

**United Nations Open-ended Working Group on strengthening the protection of
the human rights of older persons (General Assembly resolution 65/182)**

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Introductory remarks

Chair, Distinguished delegates, ladies and gentlemen,

Thank you for offering me the opportunity to address delegates today, to provide the perspective of a European NHRI on the issues facing older people and how we have been working practically with the existing regional and international standards to protect and promote the rights of older people in Scotland. I bring you the greetings of Professor Alan Miller, Chair of the Scottish Human Rights Commission, the national human rights institution for Scotland (NHRI). We are pleased that a NHRI has been invited to contribute to the significant discussions of this group.

The Scottish Human Rights Commission has been operational since 2008 and was accredited with category A status by the International Coordinating Committee of NHRIS in accordance with the Paris Principles in 2010, meaning that we were established by statute and are formally and practically independent of Government and Parliament. We have a broad mandate to promote awareness, understanding and respect for human rights as well as a series of protection powers, including the power to launch formal inquiries, enter places of detention and require the production of evidence¹.

On establishment, the Commission undertook a wide-ranging national consultation on its priority areas of work and this highlighted the concern of the population, civil society, and public and private sector bodies in Scotland about the rights of older people, and in particular the rights and dignity of older people receiving social care services which has been the focus of our work.

I would like to highlight 2 main points in this presentation. Firstly, I would like to explain how we have used the existing human rights framework, both regional and international, to advance the rights of older people receiving care and support services in Scotland.

I would draw attention to role of an NHRI as an important bridge between the international framework of human rights protection and our domestic state contexts. We see our role as building on the 3 main pillars of a human rights based approach- firstly, the *empowerment* of rights holders to understand and claim their rights; secondly, the *accountability of duty bearers*; and thirdly, the *ability* of duty bearers to

¹ Scottish Commission for Human Rights Act 2006; <http://www.legislation.gov.uk/asp/2006/16>

respect, protect and fulfil rights. Corresponding to these three pillars we have delivered a training and capacity building programme of work with three broad target groups- older people and their representative organisations to strengthen the *empowerment* of rights holders; the regulators, scrutiny bodies and policy makers of care services to strengthen *accountability* in the sector; and public, private and voluntary providers of care services to strengthen the *ability* to adopt a human rights based approach in the sector.

Secondly, I want to highlight how we have sought to draw out the relevance of the existing human rights standards to the situation of older people using care services and worked to uncover and communicate to our key audiences the untapped and unrealised potential of some of these rights as they relate to older people which, as discussed by this working group, are relatively fragmented and dispersed throughout the human rights protection framework.

In doing so we have placed an emphasis on the concept of *human dignity, autonomy* and *participation* in interpreting and applying the existing standards. Our programme of work in this area is called “Dignity in Care” and I believe we have found value from an emphasis on this notion as it closely relates to the particular situation of older people who often face unique forms of physical, mental and emotional vulnerability.

Context- Older people in Scotland

I would like to begin by saying a few words about the context in Scotland.

As reflected in the changing demography worldwide,² Scotland has a rapidly ageing population with a projected increase of 144% in the over 85 age group by 2031.³ We know this inevitably must lead to dramatic changes in public service delivery as the complexity of needs and demand for certain services, such as health and social care will exponentially increase.

Compounding the issue, there is a prevailing youth oriented and “ageist” culture, which we know is apparent in many western societies. This presents a serious challenge to the equal dignity and rights of older people as there is often a tendency to devalue the contribution older people make to society, seeing them as a burden not an asset, dependent and unable or unworthy of full participation in the structures, processes and decision making of society. It has led to a gradual exclusion, marginalisation and de-prioritisation of older people’s rights in many ways.

These negative attitudes and perceptions of older people have a particular potency in the context of financial constraints in public sector spending where there are increased pressures on health and social care services, housing and work, and competing claims and interests at stake.⁴

² UN Population Division, “World Population Prospects: The 2008 Revision Population Database; <http://esa.un.org/unpp/p2k0data.asp>

³ Shona Robison, Member of the Scottish Parliament, Minister for Public Health and Sport; 24 March 2010 and “Making the case for care” A manifesto for the future of care and support services for older people in Scotland, Scottish Care, November 2010

⁴ Dignity: A Special Focus on Vulnerable Groups By Frédéric Mégret, and Florian Hoffmann (coordinator), United Kingdom. June 2009. See also e.g. “Call for less aggressive treatment for elderly”, The Herald, UK, Jan 10, 2011. pg. 1

