

THE RIGHT OF OLDER PERSONS TO WORK AND TO ACCESS THE LABOUR MARKET

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Older workers are an asset to our economies and societies, ever more so as working lives are extended. We therefore recommend increased support to older workers that expands their choices and enables a lifelong active society. Those who want to remain economically active should be able to access assistance to do so, for example through flexible working arrangements that include reduced working hours and telework. Governments could increase opportunities for partial retirement, or raise the retirement age on an optional basis, while protecting older people from having to work beyond their limits. Technology provides new and innovative means of adapting jobs and workplaces to facilitate the continued employment of ageing workers and those who have or develop disabilities over the course of their working life. In many countries, older people, whether in subsistence agriculture or low-wage retail, cannot afford to stop working. Ensuring at least a basic pension for everyone would allow workers above retirement age to reduce their working time or stop working if they desire and mitigate old-age poverty.²

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² Global Commission on the Future of Work, *Work for a Brighter Future* (ILO, 2019), p 33 (footnotes omitted).

1. Introduction

This discussion paper on the right of older persons to work and to access the labour market has been developed by an informal group brought together on their own initiative to respond to the call of the Chair of the UN Open-ended Working Group on Ageing (OEWG) inviting stakeholders to contribute ideas and proposals on the possible elements of a new international instrument. The group comprises a small number of representatives of NGOs and experts with the immediate goal to provide input that will support the work of civil society as well as help frame the discussion at the OEWG. As a self-appointed group, it cannot reflect the diversity of the stakeholders involved in the OEWG whose opinions need to inform the next steps. Neither do its views necessarily build on the broad and consensual positions of the organisations that its members represent.

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2. Background

The ageing of populations that has already taken place in many countries and that will be a feature of demographic change across the world in the coming decades has meant that more older people participate in the paid labour force or wish to do so. This includes both older persons who have not yet reached the standard retirement or pension age and who are working or wish to work, as well as those who have reached retirement/pension age and who wish or need to continue working.³

Older persons exercise their right to continue working for various reasons, though others who wish to do so may face barriers to exercising that right in practice. Older persons continue to work for the same reasons as persons of all ages do so. These reasons include a desire for self-fulfilment, to continue to participate actively in economic and public life and to enjoy the benefits that work brings. These include economic benefits for oneself, one's family, friends and community; a psychological sense of self-worth, dignity and fulfilment; social benefits

³ In some countries, retirement ages, including mandatory retirement ages, may be lower than the age at which a person becomes entitled to retirement benefits, thus potentially leaving a person economically disadvantaged during that period.

(e.g. social status, participation in social networks), and health benefits (prevention of depression and/or deterioration of physical health).

At the same time it should be acknowledged that in some cases older persons who might prefer to retire from paid employment may not be able to make that choice for financial reasons. The financial constraints may be (a) because a person does not have sufficient personal resources (savings and/or a private or public pension) to maintain a decent standard of living in retirement, (b) because there is no universal pension available to those with no or only modest resources; or (c) because any available old age pension or other social support payment is inadequate to support a decent standard of living in retirement.

The trends of increased participation in paid work by older persons are also encouraged by government interventions designed to encourage older persons to continue to work full-time or part-time, with the objective of taking the stress off non-contributory pension schemes or other forms of social support for older persons who do not have sufficient resources of their own to maintain a decent standard of living if they are not working.

At a more general level, the nature and extent of older persons' participation in the labour market are influenced by various factors, including the structure of the labour market, the changing nature of jobs, the overall demand for labour in an economy, the type of skills required, the availability of training or retraining for older workers, narratives about the older worker and assumptions and stereotypes about older workers and particular categories of older workers such as women or older workers with disability, the adequacy of retirement income available from state or private contributory or non-contributory schemes, and the other unremunerated work that persons, especially women, undertake in the family context (for example, care work and general domestic work) or in the community (volunteering).

The phenomenon of ageism and disproportionate exclusion from the labour market on the basis of age is not something that commences only when workers approach standard retirement/pension age. There is much evidence to show that persons from their mid-40s in many economies may be subject to discrimination on the basis of age, a pattern which reflects many of the ageist assumptions and practices that are seen in the treatment of older persons in their 60s and beyond.

The ability of persons to enjoy the right to work and to exercise a real choice whether or not to work once they reach older age is closely linked to governments ensuring that older persons

enjoy a variety of other rights, including the right to retraining, the right to adequate social security and to an adequate financial support in retirement, and the right not to be subjected to treatment based on ageist assumptions and stereotypes. Laws and policies that affect people at earlier stages of their lives may also have an impact on older persons' ability to exercise choice about whether and how to work, so that a life course approach will be important to ensuring effective enjoyment of this right, especially for women or others with limited or interrupted participation in the formal sector.⁴ Intersectional discrimination against older persons is also prevalent; in addition to different forms of age discrimination experienced by women and men, older persons with disability may also experience discrimination based on multiple and intersecting discrimination. There are also other common forms of intersectional discrimination that affect the opportunities for older persons with particular characteristics to enjoy the right to work: they include a person's race or ethnicity, sexual orientation or gender identity, a person's level of education, rural or urban location, socio-economic status, and the sector in which one has worked or is seeking work.⁵ But intersectional discrimination is contextual and the grounds of multiple discrimination that older persons face are many and potentially open-ended.⁶

⁴ Committee on Economic, Social and Cultural Rights, *General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*: 'The cumulative effects of discrimination against female workers through the life cycle might require targeted measures to achieve equality and guarantee fair wages, equal opportunities for promotion and equal pension rights'; Committee on the Elimination of Discrimination against Women, *General recommendation No. 27 on older women and protection of their human rights*, CEDAW/C/GC/27, paras 20, 41-44 (2010).

