

Joint submission by AGE Platform Europe, Community Legal Centres Australia (National Association of Community Legal Centres), HelpAge International and The Law in the Service of the Elderly

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Right to Work and Access to the Labour Market

Authors

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Question 1: Legal provisions and policy frameworks

The concepts of ‘work’ and ‘the labour market’ that underpin these questions and most existing human rights instruments, as well as most national legal and policy frameworks, focus on the formal paid labour force, with some attention given to the informal sector. In considering the right of older persons to engage in remunerative work under fair and safe conditions, more attention needs to be given to the informal sector. In addition, the relationship between the opportunities, need and choice of older persons to engage in remunerative work is influenced by many factors – including the structure of labour markets, the changing nature of jobs, narratives about older workers, adequacy of retirement income, and the demands of other unremunerated and unrecognized labour – and these make it necessary to adopt a holistic approach to this issue in legislative and policy terms.

Even within the formal sector, much discussion of discrimination in work on the basis of age relates to legal relations governed by contracts of employment. 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 include status as an ‘independent contractor’ (which has assumed increased importance in the development of the ‘gig economy’), non-standard employment, ‘disguised employment’, 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.

Unremunerated and unrecognized work in the family context -- especially that performed by women – such as childbearing, childrearing and other care responsibilities and general

¹ A more detailed discussion of a number of these issues is available in a [discussion paper](https://tinyurl.com/R2WorkDP) that will be submitted to the eleventh session of the OEWGA and can be accessed here: <https://tinyurl.com/R2WorkDP>.

domestic work, affects women's ability to participate fully in the paid labour force. This frequently has an impact on women's retirement savings or pension entitlements since these are frequently linked to paid employment, contributing to women's poverty in older age. Policy frameworks need to consider the value of this work and to ensure that it is tangibly reflected in contributory and non-contributory pension schemes. A life course approach is thus required, especially in relation to women.

Question 2: Challenges faced by older persons

A critical factor in the access of older persons to work and their conditions of work is ageism. Ageist stereotypes about older workers are not confined to those who have reached the arbitrarily selected UN working definition of an older persons as one who is 60, but in many societies such discrimination begins much earlier and is also gendered. Ageism in relation to employment is part of the broader social problem of ageism, and strategies to eliminate ageism in employment must both be part of an overall strategy and be targeted at employment-specific ageist attitudes and barriers (including apparently 'neutral' practices that are in fact based on ageist assumptions, such as the justification of a mandatory retirement age as a way to preserve the dignity of older persons and avoid their humiliation if they were to be individually assessed for their capacity to carry out the requirements of a job).

Question 4-6: Availability, Accessibility, Acceptability and Quality

Efforts to promote older persons' right to work and access to the labour force require: (a) a holistic and coherent non-discriminatory rights-based approach that encompasses not just employment and workplace policy, but also other areas of social policy that interact with those areas, including life-long learning, and social protection and support, including ensuring adequate income and other support for persons who choose to withdraw partly or completely from the paid labour force or other forms of work.

The OECD has identified three elements of a policy that will promote the enjoyment of the right to work: (a) providing incentives to work longer; (b) addressing employer attitudes and concerns about employing older workers; and (c) improving older workers' employability through adoption of a life course approach in relation to opportunities to updating skills and training at all stages of one's life.

Question 7: Just and favourable conditions of work

Many countries have protections against age discrimination in their constitutions and in legislation, sometimes specifically related to age and sometimes general equality legislation that includes age as a prohibited ground of discrimination. However, according to ILO studies, many countries still do not have such detailed legislation.

Age discrimination legislation should not be limited only to the prohibition of age discrimination; it should also permit, encourage or even mandate the taking of positive action to ensure that older workers enjoy equality in work. Anti-discrimination legislation should be broad-ranging in coverage, extending to the various types of economic relationships referred to above and apply to all stages of the employment relationship. It should also cover

discrimination in relation to the provision of employment referral services (including the publication of discriminatory advertisements), and to membership of a labour union and to the equal benefit of such membership. Non-discrimination in pay should also be explicitly covered.

The legislation should cover all forms of discrimination: direct and indirect discrimination, systemic or structural discrimination, and intersecting, cumulative and multiple discrimination. In principle, a differential treatment on the basis of age (including disparate impact on older persons) is prima facie discriminatory, and it must be shown not to impair or nullify the recognition, enjoyment or exercise, on an equal basis with others, of all human rights. The definition of discrimination should include acting on the basis of ageist stereotypes or attributes, failing to provide reasonable adjustments in the workplace or in work arrangements, and discriminating against an associate of an older person on the basis of that other person's age.²

Question 8: Equality and non-discrimination

Age discrimination legislation is essential, though not in itself sufficient. ILO studies have found that, even where such laws exist, they frequently do not permit complaints of intersectional discrimination to be properly addressed: legislation formulated in terms of single-ground discrimination can make it difficult to bring in the full scope of the discrimination, and the concept of intersectional discrimination is not always something that is familiar to those processing or adjudicating such complaints.

Question 9: Remedies and Redress

Our [submission](#) on access to justice submitted separately to the eleventh session of the OEWGA,³ addresses a number of relevant issues. Issues worth highlighting include the need for financial and expert support for older persons who wish to bring claims of age discrimination, the availability of quick and inexpensive resolution of such complaints through administrative or judicial proceedings. Also important is the inclusion of a shifting burden of proof in such cases: once the complainant has established an apparent case of differential treatment on the basis of age or a disproportionate impact of an employment practice on older persons, the burden should shift to the employer or other persons to clearly demonstrate that the action was not based on age or, if it was, that it was based on an objective and reasonable justification which is not based expressly or implicitly on ageist assumptions.

² For further discussion of the guarantee of equality and non-discrimination, see our [submission](#) on 'Equality and non-discrimination' to the ninth session of the OEWGA: https://social.un.org/ageing-working-group/documents/ninth/Inputs%20NGOs/Joint_Submission_Equality_OEWG8.pdf.

³ [https://social.un.org/ageing-working-group/documents/eleventh/Inputs%20NGOs/\(AGE%20PE,%20HAJ,%20LSE,%20NACLCA\)%20-%20Access%20to%20Justice.pdf](https://social.un.org/ageing-working-group/documents/eleventh/Inputs%20NGOs/(AGE%20PE,%20HAJ,%20LSE,%20NACLCA)%20-%20Access%20to%20Justice.pdf).