As a consequence of this changing landscape we have seen increasing self-organisation among older people to advocate for equality and human rights. For example, the second Scotland's Older Peoples' Assembly met to highlight the key issues for older people in Scotland in November 2010; there have been calls for an Older People's Commissioner in Scotland⁵; and there are a number of increasingly vocal older people's advocacy groups across the country.⁶

Many of the current concerns voiced by older people's groups relate to reductions to the level of services and support for older people. For example, issues raised often centre around the level of state benefits and state pension; access to appropriate healthcare, particularly for dementia patients and also for depression which is reported to affect a quarter of older people;⁷ fuel poverty amongst older people who lack the means to heat their homes and suffer ill health as a result; elder abuse and older people being subject to neglect, ill treatment and/or other forms of physical, emotional, sexual or financial abuse; access to employment and vocational lifelong learning and the standards of care service delivery.⁸

These concerns, voiced by rights campaigners and advocacy groups, and a recognition of the hurdles, statistically (in terms of the ageing population), financially (in times of reduced public spending) and culturally that require to be overcome have led to a shifting policy agenda and number of initiatives by government and others across Scotland and the UK related to the realisation of the rights of older people.

For example, in 2007 the Scottish Government, Scotland's devolved administration with responsibility for amongst other things health and social care, published a strategy focussed on "positive ageing" with an ambitious vision of a Scotland taking priority action for the realisation of the rights of older people.⁹ This has remained high on the political agenda with strategies also announced in the last year relating the Reshaping Care for older people and a Dementia Strategy.

In other parts of the UK we have similarly seen an increased visibility of older people's issues. For example, there is an Older Peoples' Commissioner for Wales and will imminently be one for Northern Ireland.¹⁰ Furthermore, our sister NHRIs in the UK have focussed attention on care settings also, using their powers of inquiry and investigation to examine the rights of older people in care homes and care at home

⁵ Commissioner for Older People (Scotland) Bill, Fell 2 April 2007

⁶ E.g. The Scottish Pensioners' Forum was set up in 1992 as an umbrella organisation for groups and individuals working and campaigning for older people. The Commission's stakeholder database shows 233 out of 391 civil society organisations present themselves as working on behalf of older people in Scotland

⁷ E.g. Depression Alliance Scotland, Depression in Later years Research Findings, April 2009

⁸ E.g. Age UK, Agenda for Later Life 2011; Age Scotland, At home with Scotland's older people, facts and figures 2009- 2010; Report on the Scottish Older People's Assembly 2010; Scottish Pensioners Forum Election Manifesto 2010

⁹ All our Futures: Planning for a Scotland with an Ageing Population, March 2007

¹⁰ <http://www.ofmdfmi.gov.uk/index/equality/age/older-peoples-commissioner.htm>

services.¹¹ Across Europe we are aware of similar work of other NHRIS, such as the work of the NHRIs in Poland and Luxemburg regarding the rights of older people.¹²

Commission focus on Dignity in Care for older persons

The specific focus of our work however has been on addressing the issues affecting older people who are receiving care and support services either in their own homes or in residential care homes as part of our work under the theme of “Dignity in Care”¹³.

We have worked closely with a range of bodies, such as older people’s advocacy and campaign organisations, private, voluntary and public sector care providers, the regulation and scrutiny bodies, the Scottish Government and others to better understand the rights issues affecting older people when they are accessing social care services.¹⁴

We have learned, through our engagement with stakeholders, of a range of issues of daily and everyday practice that are of concern. For example, the inappropriate and undignified use of restraint, such as straps, sides on beds preventing people getting out, chairs which restrict movement; the locking of doors leading to the *de facto* detention of residents in care homes; social isolation and separation from family members; inadequate standards and levels of service provision for elderly people living in their own homes; the use of covert or inappropriate medication; malnutrition of older people who are not adequately supported to eat; lack of adequate care for people with dementia; and generally a lack of recognition of the autonomy of individuals when they are in residential care settings because of a risk averse culture focussed primarily on keeping people safe from harm.¹⁵

Care about Rights project

The Commission’s approach to these issues has been to work collaboratively to implement a human rights based approach strengthening the *empowerment* of rights holders and the *accountability* and *ability* of duty bearers to deliver on their human rights responsibilities.