⁵ See especially the discussion of work in the informal economy below (p 8).

⁶ See, eg, the non-exhaustive list of possible bases of intersectional discrimination combined with sex and gender noted by the Committee on the Elimination of Discrimination against Women in *General recommendation 35*:

The Committee's jurisprudence highlights that these may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical remoteness and stigmatisation of women fighting for their rights, including human rights defenders.

General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2017), CEDAW/C/GC/35, para 21 (2017).

3. What ‘work’ and ‘access to work’ are we talking about: formal, informal, unremunerated and unrecognised?

While there are systematic violations of older persons’ right to work and to just and favourable conditions of work, the concept of ‘work’ and ‘access to the labour market’ focused on in these discussions and most existing human rights instruments is of work in the paid labour force. Work in the informal economy is also taken into account, though often inadequately given the extent and importance of the informal economy in many economies, especially in developing countries.⁷ Further, unremunerated and often unrecognised work in the family context – especially that performed by women, such as child-bearing, childrearing and child care or other care or traditional kinship responsibilities, general domestic work – affects women’s ability to participate fully in the paid economy at various stages in their lives. That pattern of workforce participation has an impact on the retirement savings or pension entitlements, often employment-linked that are likely to be available to women as compared with men, and this unremunerated work often continues well into ‘retirement’, with there often being no real choice to ‘retire’ from this work. The failure to account fully (or at all) for this work in national accounts and to recognise in addition to its social value its economic value as well – for example, by making social insurance or pension contributions in respect of that work – continues to bring disadvantages to and have a discriminatory impact on women, which are exacerbated when women reach a later stage in their lives.⁸

Even within the formal sector, much discussion of discrimination in work on the basis of age relates to formal employment relations. There are many types of economic relations that also fall within the general right not to be discriminated against in the field of employment and occupation. These would include status as an ‘independent contractor’ (which has assumed increased importance in the development of the ‘gig economy’), partnerships, internships and other economic relationships. Ensuring that older persons also have access to equal opportunities and benefit from equal treatment in these areas is a part of ensuring equality in work and access to the labour market.

⁷ See the discussion below under ‘Work in the informal economy’ (p 8).

⁸ Committee on Economic, Social and Cultural Rights, *General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/23, para 47(b) (2016).

4. Access to the labour market: motivations and barriers

The circumstances in which older persons seek access or continuing access to the paid labour market vary. In some cases this will involve older persons who have lost their job as a result of restructuring, of employment policies “pushing” them (for example, through early retirement plans), of changes in market needs (e.g. due to technological development and the replacement of human labor force by computers or robots), or closing down of a former employer; those whose employment is terminated as the result of reaching a *de jure* or *de facto* mandatory retirement age notwithstanding the person’s desire or need to remain in paid employment; older persons who have retired but whose retirement income proves insufficient for reasons as varied as an inadequate public pension, inflation, low interest rates, or investment failures; or older workers seeking to re-enter the workforce after an extended period out of the paid labour market (women make up a significant proportion of this group). Other forms of discrimination include the offering of contracts on terms less favourable than those offered to younger workers (for example, annual contracts rather than permanent contracts), the ineligibility of older persons who are older than the standard retirement age for unemployment benefits even though they are seeking work but are unable to find it; restrictions on persons working to supplement universal pension or other social support payments that are not sufficient support an adequate standard of living. Even when work is available, studies by HelpAge International and other groups show that often the jobs that are offered are menial, low paid and dirty jobs that do not reflect their skills and experience but rather ageist attitudes, or are exploitative by virtue of older person’s limited bargaining power within the labour market.

Barriers to obtaining paid work for persons in these situations include ageist assumptions that influence employer’s decisions to take on older persons; the lack of current skills or relevant qualifications in order to satisfy reasonable job requirements (along with lack of accessible programs for training or new career development aimed at older persons – such reskilling programs often have maximum age limits that discriminate against older workers by excluding them); lack of recent experience in applying for jobs and lack of self-confidence in presenting oneself; lack of adequate and appropriate support from government or private employment agencies to assist older job seekers to obtain work; workplace health and safety requirements that are age-based or which are assumed to make it difficult or impossible to employ older persons; and a labour market in which there are not simply enough employment opportunities. In the case of older persons who decide that they wish to start their own business, there may be

other barriers, such as the reluctance of credit providers to provide loans to older persons to help them establish those businesses.

5. Ageism and the labour market

Ageism is a significant reason for the exclusion of older persons from access to and the denial of the equal enjoyment of opportunities in the labour market. Ageism involves stereotypes (both negative and positive), prejudice against older workers that may be express, unconscious or implicit in the attitudes of individual employers or co-employees or embodied in supposedly neutral rules and management practices. Acting on the basis of ageist stereotypes and assumptions and ‘neutral’ practices that are built on such assumptions is a denial of a person’s right to be free from discrimination in the enjoyment of the right to work. It also leads to economic and other forms of loss to the employer and the economy.

