the sustainability of current arrangements in the light of population ageing and the political and ethical dimensions of those arrangements.

In this paper I seek to explore whether these two concepts from different discourses have anything to offer each other. The perspective from which I approach this question is from the perspective of human rights. I first outline the broad concept of intersectionality with a particular focus on its application in the field of human rights law. I follow this with a brief discussion of aspects of intergenerational solidarity. In an attempt to discover what cross-

¹ See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", 1989(1) *University of Chicago Legal Forum* 139–167; Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) *Stanford Law Review* 1241–1299.

fertilisation might arise from bringing these two concepts together from a human rights perspective, I ask the following questions:

- Does intergenerational solidarity help us to ensure the enjoyment of human rights, in particular older persons' human rights? Is the content of intergenerational solidarity informed/refined by reference to human rights norms?
- Do human rights (including intersectional approaches) help us to achieve intergenerational solidarity and heighten its chances of being accepted as a legitimate form of ordering social and economic relations between youngers and olders? Do human rights help us to fashion the social arrangements that fall under intergenerational solidarity fairly and effectively?
- Would a new international convention on the human rights of older persons contribute to the promotion of the goals of ensuring the enjoyment of human rights and developing intergenerational solidarity

I turn first to the basic concepts.

B. Intersectionality

Referring to the pioneering work of Crenshaw in articulating the concept of intersectionality, Andrew Altman writes:²

Intersectionality refers to the fact that one and the same person can belong to several distinct groups, each of whose members are victimized by widespread discrimination. This overlapping membership can generate experiences of discrimination that are very different from those of persons who belong to just one, or the other, of the groups.

As Shreya Atrey, a leading scholar on human rights law and intersectionality puts it:

Intersectionality has . . . emerged as the go-to idea for making sense of disadvantage which cannot be neatly segregated into silos of racism, sexism, homophobia, transphobia, xenophobia, ableism, ageism etc. It thus has a wide import in human rights law, for example to illuminate how particular interests in life, liberty, security, education, housing health etc are subjectively transformed by peoples' multiple identities and the disadvantage associated with them....³

In international human rights law the concept of intersectionality has become a common reference, especially in the context of understanding the particular types of discrimination that protected groups face. For example, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee), the body of independent experts established to monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention), has recognised that "particular groups of women may experience specific forms of discrimination based on both their sex and

² Andrew Altman, "Discrimination: 7. Intersectionality" in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (online Winter 2020 Edition), https://plato.stanford.edu/archives/win2020/entries/discrimination/ (Winter 2020 (archive edition).

³ Shreya Atrey, "Introduction: Intersectionality from Equality to Human Rights" in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart, pbk ed 2021) 1, 3.

other characteristics."⁴ In its *General recommendation No 28* the CEDAW Committee explained the relevance of this concept to the obligations of States parties to the CEDAW Convention to eliminate all forms of discrimination against women:⁵

discrimination [against] women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.

What particular factors or statuses are relevant for the purposes of an intersectional analysis? While the principal ones include those mentioned in the quotations above, the potential categories appear to be open-ended, reflecting the diversity of human experience and the ways in which social distinctions of any sort can become the basis for discrimination and exclusion. For example, in *General recommendation No 35*, the CEDAW Committee set out a list of more than thirty potential bases of intersectional discrimination.⁶

Intersectionality has a number of dimensions and has been deployed in a variety of ways. As Shreya Atrey, referring to the work of Patricia Hill Collins, writes:

What is intersectionality? Is it an idea, a concept, a metaphor, a theory and praxis, a research paradigm, a heuristic and analytical tool, a methodological approach and epistemological stance or an analytical and political orientation?⁸

In practice, the concept is deployed in all of these ways. It has become a standard component of human rights analysis not only in discrimination claims but also in relation to human rights claims more generally. In this paper I use it primarily as an analytical tool – to identify patterns

⁴ Andrew Byrnes and Puja Kapai, "Article 1 [Discrimination]" in Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf, Marsha A. Freeman (eds), *The UN Convention on the Elimination of All Forms of Discrimination* (Oxford University Press, 2nd ed 2022) 79, 99.

⁵ Committee on the Elimination of Discrimination against Women, General recommendation No 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para 18 (2010).

⁶ These were "women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders... "Committee on the Elimination of Discrimination against Women, General recommendation No 28 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992), CEDAW/C/GC/35, para 12 (2017) (footnotes omitted).

⁷ Patricia Hill Collins, *Intersectionality as Critical Social Theory* (Duke University Press, 2019).