Based on these principles we have involved people in developing a resource pack and training programme consisting of films, case studies and information applying human rights standards to the issues of relevance to older people and their families, care

¹¹ E.g. Equality Human Rights Commission Inquiry into Home Care of Older People www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/; and the Northern Ireland Human Rights Commission Investigation into the rights of older people living in nursing homes

¹² E.g. Interview with Polish Ombudsman, 15 August 2010; <http://humanrightshouse.org/Articles/14860.html> and Rapport d’Activités 2010 de la Commission Consultative des Droits de l’homme du Grand-Duché de Luxembourg http://www.ccdh.public.lu/fr/publications/rapports-activite/Rapport_annuel_2010.pdf

¹³ Other areas of work in this thematic area include a focus on adult protection mechanisms in the Scotland and upholding the state duty to protect older and other adults at risk from harm and pursuing opportunities to promote a human rights based approach to healthcare.

¹⁴ The Care about Rights project is formally supported by Scottish Care (trade association representing private sector care providers); Care Commission (regulation body for care services); Age Scotland (NGO for older people)

¹⁵ E.g. Remember I’m Still Me Report; Care Commission and Mental Welfare Commission joint report on the quality of care for people with dementia living in care homes in Scotland; 2009

providers, regulation bodies and policy makers and have delivered extensive training and awareness raising sessions across the country.¹⁶

We have been working in partnership with branches of the civil society organisation, Age Scotland, itself a branch of Age UK and part of HelpAge International, to facilitate human rights workshops with older people's rights groups, campaign organisations and advocacy groups to empower them to better understand and be able to claim their rights.

We have also been working with care providers to convey how human rights are relevant to everyday decision making. In particular we have focussed on an understanding of the concept of proportionality and how it can assist in balancing the rights of the individual to freedom, choice, autonomy against protective measures designed to keep an individual safe which are disproportionately restrictive of their rights.

The project has promoted a view of human rights less as an issue of legal obligation or regulatory challenge but more as a helpful framework to guide policy making and decision making and advocacy tool aimed at resolving tensions or disputes through a common understanding of issues across different actors with responsibilities for the protection and fulfilment of human rights.

The human rights framework focus of our work

The programme of capacity building is based on the practical application of human rights principles from both the domestic and international human rights framework.

A substantial part of the resource centres on the UK's obligations under the European Convention on Human Rights (ECHR) that are legally enforceable in the domestic courts in Scotland.¹⁷ In particular we focus on the rights most applicable in care setting where issues of human dignity and autonomy are at stake such as Article 3 of the ECHR and the right not to be subject to inhuman or degrading treatment and Article 8 and the right to respect for private and family life. These rights are of course also reflected in the International Covenant on Civil and Political Rights (ICCPR).¹⁸

We have found that the potential of existing instruments to promote and protect the rights of older people has, to a large extent, remained untapped and we have promoted a broad interpretation and application of, for example, Article 8 of the ECHR and the right to respect for private and family life. In applying Article 8 we have focussed attention beyond traditional notions of privacy to the other facets of this right which pertain to an individual's dignity and autonomy such as the right to maintain

¹⁶ See www.scottishhumanrights.com/careaboutrights

¹⁷ Human Rights Act 1998 and Scotland Act 1998

¹⁸ ICCPR, Art. 7, Art. 17

relationships,¹⁹ to physical and psychological integrity,²⁰ and the right to participate in decision making.²¹

Similarly, with Article 3 of the ECHR and the right not to be subject to inhuman or degrading treatment we have focussed on the positive duties of the state to protect vulnerable individuals from ill treatment or undignified conditions. We know there is a danger that systemic failures of the support and protection frameworks could lead to potential violations of this right where individuals are left in undignified conditions or inadequately protected from abuse or ill-treatment.

We also refer to the international framework of rights focussing on some of the most relevant protections. We reference for example, many of the rights contained in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) which may have the most relevance to some older people who face physical, mental or sensory impairments, such as older people with dementia. In particular we highlight the right to physical integrity (Art. 16,17); the right to participate in decision making and make decisions on the same basis as others (Art. 19, 29, 21); the right to live independently and be included in the community (Art 19); and the right to personal mobility (Art 20).

Finally, we draw attention to the rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) including, the highest attainable standard of physical and mental health, the right to adequate housing and right to food. We recognise however that there has been limited work done at an international level by treaty bodies and others to uncover the distinct relevance of these standards as they relate to older people and the unique barriers they face in the realisation of these rights.²²

These international standards are of particular interest to the outreach groups of older people advocacy organisations and campaign groups who are learning collectively how to engage with the international framework through the treaty monitoring bodies and use the standards as an advocacy tool in their own lobbying work.