In a 2019 policy brief, the United Nations Economic Commission for Europe, drawing on the work of social scientists, noted some of the different negative stereotypes held about older persons as workers. It is often assumed that they

- have lower ability, are less motivated and are less productive than younger workers;
- are resistant to change, harder to train, less adaptable and less flexible;
- have a lower ability to learn and therefore have less potential for development;
- have shorter job tenure and therefore will provide fewer years in which the employer can reap the benefits of training investments;
- cost more because they have higher wages, use benefits more, and are closer to retirement;
- have deteriorating health and/or cognitive ability and take more sick days.’⁹

Whether or not any individual worker has one of these characteristics (and many of these characteristics may be shared by younger workers and so are independent of age), not only does it violate the right of a person to be treated equally on the basis of one of these stereotypes, it also does not make economic sense for the employer in most cases.¹⁰

The impact of ageist assumptions, rules and practices may be seen at each stage of participation in the formal labour market: in gaining employment, in the terms and conditions of employment

⁹ United Nations Economic Commission for Europe, *Combating ageism in the world of work*, UNECE Policy Brief on Ageing No 21. February 2019, p 3, Figure 2.

¹⁰ ‘[T]he philosophy underlying all the anti-discrimination laws is the dignity of each individual, the right to be treated equally irrespective of either irrational prejudice or stereotypical assumptions which may be true of some but not of others’: Baroness Hale, quoting submissions by Age UK, in her judgment for the majority in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716, para 57 (UK Supreme Court).

(including nature and quality of work and opportunities for training and promotion).¹¹ The basis on which employment is terminated; and in workplace culture including relations between co-employees.¹²

6. The interaction between the attitudes and practices of employers and legislation and government policy

Ageism is reflected not just in the attitudes of individual employers and fellow employees but is also deeply embedded in many business structures which may in turn be influenced by legislation and government policies that reflect ageist assumptions explicitly or implicitly. The clearest example of a ‘structural’ ageist policy is mandatory retirement. While already abolished in many countries, this legal practice still exists in various countries around the world and enables employers to terminate or not renew the employment of older workers based only on their age. Another example is legislation in some countries that permits an employer to renew an employment contract of a person who has reached standard retirement age on terms less favourable than the employer would do for a younger employee. More generally, the setting of the age for eligibility for access to a public pension by government who wishes to renew an employment contract influences employers’ workforce planning including phasing older workers out, as well as affecting the terms of contributory pensions. Another example is the assumption that person reaching a certain age will wish to retire completely from the paid labour force, while at the same time government fails to ensure that all retirees have access to social support payments that ensure that they can enjoy the right to an adequate standard of living in their post-paid employment life – and may unreasonably limit the amount of extra income the person may earn before social support payments are reduced.

¹¹ Committee on Economic, Social and Cultural Rights, *General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22, para 47(b) (2016).

¹² ‘Ageism can be found across various dimensions of the labour market, employment relationships and organizational structures. This starts with job advertisements, selection processes, placements, job duties, performance evaluations, career development, pay and other employee benefits. It is also present in the selection of individuals for trainings and decisions on transfers to other jobs, promotions, termination of employment and pension provisions.’ UNECE, *Combating ageism in the world of work*, above n 9, p 3.

7. Work in the informal economy

According to the ILO, more than 61 per cent of the world's employed population aged 15 or over (or two billion people) work in the informal economy.¹³ The ILO describes the 'informal economy' in these terms:

The term 'informal economy' refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.¹⁴

The proportions of different sections of the community who work in the informal economy vary according to region, level of development of the country, sector, gender, age, education, among other factors. The region with the highest percentage of workers working in the informal economy is Africa: 85.8 per cent. Percentages for the other regions are: Asia and the Pacific (68.3 per cent), Arab States (68.6 per cent); the Americas 40.0 per cent; and Europe and Central Asia (25.1 per cent).¹⁵ The rates vary between subregions and also among individual countries in those regions and sub-regions.

Employment in the informal economy is particularly important in emerging and developing economies: they represent 82 per cent of world employment, but account for 93 per cent of informal employment.¹⁶ Much informal work takes place in agriculture; when that is excluded informal employment falls to 50.5 per cent. However, informal employment in agriculture is high in Africa, the Arab States and Asia and the Pacific.¹⁷ Persons living in rural areas are twice as likely to be engaged in informal work as those in urban areas (80 per cent compared with 43.7 per cent).

While generally informal employment provides a greater proportion of employment for men (63.0 per cent) than for women (58.1 per cent) in both agricultural and non-agricultural employment, there are significant variations between the regions, with 89.7 per cent of

¹³ Florence Bonnet and Vicky Leung, *Women and men in the informal economy: A statistical picture* (ILO, 3rd ed 2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf.

¹⁴ ILO, *Conclusions concerning decent work and the informal economy*, International Labour Conference, 90th Session (Geneva, 2002), para 3.

¹⁵ *Women and men in the informal economy: A statistical picture*, above n 13, p 13.

¹⁶ *Ibid*, p 14.

¹⁷ *Ibid*, p 14.

employed women in African in informal employment compared with 82.7 per cent of employed men.¹⁸ Women in the informal economy ‘are more often found in the most vulnerable situations, for instance as domestic workers, home-based workers or contributing family workers, than their male counterparts.’¹⁹

Both younger and older persons have higher levels of informal employment than other age groups (77.1 per cent for younger people and 77.9 per cent for people aged 65 or over).²⁰ The ILO report *Women and men in the informal economy: A statistical picture* (2018) provides a statistical breakdown that includes separate figures for workers aged 55 to 64 (59.2 per cent informal employment) and over 65, but does not appear to disaggregate by age and sex..

