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Date: May 15, 2013

To: Focal Point on Ageing
Department of Economic and Social Affairs
Division for Social Policy and Development
(Email: dspd-ageing@un.org)

From: William Pope, American Bar Association,
Liaison to the U.N. Open-Ended Working Group on Ageing

RE: **Call for Non-governmental Organization Input to the
UN Open-ended Working Group on Ageing**

The ABA Commission on Law and Aging appreciates this opportunity to respond to the request for input to the Open-ended Working Group on Ageing.

One of the expert panels at the August 2012 meeting of the UN Open-ended Working Group on Ageing addressed the topic of Access to Justice for older persons. The presenter from the ABA Commission on Law and Aging gave an overview of access to justice strengths and weaknesses as they affect older persons in the United States. In the following comments, the ABA Commission on Law and Aging would like to suggest a more detailed framework for building access to justice principles into the elements of a legal instrument under consideration by the Working Group. These comments are based upon *Access to Justice Assessment Tool: A guide to analyzing access to justice for civil society organizations*, developed by the ABA Rule of Law Initiative (2012).

What Is Access To Justice?

Access to justice means that citizens are able to use justice institutions to obtain solutions to their common justice problems. For access to justice to exist, justice institutions must function effectively to provide fair solutions to citizens' justice problems.

Effectively addressing access to justice requires knowing whether citizens are able to use justice institutions to solve their common justice problems, what factors affect whether they can do so, and what reforms and programs could make

justice institutions more responsive to citizens' needs, and in particular, the needs of older persons.

Six key elements comprise the framework of Access to Justice:

- I. Adequacy of the Legal Framework**
- II. Sufficient Legal Knowledge**
- III. Access to Advice and Representation for Older Persons**
- IV. Access to a Justice Institutions**
- V. Fair Procedures**
- VI. Enforceable Solutions**

For each element, three key questions arise:

1. To what extent is each element present in the justice system?
2. What factors affect the extent to which each element is present? The explanation below will suggest factors that are critical and questions to ask, but it is important to understand that the suggested questions represent useful starters. An in-depth evaluation should expand on them. In addition, it is important to target different sub-populations of older citizens, because different subgroups will fare better or worse in outcomes, and such disparities are important to understand.
3. What are possible reform strategies? This overview of this framework will address only the first two questions. While this third question goes directly to the need for stronger normative standards and implementation mechanisms, these comments are intended only to provide a framework for addressing access to justice.

I. ADEQUACY OF THE LEGAL FRAMEWORK AS IT IMPACTS OLDER PERSONS

There must be an adequate legal framework that establishes older citizens' rights and duties and provides citizens mechanisms to solve their common justice problems?

The legal frameworks may include both formal and alternative justice systems, including the following:

- **State laws** -- Laws that have been enacted by the country's government. State laws often appear in a constitution, the highest law of the land. A constitution enumerates the power, duties, structure, and procedures of a government. It is important that the constitution contains human rights and access to justice principles to provide a basic framework that the government and citizens are required to observe. Legislation such as the criminal and civil procedure codes of a country can help to provide a more detailed framework, including how to implement constitutional provisions.
- **Formal justice systems** -- The courts, the judiciary, prosecutors, and formal administrative tribunals. A court consists of an official public justice institution authorized by state law to adjudicate disputes and apply laws. The judiciary is made up of judges and magistrates. The prosecution is the legal party responsible for

presenting a case against a citizen accused of a crime in a criminal proceeding. Prosecutors will also enforce the judgments of a court.

- **Non-state laws** -- Rules not enacted by governments, but through social interaction, reflecting customs, norms, and accepted behavior within a certain group or community. They can be written or unwritten.
- **Non-state justice systems** -- Institutions of justice that adjudicate disputes outside of formal court systems. This includes non-state justice systems such as traditional and indigenous systems, and state-sanctioned alternative dispute resolution institutions. Both provide an alternative to formal court litigation. The term “non-state” may be used interchangeably with other adjectives commonly used to refer to these systems, such as “informal,” “customary,” “traditional,” and “indigenous.”

