

Expert Group Meeting on the Human Rights of Older Persons

Note of Meeting

United Nations Headquarters, New York, 29- 31 May 2012

Meeting documents- <http://social.un.org/ageing-working-group/egm2012.shtml>

Agenda- <http://social.un.org/ageing-working-group/documents/egm/agenda.pdf>

List of participants- <http://social.un.org/ageing-working-group/documents/egm/participants.pdf>

Experts presentations- <http://social.un.org/ageing-working-group/egm2012presentations.shtml>

Background

In December 2010, the United Nations General Assembly established an open-ended working group for the purpose of strengthening the protection of the human rights of older persons by adopting General Assembly resolution 65/182. The working group was mandated to consider the existing international rights framework for older persons, to identify possible gaps and how best to address them, including by considering the feasibility of further international instruments and measures. The open-ended working group has since held two working sessions in 2011.

The United Nations Department of Economic and Social Affairs (DESA) and the United Nations Office of the High Commissioner for Human Rights (OHCHR) convened a three-day expert group meeting on the human rights of older persons in New York, 29 - 31 May 2012, to precede the third working session of the open-ended working group in August 2012. Open to Member States of the United Nations and other stakeholders as observers, the meeting aimed at informing the debate from a substantive human rights perspective by addressing urgent and relevant gaps in the respect, protection and fulfillment of human rights of older persons.

14 international experts with different backgrounds, including UN special procedure mandate holders, academics, a judge, representatives of NHRIs, researchers representing NGOs and representatives of UN agencies and regional human rights bodies, debated the extent to which present international human rights standards offer adequate protection in key areas of the lives of older persons.

Session 1 - Age discrimination and multiple discrimination

In this session, participants discussed whether age is adequately protected as a forbidden ground of discrimination in international human rights law, and whether the human rights framework offers protection against ageism.

It was remarked that there is no general prohibition against discrimination based on age, and that even if age can in theory be considered to be included under the residual “other status” umbrella usually included in non-discrimination clauses, in fact little attention has been paid to age as grounds for discrimination either in the universal or regional human rights systems. Evidence of this lack of or insufficient attention was given regarding the Human Rights Council Universal Periodic Review, UN treaty bodies, and Council of Europe and European Union courts. Even in those cases where age was considered in the context of a discrimination claim, the standard of review has not always been sufficiently strict – so distinctions on the basis of age were considered proportionate and thus justified. Age is explicitly considered as a ground for discrimination under some EU instruments, but the scope of applications of these provisions is limited to the areas of competence of the EU. Several areas where the application of the prohibition of discrimination on the basis of age was deemed insufficient were mentioned – including pensionable ages and access to goods and services, in particular financial services. Likewise, gaps were mentioned in the area of monitoring – independent monitoring and promotion of equality on the grounds of age currently does not exist.

Providing guidance on and an articulation of how human rights norms apply to older persons were seen as critical in view of the prevalence of age discrimination and ageism. A dedicated global human rights instrument would provide such a useful framework and help design and focus policies.

Participants highlighted the need to consider that older people are a diverse group, with some having various degrees of support needs. The consideration of age discrimination might also involve making important definitional issues. The need to identify age and older persons explicitly in international instruments appears to be the key to trigger the adoption of special measures regarding this group. Identifying older persons explicitly as right-holders would also play an educational role at the national level and plays an important role in monitoring and accountability. New dimensions of discrimination, such as discrimination by association, were also highlighted as issues that need particular attention in the case of older persons.

There appeared to be consensus that the explicit lack of reference to older persons as a protected group does affect realisation of their human rights, and that this offers reasons for strengthening the existing legal standard. The use of “other status” as a universal category may not be sufficient as specificity provides not only a political commitment but also serves an educational role. There was support for the need to clearly articulate forms of multiple discrimination. There is a need to address both formal and substantive equality and other issues at an international level and there is need for national monitoring mechanisms. There is also a call for increased participation of older persons at the Open Ended Working Group, recognising the problem of self-identification among older persons as an issue.