According to the ILO, there is also a clear positive relation between informal work and poverty, and those who are poor have higher rates of informal employment. However, this is complicated by the difference between an individual-based measure of poverty and one that is household-based, as household size and composition can have a significant impact on the resources available to a person.²¹ ILO analysis shows that, broadly speaking that ‘most developing countries and more generally, most countries with the highest incidence of poverty show a higher poverty rate for women than for men, meaning that more women than men in informal employment live in households which are below the poverty line. The situation is reversed when comparing poverty rates for women and men in formal employment.’²²

The disadvantages of working in the informal economy

It is thus clear that significant numbers of older persons are working in informal economy, and that there are regional and other differences (including gender). The disadvantages of working in the informal economy are many. The Preamble to ILO Recommendation No 204, *Transition from the Informal to the Formal Economy* acknowledges that ‘most people enter the informal economy not by choice but as a consequence of a lack of opportunities in the formal economy and in the absence of other means of livelihood’²³ and that ‘decent work deficits – the denial of rights at work, the absence of sufficient opportunities for quality employment, inadequate social protection and the absence of social dialogue – are most pronounced in the informal

¹⁸ Ibid, pp 20-21.

¹⁹ Ibid, p 21.

²⁰ Ibid, p 19.

²¹ Ibid, p 48.

²² Ibid, p 51.

²³ Preambular para 3.

economy.’²⁴ The ILO has identified a rights deficit, a social protection deficit and a representational deficit in the informal economy.²⁵ With the adoption of ILO Recommendation 204 the ILO has set out a framework for trying to move workers from the informal economy to the formal economy so far as possible.

8. Right to work under international human rights law

There are a number of important international treaty guarantees of the right to work and associated rights.²⁶ Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

The CESCR has noted that this article ‘requires States parties to take appropriate steps to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted.’²⁷

Article 7 of the ICESCR guarantees the right to just and fair conditions of work:

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:

²⁴ Preambular para 4.

²⁵ International Labour Office, *Decent work and the informal economy*, International Labour Conference, 90th session, 2002, Report VI.

²⁶ See Committee on Economic, Social and Cultural Rights, *General comment No 6 (1995): The economic, social and cultural rights of older persons*, E/C.12/GC/6, especially paras 22-25 (1995).

²⁷ *Ibid*, para 22. The Committee focused primarily on the situation of ‘older workers who have not reached retirement age [who] often encounter problems in finding and keeping jobs’. However, the protections against discrimination should extend to any person, whether they have reached the national retirement or pension age.

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 2(2) of the ICESCR provides that the rights are to be enjoyed without discrimination:

- 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While discrimination on the basis of age is not explicitly mentioned in Article 2(2), it is established that age falls within the category of discrimination on the ground of ‘other status’.²⁸ However, the lack of an express mention renders age partly invisible, a fact that is reflected for example in the low proportion of references specifically to older persons in the practice of the Committee on Economic, Social and Cultural Rights, in particular in its concluding observations.

Article 8 of the ICESCR also guarantees certain rights relating to participation in trade unions, the right to strike, the right to exercise freedom of association and to participate in collective bargaining. The rights are viewed as an important part of ensuring the rights set out in the earlier articles, in particular article 7. While it may be that there are issues relating to the extent to which older persons are able in fact to exercise such rights and the extent to which these organisations have represented the rights of older workers, this aspect of the right to work is not explored here. However, as with employers, labour or trade unions must not discriminate on the basis of age in the services, support and protection against unfair or discriminatory treatment in the workplace that they provide to older persons who are members of a union.

²⁸ Ibid, para 12; Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, para 29 (2009).

The right to work is affirmed by the Universal Declaration of Human Rights (Article 23) and guaranteed by Articles 6 and 7 of the ICESCR. The right is also explicitly protected under Articles 25 and 26 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the only international human rights convention to explicitly prohibit discrimination the ground of age.²⁹

Other international treaties are also of relevance to intersectional discrimination. For example Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), Article 5(e)(i) and (ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention) and the Convention on the Rights of Persons with Disabilities (CRPD), provide protection against sex and race discrimination in employment that includes protection against such discrimination for older women,³⁰ older persons belonging to particular racial or ethnic groups, and older persons with disabilities³¹ against multiple discrimination on a combination of age and these other grounds.

However, despite these guarantees, in light of the complex nature of the situation of older persons in relation to formal, informal and unrecognised forms of work, international human rights law has not adequately addressed the specific application of the right to work to the context of older age and older persons.

At the regional level, various aspects of the right to work are protected under the European Social Charter, revised 1996, Articles 1 to 6, Articles 9 and 10 and Articles 24-29 and the Charter of Fundamental Rights of the European Union, 2007, Articles 15, 27 to 31. The EU Employment Equality Directive 2000/78/EC forbids direct and indirect discrimination,

²⁹ Article 1(1) provides that the Convention ‘is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.’

³⁰ Committee on the Elimination of Discrimination against Women, *General recommendation on older women and protection of their human rights*, CEDAW/C/GC/27, paras 20, 41-44 (2010)..

³¹ See *Report of the Special Rapporteur on the rights of persons with disabilities*, A/74/186 (17 July 2019).

harassment, instructions to discriminate and harassment on the grounds of, inter alia, age. However, it also allows employers to justify differential treatment on ground of age.³²

Older persons' right to work and employment is enshrined in Article 18 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

9. International labour standards

The International Labour Organization has also adopted a number of conventions or other instruments that cover work and older persons; older persons are also covered by many of the ILO's conventions addressing general matters of employment policy and specific regulation.