⁸ Shreya Atrey, "Introduction: Intersectionality from Equality to Human Rights" in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart, pbk ed 2021) 1, 5 (footnotes omitted). See generally Cressida Heyes, "Identity Politics" in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (online, Fall 2020 Edition) https://plato.stanford.edu/archives/fall2020/entries/identity-politics/ (Fall 2020 archive edition).

⁹ See the discussion in Colm O'Cinneide, "The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication" in Atrey and Dunne (eds), above n 8, 59-82.

of disadvantage and discrimination – as well as a normative and policy framework about how to address those violations of human rights. ¹⁰

C. Intergenerational solidarity

The concept of intergenerational solidarity has an equally long intellectual history, with early articulations of the concept in the 1960s and 1970s and the subsequent emergence of substantial bodies of literature in many disciplines exploring the scope and meaning of the concept. ¹¹ The classic simple formulation of the concept is that of "social cohesion between generations" was articulated and further developed by Vern Bengston and colleagues in many different publications. ¹² The concept and its deployment are no doubt familiar to the participants in this meeting so I do not seek to give an extensive overview of those here.

Those who invoke the concept of and the need for intergenerational solidarity see it as a good thing: the reasons may be moral or ethical, instrumental, or driven by specific notions of justice, among other reasons. In the context of the COVID-19 pandemic, the term was invoked as goal to be striven for to ensure social cohesion and unity in itself but also as a means of seeking to protect a cohort the members of which were particularly susceptible to the ravages of the virus, namely older people. In the context of climate change it is invoked as a rationale for all of us to take action to mitigate and adapt to the impact of climate change now, but also to ensure that the world to come is inhabitable by those who are now young and indeed those generations who are yet to be born, the so-called "future generations".

This is a term that is not without its conceptual and practical difficulties. ¹³ In the light of narratives that seek to construct and highlight competition and alleged intergenerational unfairness and injustice, particularly beloved of some media who find support and cohesion less worthy of recounting, we need to remember that "generations" are not homogeneous groups of people in all respects, even though they may belong to the same age cohort as each other. Accordingly, an intersectional approach is useful here to break down monolithic accounts of generations pitted against each other, with a relatively deprived younger generation facing off against a uniformly privileged older generation. There are certainly questions of

¹⁰ See Olena Hankivsky and Julia S Jordan-Zachery, "Introduction: Bringing Intersectionality to Public Policy" in Olena Hankivsky and Julia S Jordan-Zachery (eds), *The Palgrave Handbook of Intersectionality in Public Policy. The Politics of Intersectionality* (Palgrave Macmillan, 2019) 1-28.

¹¹ Intergenerational solidarity may also be viewed as a subset of, or at least overlapping with, a broader family of concepts of social solidarity or international solidarity. See, for example, the appeal to solidarity in the Millennium Declaration as "one of the fundamental values of international relations in the 21st century, wherein those who either suffer or benefit least, deserve help from those who benefit most". United Nations, "International Human Solidarity Day 20 December", https://www.un.org/en/observances/human-solidarity-day (visited 5 October 2023). See generally Andrea Sangiovanni and Juri Viehoff, "Solidarity in Social and Political Philosophy" in Edward N Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Summer 2023 Edition), https://plato.stanford.edu/archives/sum2023/entries/solidarity/ (archive edition https://plato.stanford.edu/archives/sum2023/entries/solidarity/ (archive edition Summer 2023).

¹² See, for example, Vern L Bengston and Petrice S Oyama, "Intergenerational Solidarity and Conflict", Background Paper, UNDESA Expert Group Meeting on Intergenerational Solidarity: Strengthening Economic and Social Ties, New York, 23-25 October 2007. Another version of this paper was published as Vern L Bengston and Petrice S Oyama, "Intergenerational Solidarity and Conflict: What does it mean and what are the big issues?" in María Amparo Cruz-Saco and Sergei Zelenev (eds), *Intergenerational Solidarity: Strengthening Economic and Social Ties* (Palgrave Macmillan US, 2010), 35-52.

¹³ Bengston and Oyama in Cruz-Saco and Sergei Zelenev (eds), above n 12, 37-39.

international justice and equity involved in our social arrangements, but drawing battlelines in this simplistic manner misses much that is important.