Factors that Affect the Adequacy of the Legal Framework:

1. The existence of clear rules and standards.
2. The existence of a non-discriminatory legal framework.

Questions to consider in evaluating the adequacy of the legal framework:

- What state laws, if any, exist that create clear legal rights for older citizens within the formal justice system? Multiple areas of law must be examined, such as land and property rights, and rights to financial security, health and long-term care, housing, and safety.
- What customary laws and practices, if any, exist that create clear legal rights for older citizens within the informal justice system?
- Are they simple and easy to understand?
- Are they consistently enforced and applied?
- What mechanisms does the law provide to citizens to allow them to enforce their rights?
- Are informal justice institutions given the power, by law, to solve justice problems or provide a remedy?

II. SUFFICIENT LEGAL KNOWLEDGE

Access to justice is premised upon older citizens being aware of:

- A. Their rights and duties; and
- B. The mechanisms available to solve their common justice problems.

Factors that affect whether older citizens are aware of their rights and duties?

- Education and literacy levels of older citizens.
- The availability of information from government and non-state institutions.

Factors that affect whether older citizens are aware of mechanisms to solve their common justice problems?

- Citizen trust of relevant institutions.
- The existence and strength of social networks in the community.

Questions to consider when evaluating whether the population's legal knowledge is sufficient:

- How would you rate the older populations' level of familiarity with:
 - How to access legal information?
 - Functions of the formal justice system?
 - Functions of the informal justice system?
 - Functions of lawyers?
 - Functions of paralegals?
 - Functions of the court?
 - Functions of the prosecutor?
- What are the amount and quality of legal information available to older citizens?
- What is the extent to which legal information is produced in local languages?
- What activities do state and non-state actors undertake to enhance legal knowledge among older citizens?
- How would you rate the level of information dissemination by the state (i.e., good, average, not good, do not know)?
- What media are used to communicate legal awareness messages?
- What are the main obstacles to raising legal awareness of citizens?

III. **ACCESS TO ADVICE AND REPRESENTATION**

Access to justice depends on the extent to which older citizens have access to the competent legal advice and representation necessary to solve their common justice problems.

The source of legal advice and representation may come from a variety of possible providers, most commonly one or more of the following:

- **Government Programs:** Government-funded legal aid can take a variety of different forms. Legal aid can be provided through a government agency, such as a public defender office, through private lawyers, employed by the government on a case-by-case basis, or through cooperation agreements with civil society organizations (CSOs), whereby the government pays the costs of legal services delivery by a CSO.
- **Pro-bono Assistance:** To varying degrees, lawyers and law firms may provide free or reduced cost legal aid to persons who would not otherwise be able to afford legal representation.
- **Civil Society Organizations:** CSOs frequently supply legal services, whether through lawyers or paralegals. CSO intervention can also take the form of self-help, whereby citizens are trained to represent themselves in simple legal proceedings.
- **Law School Clinics:** Law school clinics utilize law students to supply legal services, providing free legal advice and representation while also affording hands-on-legal experience to students.

Factors that affect access:

- Accessibility of legal advice and representation in remote areas.
- Cost of lawyers and paralegals and other authorized advisors.
- Citizen trust of lawyers.

Questions to consider when conducting the assessment for element 3 include the following general areas of inquiry:

- What is the availability of lawyers offering legal advice and representation to older citizens?
- What is the availability of lawyers' services that are free of charge?
- What is the availability of services by paralegals and non-lawyers?
- How would you assess the quality of the above (i.e., quality service, low quality because it is free of charge/from a non-lawyer, unsatisfactory, cannot make assessment)?
- What roles do paralegals and other non-lawyers play in resolving justice problems?

IV. ACCESS TO JUSTICE INSTITUTIONS

Older persons must have access to justice institutions, whether formal or informal, that are:

- Affordable, and
- Accessible, and
- Able to process cases in a timely manner.