Session 2 - Human Rights related to the enjoyment of the right to health in old age

This session was devoted to human rights issues related to specific health needs and demands of older persons. It started with a detailed discussion of the issue of palliative care, which has received little attention from human rights bodies and from a human rights perspective in general. Most people die of chronic illness that they experience over an extended period of time. WHO estimates that 60% of people who die need palliative care—about 36 million people every year. While

palliative care does not require expensive drugs or equipment, a 2012 Worldwide Palliative Care Alliance report found that in most places it is simply not available and has been integrated into health systems in only a small number of countries. Many patients are therefore experiencing unnecessary pain and other symptoms and are often unable to access inexpensive medication or interventions because they are too far away, or restrictive regulations around morphine result in a lack of availability. There is generally a lack of priority afforded to the issue and policies are often silent with a focus on preventative and curative care resulting in the invisibility of patients who are unable to advocate for themselves. While some general right to health standards are available, they lack specificity and cohesion, there is a failure to implement them, and the majority of monitoring systems are not picking up on the issue. Few or no complaints are ever received on the issue and little attention has been paid to it in concluding observations by human rights bodies. There is, therefore, a strong argument to re-state, monitor and enforce the rights.

Issues regarding institutionalization and informed consent were also discussed. Examples of how the CRPD deals with this, not as health issues, but as a form of violence, were debated, with a view to assessing possible gaps in the application of CRPD to older persons, and as a model that older persons-specific standards should take into consideration. Other standards included in CRPD in relation to health services that should be considered in the context of older persons are accessibility of services, autonomy and choice for a person's own needs, the obligation to provide services close to communities, including rural areas and prohibition of discrimination in accessing health insurance.

Other interventions also pointed out the need to focus on chronic diseases as an issue that disproportionately affects older persons, and the need to provide specific human rights guidance on this and to provide age-appropriate health services. While from a normative perspective it is important to ensure that health systems are adequately resourced, there is a need for healthcare expenditure to be seen as an investment for a society in which older persons will be called on to play a more active role. Having a specific normative framework on the rights of older persons would contribute to a paradigm shift towards the promotion and protection of the autonomy of older persons as active and entitled rights-holders beyond traditional views as passive beneficiaries of care. It was also noted that stereotypical assumptions about older persons might have the effect of excluding them from some health services, such as sexual and reproductive services or HIV prevention programmes - while in reality the HIV prevalence rate among older persons in some countries might be high.

Inequality and age-related discrimination in relation to access to healthcare services was discussed, in particular for older women. The issue of rising healthcare costs and age discrimination in accessing insurance, which due to the increasing trend of individualisation of the health care risk can leave many older people uncovered.

Other specific issues that appear not to be well covered by existing human rights standards include end-of-life care and decisions, including advance directives.

Session 3 - Violence and abuse against older persons in the public and private sphere

This session considered the different forms of violence, abuse and neglect to which older persons may be subject both in the public and private sphere. Participants agreed that violence, abuse and neglect can take various forms, including physical harm, psychological abuse and financial exploitation.

The meeting discussed the root causes of violence against older persons. Participants agreed that social exclusion, isolation and poverty are among the main factors contributing to violence, neglect and abuse. Other key factors highlighted during the meeting included the depiction of older people as frail, weak and dependent; the erosion of the bonds between generations within a family; deprivation of legal capacity and the appointment of a guardian; systems of inheritance and land rights affecting the distribution of power and material goods within families; migration of young couples, leaving older parents alone, in societies where older people were traditionally cared for by their offspring; and a lack of funds to pay for care. Ageism which is prevalent in a growing number of societies combined with poor support for carers was also indicated as a possible cause of elder abuse.

Violence against older persons is often characterised by relationships of dependency and power which are often complicated by family and societal loyalties and trust arising out of a caring relationship – professional, family or community.

Violence, neglect and abuse very often take place in private, either at home or in institutionalised settings. Domestic violence is often perpetrated by the partner of the victim, usually against an older woman, and State responses to domestic violence have often been insufficient. Violence, neglect and abuse also takes place in institutionalised settings, including residential and nursing homes, as well as in prisons and detention centres.