Intergenerational solidarity is directional (including bi- and possibly multi-directional) — it focuses on types of social support that are seen as moving from one cohort to another, even as other forms of support might move in the opposite direction at the same time. Much of the focus of intergenerational solidarity in the context of older persons relates to the support that is provided to older persons, both from private but especially from public sources in the form of state-supported pensions, increased levels of health care and other forms of care and support services. Yet intergenerational solidarity also moves in the other direction, from older to younger, though not necessarily simultaneously. The significant public and private resources committed to the upbringing of children from birth to their entry into the paid labour market or other activities is a form of intergenerational support and solidarity. It is generally seen not just as highly desirable but also as unproblematic — it is an investment in the future of our society and well as in the futures of our children.

So far as the support or exchange from younger to older goes, it can also be seen as part of a social contract. Ariella Lowenstein writes: 14

"... The overall pattern is that the public generational contract, in which younger generations provide transfers to the older generations, is partly balanced by a private contract in the opposite direction. Family transfers function, to some extent, as an informal insurance system for periods of special needs. It should, thus, be acknowledged that the potential for distributional conflicts among generations certainly exists and is fuelled by the current challenges of public finance and changing demography

. . .

Thus, one of the challenges is to maintain the intergenerational contract. The intergenerational contract is based on the notion that each generation invests in the human capital of the next and is taken care of at the end of life by the generations in which it has invested. Hence, each generation cares twice (once for the previous generation and once for the next generation) and is taken care of twice (in childhood and in old age). Within a family context, women are the traditional brokers of the intergenerational contract, providing most of the informal care to children and aged relatives.

D. Intergenerational solidarity as a means of ensuring the enjoyment of human rights, in particular the human rights of older persons

Do efforts to bring about intergenerational solidarity also lead to better protection of the human rights of older persons, in particular those groups of older persons who are shown by intersectional analysis to be most deprived? It seems clear that various arrangements that are formulated by reference to or bolstered by the justification of intergenerational solidarity have the potential to achieve outcomes that align with the goals of human rights. The intergenerational solidarity appealed to by the United Nations Secretary-General during the

¹⁴ Ariela Lowenstein, "Determinants of the Complex Interchange among Generations: Collaboration and Conflict" in Cruz-Saco and Sergei Zelenev, above n 12, 53, 58, 67.

height of the COVID-19 pandemic and similar manifestations of the same approach certainly had as its goal the saving of lives – not just of older people but of other groups who were particularly susceptible to the virus such as persons with disabilities or with particular medical conditions. ¹⁵ At the national level there were in many countries many instances of the majority of the community accepting (at least for a time) significant restraints on their usual activities for the greater good and to ensure the safety of older persons.

Yet the concept of intergenerational solidarity is a malleable one and even during the pandemic discussions there were different notions of what intergenerational solidarity involved. As Groppe, Pfaller and Schweda conclude after studying three different instances of the deployment of the concept in responding to the pandemic, "the concepts of intergenerational solidarity and responsibility . . . constitute central normative points of reference in policy statements, civil society debates and public media discourse. However, the exemplary analysis of the three selected cases makes clear that there can be significant differences in the use and implications of these concepts." ¹⁶ Intergenerational solidarity can be, and was, invoked to a reason for youngers to accept constraints on what they could do and the significant adverse economic and mental health impacts that resulted, in order to protect their older compatriots. It can also be, and was, invoked to argue that older people should show solidarity with younger people and accept specific restrictions on their mobility and activities in order to support younger generations.

Thus, there may be no direct or necessary correlation between what a human rights analysis might require and the design and legitimacy social arrangements that are based on actual or assumed differences in generational interests. In some cases human rights enjoyment may be advanced (for example in relation to climate change¹⁷); in others not necessarily so. There appears to be no particular guarantee that human rights norms informed by intersectional perspectives will drive the arrangements designed to foster intergenerational solidarity. But they can do so, and there are good arguments that they should.

E. Intersectional analysis as a means of realising intergenerational solidarity and human rights of older persons

It is often said that older persons do not constitute a homogeneous group but are in fact the "most diverse group" in society. That older persons are a heterogeneous group is clear, the more so if one moves beyond a simple designation of who is an "older person" that is based on chronological age and one accepts that "older age" is in many contexts a social construction linked only loosely to the numerical ages so often used to allocate someone to the status of "older person".

¹⁷ See the important contribution by the Committee on the Rights of the Child: *General comment No 26 (2023) on children's rights and the environment, with a special focus on children's rights*, <u>CRC/C/GC/26</u> (2023). The General comment adopts both a human rights approach focusing on those particularly affected or likely to be particularly affected by climate change with an appeal to intergenerational solidarity, including in relation to future generations: see paras 8, 14, 24 and 26.