The principal ILO instrument relating to discrimination in employment, the *Discrimination (Employment and Occupation) Convention and Recommendation*, 1958 does not explicitly include age among the prohibited grounds of discrimination. However, the Convention provides that individual States may choose to add other grounds for discrimination to those listed, and many States have added age under the national laws implementing the convention. Other ILO conventions of general application would also apply to older workers,³³ as would the various ILO conventions relating to social security and social support.

Another important ILO Convention relating to discrimination in employment, the *Termination of Employment Convention*, 1982 (No 158) lists a number of grounds as not being valid reasons for termination of a person's employment, including 'race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin' and

³² Naj Ghosheh, *Age discrimination and older workers: Theory and legislation in comparative context*, Conditions of Work and Employment Series No 20 (International Labour Organisation, 2008), 15.

³³ For example, the *Equal Remuneration Convention*, 1951 (No. 100), *Workers with Family Responsibilities Convention*, 1981 (No. 156) and *Violence and Harassment Convention*, 2019 (No. 190). In fact, any ILO instrument application of general application potentially applies and those related to social security may also be of relevance to older workers who often have care responsibilities. ILO Convention No 156 applies to men and women workers with responsibilities in relation to their dependent children, but also 'in relation to other members of their immediate family who clearly need their care or support' where those responsibilities limit their possibilities to participate in paid work: Article 1(10 and (2)). Article 8 provides that family responsibilities may not as such be a valid basis for termination of employment.

Similarly, the *Employment Promotion and Protection against Unemployment Convention*, 1988 (ILO No 168) requires both the promotion of employment opportunities for groups that include older workers (Article 8(1)), as well as ensuring that in providing support to workers who lose their jobs there is no discrimination on the basis of age (Article 6(1)).

‘ absence from work during maternity leave’.³⁴ However, it does not explicitly include age as an impermissible ground for termination of employment.³⁵

The major ILO instrument addressing the rights of older persons in relation to work is a non-binding recommendation, the *Older Workers Recommendation*, 1980. It applies ‘to all workers who are liable to encounter difficulties in employment and occupation because of advancement in age.’ (Article 1(1)) It provides that:

1(2) 2. Employment problems of older workers should be dealt with in the context of an overall and well balanced strategy for full employment and, at the level of the undertaking, of an over-all and well balanced social policy, due attention being given to all population groups, thereby ensuring that employment problems are not shifted from one group to another.

5. Older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers as regards, in particular--

- (a) access to vocational guidance and placement services;
- (b) access, taking account of their personal skills, experience and qualifications, to-

- - (i) employment of their choice in both the public and private sectors: Provided that in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment;
 - (ii) vocational training facilities, in particular further training and retraining;
 - (iii) paid educational leave, in particular for the purpose of training and trade union education;
 - (iv) promotion and eligibility for distribution of tasks;
- (c) employment security, subject to national law and practice relating to termination of employment and subject to the results of the examination referred to in Paragraph 22 of this Recommendation;
- (d) remuneration for work of equal value;
- (e) social security measures and welfare benefits;
- (f) conditions of work, including occupational safety and health measures;
- (g) access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

The ILO has also adopted standards that explicitly address the informal economy – an area of work of particular importance for many older workers -- though these are in the form of a (non-

³⁴ . ILO Convention No 156, Article 5 (d) and (e).

³⁵ However, Article 4 of ILO Convention No 158 provides that a person’s employment may not be terminated ‘unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’ This may [provide some limited protection for workers being dismissed on the basis of age.

binding) Recommendation, the *Transition from the Informal to the Formal Economy Recommendation, 2015* (ILO Recommendation No 204).³⁶

10. Comprehensive strategies to ensure equality in work and access to the labour market

The OECD has noted that in order to ensure that older persons have the right to choose to undertake paid work, whether before or after the standard retirement or pension age, ‘a comprehensive approach, involving governments, employers, labour representatives and civil society.’³⁷ In a 2019 report it noted that much policy has focused on ‘reducing incentives to retire early and rewarding longer working lives’ but that much more needed to be done ‘to tackle demand-side barriers’: ‘we need workers who want to work longer, but also employers who want to employ them.’³⁸ In 2015 the OECD Council adopted a recommendation on Ageing and work that had three elements: (a) providing incentives to work longer; (b) addressing employer barriers to employing older workers; and (c) improving older persons’ employability through the adoption of a life-course approach which recognises that the ability to be employed in older age will be influenced by an older person’s opportunities and training at an earlier age.³⁹

The UNECE has suggested that there are at least three components to a successful strategy. The first is legal: repealing discriminatory laws and regulations, enacting and enforcing equality legislation, and supporting older persons’ knowledge and enforcement of their rights. The second involves addressing ageist assumptions and prejudice, through research, awareness-raising, promoting inter-generational contact and supporting older persons to overcome internalised ageist attitudes. The third is structural, namely encouraging and developing age-inclusive and age-diverse workplaces.⁴⁰

³⁶ The ILO has also pointed out that many binding obligations under other ILO conventions apply to workers in the informal economy, even though the conventions may not explicitly refer to informal workers. This would also include older workers in the informal economy. International Labour Office, *Transitioning from the informal to the formal economy*, International Labour Conference, 103rd session 2014, Report V (1), Chapter 2 (‘The regulatory environment relating to the informal economy’).

³⁷ OECD (2019), *Working Better with Age*, Ageing and Employment Policies, OECD Publishing, Paris, 12, <https://doi.org/10.1787/c4d4f66a-en>.

³⁸ *Ibid*, 12.

³⁹ *Ibid*, 13.

⁴⁰ UNECE, *Combatting Ageism*, above n 9, p 1.