Factors that affect affordability:

- **Direct and Opportunity Costs** - When analyzing the cost of using a justice institution, consider both "direct" and "opportunity" costs. Direct costs are fees citizens must pay to use the justice institution, such as a payment to a legal representative, a charge to file a case, or a bribe. An opportunity cost is the income citizens lose when they spend time bringing a case before the justice institution rather than earning money.
- **"Up - Front " Costs** – One may distinguish between costs that must be paid when citizens begin their claim and those that citizens need only pay after the justice institution finds a solution to their justice problem. Citizens may find it much easier to pay costs once they have a solution to their justice problem, particularly where the solution awards citizens money.

Factors that affect accessibility:

- The number and distribution of justice institutions.
- Transportation infrastructure.
- Security – the level of stability in a region.
- The extent of restrictions on travel.

- Threatening environment – Are people threatened by a justice institution and wary of negative consequences that may arise from interacting with a justice institution.

Factors that affect timeliness:

- Size of caseloads.
- Quality of case management procedures.

Questions to consider when conducting the assessment for element 4 include the following general areas of inquiry:

- In your opinion, what justice institutions do citizens use in resolving disputes, and why?
- What is the approximate time citizens take to travel to and return from the justice institution?
- What are the costs of accessing the justice institution?
- How quickly are justice problems resolved?
- What obstacles prevent citizens from bringing justice institutions before the justice institution?
- What activities are state or non-state actors undertaking to make access to the justice institution easier?

V. FAIR PROCEDURES

The operational procedures of justice institutions, whether formal or informal, must ensure that:

- Older citizens have an opportunity to effectively present their case.
- Disputes are resolved impartially and without improper influence.
- Where disputes are resolved by mediation, citizens can make voluntary and informed decisions to settle.

Factors that affect whether older citizens have an opportunity to effectively present their case:

- Procedures during hearings and the legal process in available forums.
- Accommodations for language barriers and disability barriers.
- The ability to ensure witness attendance.

Factors that affect whether disputes are resolved impartially and without improper influence:

- Institutional guarantees of judicial/administrative
 - *Independence*
 - *Transparency of the appointment process*
 - *Protection from dismissal*
 - *Sufficiency of salaries*
 - *Safety and security.*
- Oversight mechanisms.
- Reasoned decisions.

An adjudicator or mediator should not be biased in relation to any of the issues or parties involved in a dispute, nor be influenced to resolve disputes in a particular way.

Factors that affect mediation and negotiation and whether citizens can make voluntary and informed decisions to settle:

- Imbalances of power between the parties.
- The role of the mediator.

Questions to consider when conducting the assessment for element 5:

- What is the extent to which citizens can present arguments and call witnesses before the justice institution?
- What is the extent to which the judicial system accommodates variable physical, cognitive, emotional, and social needs of older citizens in judicial and administrative procedures?
- What are the procedures for presenting arguments and calling witnesses?
- What is the extent to which laws give citizens a right to a reasoned decision that can be reviewed by a higher tribunal?
- How much must a party pay to lodge an appeal?
- What is the average time taken for an appeal to be heard?
- What activities are state or non-state actors undertaking to address problems in the procedure used by the justice institution to resolve justice problems?

VI. ENFORCEABLE SOLUTIONS.

Older persons must be able to rely on the enforceability and integrity of solutions rendered by justice systems.

Factors that affect enforceability:

- The existence of coercive force variables:
 - Costs
 - Corruption
- The strength of social sanction:
 - Strength of community norms
 - Power imbalances

Questions to consider when conducting the assessment for element 6:

- What procedures, if any, exist, established by law, to provide for decisions to be enforced?
- What is the amount of costs a party must pay to enforce a decision?
- To what extent does corruption affect whether decisions are enforced?
- What obstacles prevent a decision from being enforced?
- What activities are state or non-state actors undertaking to make decisions easier to enforce?

The ABA's *Access to Justice Assessment Tool* provides an in-depth methodology for assessing the extent the above elements have been implemented in a state. These comments have proposed using the elements of this tool to define the necessary elements of access to justice as it applies to older persons. Older persons are not a homogenous group. So, it is vitally important to understand the situation of different sub-populations of older citizens. Each may fare better or worse in experience and outcomes under a justice system, and such disparities are important to understand and respond to.

Respectfully submitted,

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