Older persons who experience violence are usually reluctant to speak out due to shame, humiliation, and fear. They are often not aware of their rights or of the avenues, if available, to seek redress. Further barriers include poverty; illiteracy; limited mobility due to the absence of mobility aids or assistive devices; language and physical barriers; laws that allow for deprivation of legal capacity, resulting in the appointment of a legal guardian to make and express legally binding decisions; lack of access to information and counselling services; fear of reporting the abuse due to concerns about losing needed care; and fear of institutionalization if the abusive home environment is reported.

The meeting highlighted that welfare responses do not provide an adequate response to all forms of violence against older persons, and that some forms of abuse are not treated as criminal offences by the police and prosecuting authorities. Participants pointed out that non-criminal justice responses to violence could be identified.

Participants acknowledged that some older persons may be subject to multiple forms of discrimination on account of their gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, and illiteracy. In particular, the experts highlighted that older women are more vulnerable to discrimination and abuse as compared to men, and that they are less likely to have access to effective remedies. Discrimination against older women may result in a lack of (or limited access to) basic resources for subsistence, health care, adequate housing, social services and income security. It may also give rise to situations of abuse in which older women are subjected to maltreatment, neglect, and isolation.

A number of challenges have so far prevented the identification and implementation of appropriate responses to violence against older persons. These challenges include: lack of reliable data on elder abuse; lack of legally binding instruments at the international and regional levels addressing violence against older persons; lack of legislation; lack of awareness of this phenomenon within society; and under-reporting.

In terms of possible measures to address violence against older persons, participants agreed that legislation alone would not be sufficient to reduce violence against older persons, and that awareness-raising initiatives were needed to change the attitude of society towards this phenomenon. With regard to legislation, key principles to be included in national or international law on this issue were highlighted, including respect for the autonomy of older people, a definition of 'older person at risk of abuse or neglect', recognise the older person's right to protection and redress, the need for State intervention (in exceptional circumstances) to protect an older person, the criminal nature of most forms of abuse and coercive conduct by the abuser. Key approaches to address the issue also require the provision of assistance beyond welfare support for abused older people, for example within the criminal and civil justice systems; a safe environment in which to report abuse; and an expectation of State agencies, the third sector and practitioners working together and sharing information and finally, paying attention to the need to restore family and caring relationships where appropriate and safe.

Session 4 - Life in dignity, right to social security and access to productive resources

This session considered the obstacles that older persons encounter in exercising their right to social security, including social insurance.

Participants recognised that access to social protection and to social insurance constituted an important pre-condition for the enjoyment of other human rights and for ensuring the autonomy and dignity of older persons. They also noted that the enjoyment of this right was *per se* not sufficient to ensure a life in dignity. For example, one of the experts stressed that access to a non-contributory pension would not be sufficient *per se* to ensure a dignified life if high user fees prevent older persons from having access to healthcare services.

The experts agreed on the fact that the effective enjoyment of the right to social security requires the elimination of physical and economic barriers that prevent older persons from exercising their right to social security on an equal basis with others. The experts acknowledged that access to non-contributory pensions were of particular importance for older women, since they are over-represented in the informal sector, earn lower wages than men or are more likely to work on a part-time basis to fulfil caring responsibilities. To ensure dignity in old age income needs to be sustainable throughout life taking into account that old age can span even 30-40 years as well as high dependency needs and related costs.

The meeting acknowledged that older persons are among the most vulnerable groups in term of poverty and material deprivation, and that older women have a higher risk of poverty *vis-à-vis* older men. The experts considered that poverty amongst older persons was often underestimated, and that demographic changes, the crisis of traditional family structures, HIV and the financial and economic crisis were factors that could further exacerbate the vulnerability of older persons.

Although the right to social security is enshrined in a number of international human rights treaties, including the ICESCR and the ILO Convention No. 152, existing human rights standards are formulated in very broad terms, which make it difficult to tailor them to the particular situation and needs of older persons. In its General Comments No. 19 (2008) and No. 6 (1995), the Committee on Economic, Social and Cultural Rights has spelled out the normative content of the right to social security and identified the measures that States parties need to adopt to give effect to the provisions of article 9 in relation to older persons. The Special Rapporteur on Extreme Poverty and Human Rights has also contributed to clarifying the obligations of States parties to establish appropriate contributory and non-contributory schemes to reduce poverty and vulnerability among old people.