11. Age discrimination legislation

Legislation that prohibits discrimination on the basis of age in employment (including access to and termination of employment) and similar economic relationships is a critical element of any strategy to promote equality for older workers in the labour market. It should apply to direct and indirect discrimination, cumulative and multiple discrimination.

An older person who has suffered a violation of their right to work without discrimination or their right to just and favourable conditions of work, is entitled to a remedy. That remedy may be a judicial remedy; however, it may also be provided through other institutions, including NHRIs, labour inspectorates, Ombuds institutions or other institutions.⁴¹

Age discrimination in employment, business obligations and the duty of the State

The UN Committee on Economic Social and Cultural Rights has underlined the obligation of States parties to the ICESCR to prohibit and provide remedies for discrimination by private employers on the basis of age:

7.....Under articles 2 and 3 of the Covenant, States parties have the obligation to guarantee the enjoyment of Covenant rights to all without discrimination.²¹ The requirement to eliminate formal as well as substantive forms of discrimination²² includes a duty to prohibit discrimination by non-State entities in the exercise of economic, social and cultural rights.⁴²

12. Mandatory retirement ages

Mandatory retirement ages involve the termination of the employment of a person who does not wish to leave their job on the basis that they have reached a particular age. As a matter of principle this is discrimination on the basis of age and inconsistent with the person's right to work. It subjects the person to adverse treatment based on their age to which other workers are not subject, and often involves ageist assumptions about the lack of capacity of older workers to carry out their job or about the appropriate place of older workers in the workforce.

While mandatory retirement ages have been abolished in some countries, in many other countries they persist in one form or another. They may be embodied in legislation, in contracts

⁴¹ Committee on Economic, Social and Cultural Rights, *General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22, para 57 (2016).

⁴² Committee on Economic, Social and Cultural Rights, *General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, E/C.12/GC/24, para 7(b) (2017).

of employment or partnership agreements, or in collective agreements; sometimes they apply only to particular types of jobs, or to specific sectors or industries.

The acceptability of mandatory retirement ages is often taken for granted by policymakers and employers without much thought as to whether the practice is fair or rational. In other cases mandatory retirement ages are argued to be acceptable at a policy level by reference to broad concepts such as ‘intergenerational justice’ or the promotion of workforce diversity, or if they can be shown to be ‘objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.⁴³

Below we argue that these general and specific justifications nearly always involve the use of ageist assumptions and stereotypes in a discriminatory manner and that the broader justifications (for example, that older workers remaining in employment diminishes employment opportunities for younger persons) are not supported by the available evidence. Further, the use of ageist assumptions about older workers fails to take into account the documented economic and other advantages for employers, co-workers and society of retaining older workers in jobs.

In some countries mandatory retirement ages are provided for by law, especially in the case of civil servants. These are often linked to the vesting of contributory or non-contributory pension entitlements linked to employment or to the employee’s reaching the qualifying age for any available non-contributory social support for older persons (such as a universal pension). In other instances, a mandatory retirement age is provided for under a contract of employment or a partnership agreement, where such provisions are not unlawful under national law. In other countries, age limits may be imposed in respect of specific professions and occupations, for example for airline pilots or bus drivers,⁴⁴ with a prohibition of such differential treatment in other jobs and occupations.

⁴³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16–22.

⁴⁴ See, eg, *Fries v Lufthansa CityLine GmbH*, Case C-190/16, judgment of 5 July 2017, the ECJ held that a compulsory retirement age of 65 for commercial pilots operating passenger aircraft was justified and therefore not age discriminatory. In *Prigge and others v Deutsche Lufthansa AG*, Case C-447/09, judgment of 13 September 2011, the ECJ had held that a compulsory retirement age for pilots of 60 was not justifiable. Compare with the decision of the European Committee of Social Rights in *Fellesforbundet for Sjøfolk (FFFS) v Norway*, Decision on the merits, 2 July 2013 (holding that law setting 62 as presumptive retirement age for seafarers where 70 was standard retirement age was not justified and therefore discriminatory on the basis of age).

In some jurisdictions differential retirement ages have been set for women and men, generally with men's age being higher than that set for women. These may sometimes have been motivated by the desire to reflect women's double burden of unremunerated domestic work and work in the paid labour force, or the fact that in some countries women become entitled to pensions at an earlier age. However, such differential retirement ages not only negate women's exercise of a choice to continue to work but can have a severe discriminatory impact on women, both as regards their income once they reach the specified age and also on the amount of retirement savings and entitlements to contributory pensions or to pensions that are based (in part) on years of service.⁴⁵

The assumptions which underpin the use of age as a proxy for an individual's ability to perform a particular job involve stereotyped and wrong assumptions about the capacities of older persons in general and dispense with an individual assessment of a person's capacity to perform the job in question – approaches which are considered unacceptable in relation to the treatment of women or minority groups. Legislative or other policy decisions that permit older workers to be forced out of their job because of assumptions about older persons' ability to perform a specific job or type of job because of their age, or because they have had a 'fair go' are equally problematic in human rights terms.

Decisions to set retirement ages or to terminate an employment relationship at a particular age or because a person is getting 'old' are frequently based on assumptions about the individual's abilities, interests, and commitment or about the nature of an 'appropriate' composition of the employer's workforce and whether older workers will 'fit in'. In nearly all cases these will constitute discrimination on the basis of age because of their reliance on stereotypes about older persons and their failure to undertake an objective assessment of whether the individual involved can carry out the inherent requirements of the job (and to take into account the positive contributions the worker can make to the work community).