¹⁵ Niklas Ellrich Groppe, Larisa Pfaller and Mark Schweda, "Young for old – old for young? Ethical perspectives on intergenerational solidarity and responsibility in public discourses on COVID-19" (2021) 18 *European Journal on Ageing* 159-171, 159.

¹⁶ Ibid, 168.

In human rights terms an intersectional approach is important to identify which groups are most disadvantaged and thus which groups fail to enjoy particular human rights on the basis of equality with others. That has clear implications for policy initiatives and programs to ensure that these groups do get to enjoy human rights. In some cases disadvantage will reflect the cumulative effect of a lifetime of disadvantage or discrimination because of one or more characteristics or may result from new forms of disadvantage experienced once a person reaches one or more of the thresholds of older age. For example, statistics assembled by the Australian Institute of Health and Welfare, a government-funded research body, show that older Indigenous Australians (who are designated as those aged 50 and over rather than the 65 and over threshold standard used for the overall population) fall short of the overall population on nearly every health indicator.¹⁸

These insights also have implications for policies that are directed to earlier stages of the life course as well. For example, we know very well the impact of many women's different patterns of participation in the formal labour market that is directly influenced by their reproductive labour and their disproportionate share of domestic work including care work on their ability to accumulate savings for the later stages of their lives ("post retirement"). The impact of the death or separation from a partner in later life can also have major detrimental impacts on the standard of living of many older women. If an intergenerational solidarity approach is to be adopted, then focusing on women – and indeed on particular subgroups of women that reflect intersections other than just race and sex/gender— is both an ethical duty and a means of effectively directing social resources to where they are most needed and also ensuring thereby the better enjoyment of human rights.

This intersectional analysis of specific groups' deprivation and needs in older age should thus also stimulate policy interventions at earlier stages of life. For example, where pension schemes include a contributory element so that the final pension available to a pension when they leave or scale down their paid labour force participation, women's ability to accumulate savings because of interrupted labor force participation and often part-time work due to other responsibilities that women have less in such retirement savings than men (and other characteristics? One partial response to such limitations would be for governments to contribute on behalf of women to make up the shortfall – something that has been proposed, for example in Australia in relation to government-paid maternity leave which presently does not include a contribution towards superannuation (a compulsory national contributory pensions scheme).

Such an approach can also makes sense in human rights terms, justified by reference to a range of different obligations that apply at earlier stages in life (for example, the right to non-discrimination in terms and conditions of employment under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CEDAW Convention), as well as in later life (the rights to social security and to an adequate standard of living in the ICECSR and the non-discrimination obligations in both the ICESCR and the CEDAW Convention). Thus, important dimensions of the arrangements embodied in notions of intergenerational solidarity are driven by intersectional analysis at all stages of life. In a real sense, ensuring children's

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¹⁸ Australian Institute of Health and Welfare, "Older Australians: Aboriginal and Torres Strait Islander people", pp 9-19, https://www.aihw.gov.au/getmedia/73a6a317-b508-4ecc-834a-cb0a54378b9d/older-australians.pdf?v=20211119100017&inline=true.

rights, women's rights and the rights of persons with disabilities (among others) are also an essential way to ensuring the human rights of older persons. This is one lesson of a life course approach.

F. A new convention as a means both of promoting human rights and intergenerational solidarity

I have argued that a human rights-based approach which incorporates intersectional perspectives is not only useful for advancing the better enjoyment of human rights by those who are most disadvantaged and marginalized but that it also provides a useful analytical and policy tool for advancing intergenerational solidarity and social cohesion.

The current body of international human rights standards provides some assistance in realising intergenerational solidarity as regards support for older persons but lacks sufficient coverage and specificity to address directly or through intergenerational solidarity the existing and emerging challenges that face our societies in the contexts of demographic ageing. The examination of this issue over the last decade or so in the context of the United Nations General Assembly Open-ended Working Group on Ageing and the United Nations Human Rights Council have shown the limitations of the existing international human rights framework for better protecting the human rights of older persons (or in older age). The reasons are fundamental, not just operational: the current human rights framework is conceptually flawed as it fails reflect an understanding of the social construction of older age, the pervasiveness and impact of ageism and age discrimination, the diversity of older persons and thus the need for an intersectional analysis, and the broader context of population ageing.