Participants noted, however, that treaty bodies' general comments and reports by Special Procedures mandate holders do not create legally binding obligations and are usually regarded by States as guidance or interpretative tools.

Session 5- Long term care of older persons

In this session, participants discussed how existing human rights instruments cover the long term support needs of older persons. It was emphasised that good care has physical, psychological and social elements provided in a continuum of social care, homecare, residential and institutional care. Despite the important rights issues raised in relation to care, there are no explicit standards and the main source of guidance remains treaty body General Comments and Recommendations, in particular CESCR General Comments 6 and 14, CEDAW General Recommendation 27 and CAT General Comment 2. It was also underscored that the rights of caregivers are one of the least covered areas in international law despite the significant effects on individuals, even if some regional instruments make mention of the issue. Explicit guidance will also be important regarding third party obligations, as care services are often provided by private parties. Due to the existing plurality of normative sources, their different legal status and varied regional scope and contents there is a need for more explicit articulation in international law, particularly in relation to the availability, acceptability, affordability and quality of care services.

The accessibility and inclusive character of technological solutions that improve the provision of long-term care and support independent living was also discussed, as well as the potential human rights issues related to the use of such technology in connection with care for older persons. The role of National Human Rights Institutions in promoting the adoption of standards for care homes institutions and to monitor them was highlighted. Further debate focused on the adequacy of institutionalization and the applicability of CRPD standards.

Session 6 - Older persons and the justice system

The meeting discussed the rights of older persons in the justice system and their right to a remedy.

Older persons face a number of obstacles when they access the justice system as litigants, plaintiffs, defendants and jurors. When they participate in the administration of justice as litigants, older persons have right to be assisted by a legal counsel of their choice on an equal basis with others. However, participants stressed that many older people do not know how to find a lawyer or cannot

afford one. Furthermore, it was stressed that where legal advice is provided on a *pro bono* basis, this can be of low quality.

The experts stressed that at times lawyers are not familiar with the difficulties that older persons face within the justice system. For this reason, experts highlighted the need to ensure that those working in the field of administration of justice, including police and prosecutors, be trained on how to ensure effective access to justice for older persons. In this regard, specific reference was made to articles 12 and 13 of the CRPD. Access to alternative dispute resolution for older people could also prove useful to address the challenges faced by older persons in the justice system.

Participants also discussed the accessibility requirements older persons may have. Court rooms should be accessible for older persons, and court procedures should be adapted to ensure that older persons be allowed to participate on an equal basis with others. For example, participants mentioned that judges and legal practitioners should tailor their language to the particular situation and needs of older persons participating in the proceedings. In elder abuse cases, participants stressed that an enabling environment needs to be created to facilitate the participation of older persons in the field of administration of justice and preserve the accuracy of their testimonies. The mandatory age for retirement to which judges are subject in many legal systems and exclusions of jurors on the basis of age was also discussed.

The situation of older defendants and prisoners was also raised. Where older persons are accused of a crime, they need support and accommodation to be able to defend themselves effectively. Furthermore, specific issues arise with regard to older prisoners, such as health issues, the need for mobility aids, medical and dental care, depression, stress and fear of dying in prison. Participants also discussed what forms of sentences were more suitable for older persons. Re-entry into society is also an issue of particular relevance for older prisoners, since as they may have no or limited pensions, no family and no or limited access to health care. Participants agreed that there may be a need for more targeted re-entry planning.

One of the participants suggested considering the issue of legal capacity of older persons in the light of article 12 of the CRPD, which requires States to move from substituted decision making to supported decision making. Accessibility and reasonable accommodation in all matters related to legal capacity are also required under the CRPD framework. Implementing Article 12 of CRPD has required legal reform and changes to practices including awareness-raising, new services, changing service systems, and establishing support networks including and beyond family. The CRPD does not contemplate restricting autonomy or legal capacity in order to prevent abuse or exploitation; rather, it has provisions for proactive measures aimed at prevention of all forms of violence, exploitation and abuse in Article 16 including providing information and education to persons with disabilities and their family members and carers on how to recognize and report; recovery/reintegration; prosecution; monitoring of facilities and programmes.