

ENNHRI Submission to the OEWG-Ageing: Equality and Non-Discrimination

5th May, 2017

Introduction

The European Network of National Human Rights Institutions (ENNHRI) brings together over 40 NHRIs¹ across the wider European region. ENNHRI's goal is to enhance the protection and promotion of human rights throughout Europe by assisting in the establishment and accreditation of NHRIs; co-ordinating exchange of information and best practice between members; facilitating capacity building and training; engaging with regional mechanisms; and intervening on legal and policy developments at the European level. ENNHRI is one of four regional networks of NHRIs, which together make up the Global Alliance of NHRIs (GANHRI). This submission focuses on how international human rights standards operate at European level, particularly in the area of long-term care (LTC).

Over the last ten years, almost all ENNHRI members have engaged in work across the full spectrum of competences within NHRIs' mandates to protect and promote the human rights of older persons in their jurisdiction. Some of this work specifically focused on equality and non-discrimination.²

The Human Rights of Older Persons and Long-term Care Project

In January 2015, ENNHRI started a three-year European Commission-funded project on *The Human Rights of Older Persons and Long-term Care*, to improve the human rights of older persons in residential LTC. As part of the Project, a Pilot Group of six European NHRIs³ carried out intensive monitoring within their jurisdictions.

Human Rights Framework: Equality and Non-Discrimination Standards

To guide the monitoring work, ENNHRI carried out a text-based analysis of the binding and non-binding international and European conventions in order to identify the human rights standards relevant to the organisation and delivery of LTC.⁴

¹ National Human Rights Institutions (NHRIs) are state-mandated bodies, independent of government, with a broad constitutional or legal mandate to protect and promote human rights at the national level. A list of the A-status members, supporting this submission, is available on request.

² For example, in 2013, the Netherlands Institute for Human Rights published a literature review of underlying discrimination and prejudice mechanisms to inform the content of a training programme raising awareness about mechanisms that lead to discrimination, prejudice and stereotyping and how best to counteract the effects of these mechanisms. Several members also include information on human rights and discrimination of older persons in their annual reports. Click [here](#) for more information.

³ UNIA, the Interfederal Centre for Equal Opportunities, Belgium; The Office of the Ombudswoman of the Republic of Croatia; The German Human Rights Institute; The Office of the Commissioner for Human Rights Hungary; The Seimas Ombudsmen's Office of the Republic of Lithuania; and The Romanian Institute for Human Rights.

⁴ ENNHRI: *Human Rights of Older Persons and LTC Project: The Application of International Human Rights Standards to Older Persons in LTC*, http://ennhri.org/IMG/pdf/ennhri_application_of_human_rights_to_ltc_feb_2017.pdf.

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This showed that human rights legislation in relation to equality and non-discrimination on the basis of age is relatively weak. Few international treaties explicitly provide for non-discrimination on the basis of age. However, the Committee on Economic, Social and Cultural Rights has since specified that Article 2 on Non-discrimination includes implicit reference to age.

Both the European Convention on Human Rights (ECHR, Article 14) and the Revised European Social Charter (Part 5, Article e) contain references to discrimination on the ground of “other status”. Other than Protocol 12 to the ECHR (which has only been ratified by 19 out of 47 member states), there is no free-standing right to non-discrimination.

The European Union’s Charter of Fundamental Rights includes non-discrimination clauses relating to age, though applying only to the EU Institutes and member states when implementing European Union law and so excludes key areas where member states largely co-ordinate policy, including health, employment, education, economic and social policy.

Furthermore, a ‘single ground approach’, which descends from the conceptualisation of each ground of discrimination separately from all the others, informs international and regional human rights law. While Article 14 of the ECHR on equality and non-discrimination prohibits discrimination on a large number of grounds, the European Court of Human Rights does not recognise multiple discrimination. Furthermore, a violation of Article 14 is difficult to claim in cases where access to healthcare is at stake as the ECHR does not mention healthcare in any of its provisions.⁵

Project Findings on Equality and Non-Discrimination

Several instances of discrimination, both age-based and on other grounds, were identified throughout the monitoring work by ENNHRI’s Pilot Group.