Advocates for a new treaty on the human rights of older persons argue that, given the proportion of humanity that will fall within any chronologically-based and/or broader definition of "older persons" or "older age", a new legally binding policy framework in the form of a treaty is necessary. While some improvements to the existing human rights system are possible (and should be attempted), the changes required are so far-reaching and so fundamental that they need more than marginal improvements around the edges. A new treaty will make a unique and significant contribution to improving the enjoyment of human rights by older persons, in the same way that treaties on women's human rights, the rights of the child and the rights of persons with disabilities have changed ways of thinking about and acting on the human rights of those social groups. It will also incorporate intersectional perspectives and help to influence such analysis at the domestic level.

Such a treaty could also help to frame our contemporary understanding of what intergenerational solidarity should comprise and how to achieve it. Consider the example of long-term care and support, a critical issue for most societies now or in the coming decades and often proffered as an example of intergenerational solidarity. International human rights

¹⁹ See, among other discussions, Office of the United Nations High Commissioner for Human Rights (OHCHR), Update to the 2012 analytical outcome study on the normative standards in international human rights law in relation to older persons, Working paper prepared by OHCHR, March 2021, https://social.un.org/ageing-working-group/documents/eleventh/OHCHR HROP working paper 22 Mar 2021.pdf; OHCHR, Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons, https://www.ohchr.org/en/special-procedures/ie-older-persons/annual-reports.

law provides almost nothing in terms of guidance on how States and societies should go about providing support of different kinds to enable people to continue to live independent lives in their communities as they age. In many societies it is still families who are expected to and do provide care and support to older relatives, though that is changing in many countries as a result of demographic changes, urbanisation and smaller family sizes.²⁰ (It also has its drawbacks as well as its advantages.)

In many countries, especially developed countries the expansion of institutional aged care in the form of long-term care homes has been a feature of how those societies have responded to the ageing of their populations and the need to provide significant levels of care and support to older cohorts. Whatever the benefits of such arrangements, concerns about them and the ways in which they can involve significant violations of the human rights of older persons continue to grow. The horrific stories that emerged during the height of the COVID-19 pandemic about the treatment of older residents in some countries have underlined the issues.

Exploration of better alternatives is increasingly engaging both human rights advocates and policymakers, with the goal of some form of de-institutionalisation in the medium- to longer term receiving attention.²¹ This is driven in part by acceptance that congregate institutional living on a large-scale is seen as having major problems and by a rights-based analysis which draws on developments in relation to the human rights of persons with disability, in particular Article 19 of the Convention on the Rights of Persons with Disabilities which guarantees all persons with disabilities, including older persons with disabilities, the right to live independently and in the community.²²

In addition, a new treaty would include both a rights-based approach to the needs of different groups of older persons but also a recognition of their rights to continue to participate in and contribute to the community in economic and other ways. The counter-discourse to intergenerational solidarity that is sometimes used to create competition between generations by arguing that social outlays and other privilege extended to older cohorts (an appeal to intergenerational justice and equity), often fails to acknowledge and take into account the economic and other unremunerated contributions by older persons in the public and private spheres: continued economic activity, volunteering, the provision of care and support for family members old and young, and intergenerational transfers of assets and resources are not always included in the narratives around intergenerational justice and fairness. A new convention would not only acknowledge those contributions and encourage the collection of better quality data around them but also create more opportunities for older persons who wish

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²⁰ See, for example, Peng DU, "Intergenerational solidarity and old-age support for the social inclusion of elders in Mainland China: The changing roles of family and government" (2013) 33(1) *Ageing & Society* 44-63. doi:10.1017/S0144686X12000773.

²¹ See, for example, Committee on the Rights of Persons with Disabilities, *Guidelines on deinstitutionalization, including in emergencies*, CRPD/C/5 (2023). For an example in the context of aged care see Older Persons Advocacy Network (Australia), *Deinstitutionalisation in Aged Care, Position Statement*, December 2023 https://media.accessiblecms.com.au/uploads/opan/2023/02/OPAN-Deinstitutionalisation-in-Aged-Care-Position-Statement.pdf.

²² For another example that underlines the importance of an intersectional analysis when designing ageing-in-place or other housing strategies for older people, see Judith Sixsmith et al, "Ageing-in-Place for Low-Income Seniors: Living at the Intersection of Multiple Identities, Positionalities, and Oppressions" in Hankivsky and Jordan-Zachery (eds), above n 10, 641-664.

to do so to contribute in these ways. This would lead to an enriched understanding of the relations between and within younger and older generations.

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