Sometimes imposition of a mandatory retirement age is sought to be justified by the argument that it is necessary to achieve a 'balanced' workforce and to provide younger persons with opportunities to enter the workforce, sometimes articulated as ensuring 'intergenerational fairness'.⁴⁶ While these justifications raise complex conceptual and evidentiary issues (as well

⁴⁵ Committee on the Elimination of Discrimination against Women, *General recommendation No. 27 on older women and protection of their human rights*, CEDAW/C/GC/27, paras 20, 41-44 (2010).

⁴⁶ Baroness Hale in the UK Supreme Court decision in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716, at paras 55-57.

as value judgments), it is important to subject them to close analysis given that their purpose and effect is to exclude a whole section of the community from remunerative activity on the basis of a group characteristic, something we do not accept in the cases of other group characteristics. Scrutiny of these justifications shows that ageist assumptions and assertions that have no empirical basis (and may indeed be contradicted by the available evidence) often underpin them. The fact that they seem ‘intuitively’ reasonable shows the extent to which ageist assumptions have become internalised in our societies.

For example, it is often assumed that older workers and younger workers are fungible and that by forcing older workers to retire one will create new opportunities for younger workers that would not otherwise exist (the so-called ‘lump of labour’, ‘boxed economy’ or zero sum approach). It may be that this is arguably so in some limited cases if one focuses on a small and limited workplace, but even then this outcome is frequently assumed rather than demonstrated, as well as reflecting implicit assumptions about what ‘intergenerational fairness’ requires, neglecting the potential the benefits brought to the workforce by retaining older workers, failure to explore other options, and not addressing the question of equivalent skills and substitutability of workers, among other issues.⁴⁷ It is ironic that such justifications are being put forward at a time when so many countries are adopting policies to encourage older people to remain in paid employment for reasons of fiscal sustainability of national budgets.

Furthermore, a number of empirical studies suggest that when viewed in the broader economic context maintaining older workers in jobs does not decrease employment opportunities for younger persons but in some case may in fact increase them.⁴⁸ For example, one analysis of US and Chinese data⁴⁹ and a comparative study of the US and a number of European countries⁵⁰

⁴⁷ See Elaine Dewhurst, ‘Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?’ (2013) 50 *Common Market Law Review* 1333, 1357-1362.

⁴⁸ See Dewhurst, above n 47, at 1350-1359.

⁴⁹ Alicia H Munnell and April Yanyuan Wu (2012), ‘Will delayed retirement by the baby boomers lead to higher unemployment among younger workers?’ *Boston College Center for Retirement Research Working Paper* 2012-12 (analysis of US data from 1977-2011 ‘show[s] no evidence that increasing the employment of older persons reduces either the job opportunities or wage rates of younger persons’ – ‘If anything, the opposite is true’; and that ‘the analysis of Chinese data also finds that the employment of older people has no impact on labor market outcomes for other age groups’).

⁵⁰ Axel Börsch-Supan, ‘Note on the Myth that Older Workers Delaying Retirement Creates Unemployment for the Young’ (October 1, 2014), Max Planck Institute for Social Law and Social Policy Discussion Paper No. 24-2014, <https://ssrn.com/abstract=2663934> (‘little empirical evidence’ to support the concern that the delayed retirement of older workers resulting from an increase in the retirement age ‘will crowd out younger workers from the labour market causing an increase in youth

have shown that the assumption the continuing to employ older workers ‘crowds out’ younger workers is not made out on the evidence. This suggests that at the very least any argument that mandatory retirement ages will have this effect should be met with close scrutiny.

Such justifications are, for example, permitted under EU law: the Court of Justice of the European Union has held that under the Equality in Employment Directive imposing a mandatory retirement age in order to bring younger workers into the particular workforce or industry may in certain circumstances be considered as non-discriminatory, provided the particular measure is closely tailored to achieving the objective.⁵¹ Too often, though, justifications are in broad terms without specific analysis of particular workforces and uncritical and ageist invocations of notions of intergenerational fairness.⁵² Established EU law on this point is, of course, not beyond criticism and the analysis above suggests that both the norm itself and its application in particular instances are not consistent with modern ideas of anti-ageism and equality, or the empirical evidence relating to labour markets.⁵³

Another justification sometimes offered is that a fixed retirement age is necessary for the preservation of older workers’ dignity: ‘avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and [...] avoiding the need for costly and divisive disputes about capacity or underperformance.’⁵⁴ As one senior British judge commented in relation to such proffered objectives, ‘[t]he assumptions underlying these objectives look suspiciously like

unemployment’; more likely that older workers delaying their retirement ‘may actually improve the employment opportunities for the young’).

⁵¹ For a recent review of the EU cases and UK, see *Pitcher v Chancellor, Masters and Scholars of the University of Oxford and Saint John the Baptist College in the University of Oxford (England and Wales: Age Discrimination)* [2019] UKET 3323858/2016, paras 327-337 and paras 319-336 and 338-355 (UK Employment Appeal Tribunal, 16 May 2019) (upholding compulsory retirement age for academics), https://www.bailii.org/uk/cases/UKET/2019/3323858_2016.pdf.

⁵² Council Directive 2000/78/EC of 27 November 2000. Under European Union law, age discrimination in employment and occupation is unlawful. This covers direct and indirect discrimination. However, Article 6 of the Employment Equality Directive sets out a range of permissible exceptions for differential treatment in employment on the basis of age. These include differential treatment on the basis of age where, in the context of national law, it is ‘objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.