Legal capacity: in four of the six countries, it is permissible for the contract with the care home to be signed by a member of the immediate family (particularly if they had agreed to pay the care home’s costs) on behalf of the potential resident, without the individual giving their free and informed consent, and without legal intervention. This action is prohibited for other social groups.⁶

Financial costs as age-based discrimination: rising out of pocket payments are making LTC prohibitive for individuals with limited financial means, even with means testing in place, in three of the six countries. Indeed, recent research by the ILO has concluded that wide gaps of social protection coverage in LTC and infrastructure and unequal treatment of older persons in need of LTC compared to younger persons with similar needs, such as health care, constitute a form of age-based discrimination.⁷

In addition, pensions were automatically taken from residents who were only given pocket money can be characterised as a related form of systemic age-based discrimination, in three of the six countries. This practice puts residents at a disadvantage in comparison to those living in their own homes, as the former do not have full control over their finances.

⁵ European Union Agency for Fundamental Rights, 2013, Inequalities and multiple discrimination in access to and quality of healthcare, Vienna, FRA.

⁶ The CRPD Committee has interpreted that involuntary commitment to any institution is in contravention of Article 14. CPRD Committee, 2015, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities. www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc

⁷ Scheil-Adlung, X: *LTC protection for older persons: A review of coverage deficits in 46 countries*. International Labour Organisation, Geneva 2015.

Gender-based discrimination: In all six pilot countries, as indeed, throughout the EU, women make up the vast majority of both residents (due to higher life expectancy) and care workers. This in turn contributes to systemic gender bias reported elsewhere,⁸ whereby older women in need of care are often cared for by female family members at home, who in turn see their access to the full time labour market obstructed by their caring duties thus affecting their pensions. In turn, rising co-payments may reduce access to formal LTC services in their old age. Moreover, professional care workers are largely under-paid with limited control over their working hours, and often forced to part-time shifts. This in turn will impact on their own pensions and access to formal LTC in the future.

Implications for the Human Rights Legislative Framework

International and regional human rights standards on equality and non-discrimination in Europe are not adequately focused on age. Evidence of how this impacts in key areas, particularly employment, has been widely documented.⁹ However, it has been previously argued that the CRPD adequately protects the rights of older persons with disabilities in need of LTC.¹⁰ The findings from ENNHRI's project indicate that that protection may be inadequate, and may even point to a normative gap, whereby older persons' right to the highest attainable standard of health, including access to healthcare, is inadequately protected in the context of rising health and long-term care costs vis-à-vis other groups.

Recommendation

ENNHRI underlines that all relevant actors must work towards the effective implementation of existing human rights standards to protect the human rights of older persons. At the same time, given the normative and implementation gaps in existing international and regional human rights legislation outlined in this statement, ENNHRI recommends a new Convention on the Rights of Older Persons,¹¹ which includes the right to equality and non-discrimination.

⁸ Ibid.

⁹ Fredvang, M. and Biggs, S., 2012, The rights of older persons, Protection and Gaps under human rights law, <https://social.un.org/ageing-working-group/documents/fourth/Rightsolderpersons.pdf>, pg. 17; Age Platform Europe, 2016, Position Paper on Structural Ageism, http://age-platform.eu/images/stories/Publications/papers/AGE_IntergenerationalSolidarity_Position_on_Structural_Ageism.pdf

¹⁰ <http://eu-un.europa.eu/eu-statement-United-nations-general-assembly-human-rights-dignity-older-persons/>

¹¹ ENNHRI is aware of the challenges faced in drafting a Convention for the Rights of Older Persons, not least in defining the term 'older person'. From NHRIs' experience of working on older persons' human rights, ENNHRI stands ready to input to this process.