The 2 underlying themes which I would highlight from the rights focus of this work would be the concepts of *dignity* and *participation*, both of which can be drawn from existing standards, recognising the contextual and cultural differences in the notion of dignity for older people. I think these aspects of the rights framework warrant particular attention when it comes to older people both as a means to interpret rights as well as the emphasis that can be given to rights in environments such as health, social care and home settings in which older people often find themselves in vulnerable situations.

¹⁹ E.g. Niemietz v Germany; European Court of Human Rights, (Merits) 16/12/1992, (Application 13710/88); Evans v UK, Grand Chamber (Application no. 6339/05)

²⁰ E.g. X and Y v the Netherlands, Judgment of 26 March 1985, Series A no. 91, p. 11, § 22

²¹ E.g. Ta'skin and other v Turkey (Application no. 46117/99), 10 November 2004 regarding environmental matters; McMichael v United Kingdom, (1995) 20 EHRR 205; TP&KM v UK (Application No. 28945/95 – Judgment 10 May 2001)

²² Most notable exceptions to this include Committee on Economic, Social and Cultural Rights General Comment 6, 1995; Committee on the Elimination of Discrimination against Women General Recommendation 27, 2010 and Committee Against Torture General Comment 2, 2008

Using dignity as a lens to view rights is helpful in transcending all categories of rights and also the public/ private sphere divide which requires to be overcome in the case of older persons due to the settings and range of actors which play out in older people's lives.²³ Moreover, we have found the concept has particular resonance in the care sector and with older people themselves in Scotland.

Our work has also concentrated on aspects of the ECHR and international treaty rights relating to participation, both in every day decision making and, in an attempt to overcome the assumptions and objectification of older people, the participation at a societal level of older people which is required for the realisation of the full range of rights of older people and for others.

For these reasons we have focussed on the dignity and participation aspects of existing rights and we note with interest that dignity has been central to the framing of older people's rights in the UN Principles on Older People²⁴ the EU Charter of Fundamental rights where it refers to the rights of the elderly²⁵ and the Madrid International Plan of Action on Ageing adopted in 2002.²⁶ I was also pleased to hear yesterday the distinguished delegate from El Salvador and the representative from HelpAge International explicitly refer to the importance of the exploration of this concept in our work.

Concluding remarks

In conclusion, in promoting awareness, understanding and the protection of the human rights of older people in Scotland we have taken an approach focusing on the 3 pillars of the *empowerment* of older people and their families, and increasing the *ability* and *accountability* of duty bearers through raising awareness and fostering a shared understanding across all the relevant actors of the implications of the existing human rights standards in their relatively fragmented and dispersed form.

In promoting the rights of older people in care settings we have looked at the full range of rights, viewing them through the lens of human dignity and drawing out some of the aspects which particularly pertain to the inherent dignity and equality of older people and their right to participate in decision making. In doing so we have consciously sought to expand understanding of the relevance and potential of existing human rights standards to the rights of older people. I would echo then the comments of Mr. Mario Lopez from the Inter-American Commission on Human Rights, this morning regarding the need for creative use of the existing system to strengthen implementation.

I believe our work reflects, however, that the value of human rights legal instruments can go beyond clarifying state obligations but also may serve as educational tools,

²³ Dignity: A Special Focus on Vulnerable Groups, Frédéric Mégret, and Florian Hoffmann (coordinator), United Kingdom. June 2009.

²⁴ The United Nations Principles on Older Persons, GA Res 46/91, UN GAOR 1991, UN. Doc. A/Res/46/91 (1991), <http://www.un.org/NewLinks/older/99/principles.htm>

²⁵ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (7 December 2000) at art. 25.

²⁶ Second World Assembly on Ageing, Madrid International Plan of Action on Ageing, UN Doc. A/CONF.197/L.2., http://www.un.org/ageing/madrid_assembly.html

overcoming the invisibility of older people and emphasising the roles and responsibilities of different actors.

We hope that our work will contribute towards a conceptual and cultural shift in the way in which we see older people in society. We have harnessed the human rights standards and underlying principles to try to overcome the perception of older people as the passive recipients of care services stripped of dignity to rights holders, with their participation at the centre of all decision making. We welcome then the work of this working group to consider how better the human rights framework can protect, promote and realise the rights of older people globally.

Thank you for your time.