⁵³ See Dewhurst, above n 47.

⁵⁴ Baroness Hale in the UK Supreme Court decision in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716 at para 57. See the discussion of the flaws and potential for the dignity argument to reflect age-based stereotypes by Alysia Blackham in ‘Interrogating the “Dignity” Argument for Mandatory Retirement: An Undignified Development?’ (2019) 48(3) *Industrial Law Journal* 377, especially at 396-403.

stereotyping.⁵⁵ Policies adopted on this basis would therefore violate the right to equality; any assessment of an individual's capacity to do a job should be based on an individual assessment.

We conclude therefore that policies and legislative schemes that require or permit employers to compulsorily retire older persons on the basis of older age are in principle inconsistent with the right to work without discrimination on the basis of age. Whether such laws and policies are justifiable in limited circumstances is contentious; in most cases in which justifications are advanced they are based explicitly or implicitly on ageist assumptions or stereotypes and claims that are not supported by the empirical evidence. Yet national legislatures, national and international courts and tribunals, and employers continue to implement and justify such policies despite this, and many of them argue that this approach is consistent with existing international human rights law. In this regard a fundamental rethink of international human rights law on this issue and new, clearer and fully human-rights compatible standards are needed.

13. Law and policy recommendations and suggested normative elements of the right to work and access to the labour market

We endorse the need identified by the OECD to adopt a holistic approach to ensuring the enjoyment by older workers of the right to work without discrimination. In addition to the specific, legal and policy measures set out below, such an approach involves (a) providing incentives for older person to work and be employed for longer; (b) addressing employer barriers to employing older workers; and (c) improving older persons' employability through the adoption of a life-course approach which recognises that the ability to be employed in older age will be influenced by an older person's opportunities and training at an earlier age.

The following paragraphs set out suggested normative elements in relation to the right to work and access to the labour market:

Affirmation of the right

- Older persons have the right to meaningful and decent work on an equal basis with others.
- Older persons have the right to determine when and at what pace to withdraw from the labour force.
- Older persons have the right to dignity at work, to just and favourable working conditions, including equal opportunities and equal remuneration for work of equal

⁵⁵ *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716, at para 57.

value, safe and healthy working conditions, including protection from harassment, and to the redress of grievances, on an equal basis with others.

- Older persons are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.
- Older persons should have the right to work even when in receipt of a pension and to ensure that their combined income is sufficient to afford them a decent standard of living

State obligations

States should take steps and measures to ensure:

Legal guarantees

- The elimination of ageist assumptions and prejudice, through research, awareness-raising, by promoting inter-generational contact and supporting older persons, employers and employment agencies to overcome internalised ageist attitudes
- The right to work and access to the labour market in older age are universally guaranteed under the law
- The repeal of discrimination laws and regulations (including discriminatory health and safety or insurance laws)
- The right to protection against discrimination by both public and private employer sectors
- The right to be free from discrimination on the basis of age extends beyond formal contractual employment relations to include independent contracting relations, partnerships, internships and similar legal relationships involving the right of an older persons to engage in economically remunerative activity
- The prohibition of discrimination against older persons on the basis of age alone or in combination with other grounds in all matters related to employment, including recruitment, hiring and employment, access to training and retraining, continuation or renewal of employment, career advancement, retirement policies and safe and healthy working conditions in the formal and informal sectors, including harassment on the basis of age.
- The prohibition of mandatory retirement ages under the law
- The right to flexible or gradual retirement schemes and flexible working practices for older workers
- The legal duty of employers to accommodate the workplace and working conditions to the changing needs of older workers
- Affirmative action programs to promote the hiring of older workers are allowed under

Non-discrimination and equality

States should take all necessary measures to ensure:

- The development of age-inclusive and age-diverse workplaces
- Every older person enjoys their right to work without discrimination
- Labour policies account for the needs and characteristics of older persons, and workplaces are suitable in terms of working conditions, environment, work hours, and organisation of tasks.

- Employers shape their organisational culture in order to eliminate ageism and age discrimination
- Older persons are able to exercise their labour and trade union rights.

Availability and accessibility

States should take all necessary measures to ensure that:

- Promotion of employment opportunities and career advancement for older persons in the labour market, as well as assistance and support for older persons in locating, obtaining, maintaining and returning to employment.
- Older persons have access to career-development, technical and vocational guidance programmes, placement services, and vocational and skills development training.
- Older persons have access to the labour market including through physical accessibility, access to information about employment opportunities, the support of state and state-subsidised employment support services, training and the provision of reasonable accommodations
- Promotion of opportunities for older persons for self-employment and entrepreneurship, and support appropriate and effective measures to protect the rights of older persons working in the informal sector.

Remedies and redress

States should take all appropriate measures to ensure that:

- Older persons have access to the mechanisms necessary to make complaints and seek redress for denial of their right to work and access to the labour market
- A shifting burden of proof applies to discrimination complaints, so that once a person shows differential treatment apparently based on age, the burden of proof shifts to the employer to show that the treatment was not based on age or, is based on age, was a reasonable and objective justification that was not influenced by direct or indirectly ageist assumptions.

Informal or unremunerated work

States should take all necessary measures to ensure that:

- Older persons enjoy fair and safe conditions of work when undertaking informal or unremunerated work
- Older persons' informal or unremunerated work does not limit their opportunities to be engaged in the paid workforce
- Older persons' informal or unremunerated work, including domestic work, work as carers, and as volunteers, is reflected in national statistics and its social and economic value and importance taken into account in policymaking.
