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## United Nations Open-Ended Working Group 12<sup>th</sup> Session (2022)

### AGE Platform Europe submission on normative elements: Access to work and access to justice

This short answer is submitted in reply to the call of the Chair of the Open-Ended Working Group on Ageing (OEWG) to NGOs. AGE Platform Europe (AGE) has ECOSOC status and is accredited to the OEWG since 2012.

As the largest European network of self-advocacy organisations of older people, our position aims to reflect the situation at EU level on behalf of the 40 million older citizens represented by our members. Our contribution is based on written answers received from organisations of older people in several EU Member States and webinars open to all AGE members. It also builds on the AGE submissions to OEWG11.

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## Guiding questions for defining the normative content of the issues examined at the eleventh session of the General Assembly open-ended working group for the purpose of strengthening the protection of the human rights of older persons

### Right to work and access to the labor market

#### Definition

1. How is the right to work and access to the labor market for older persons defined in the national legislation in your country? If such a definition is not available, how should it be defined considering relevant existing national, regional and international legal frameworks?

Article 15 of the Charter of Fundamental Rights (CFR) recognizes that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Directive 2000/78/EC covers age discrimination in the employment and training, but leaves room for a wide margin of exemptions, notably regarding mandatory retirement ages and vocational training policies<sup>1</sup>. Article 25 of the CFR refers to the right of older people to participate in social and cultural life and does not explicitly extend participation to the economic sphere. Similarly, despite several provisions dedicated to the right to work in the Revised European Social Charter (RESC), article 23 on the rights of older people merely enshrines a right to social protection and maintains a welfare approach by referring to the right to remain full members of society *'for as long as possible'*.

The definition of the right to work should extend protection for older *persons on an equal basis with others*, which is currently not the case under European law. Older persons should have the right to determine when and at what pace to withdraw from the labour force and not be obliged to retire due to mandatory retirement or other policies. 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.

#### Scope of the right

2. What are the key normative elements of the right to work and access to the labor market for older persons? Please provide references to existing standards on elements such as: a) Prohibition of all forms of discrimination against older persons on the basis of age, alone or combined with other grounds, in all matters related to employment. b) Elimination of all forms of ageism and age discrimination from the workplace and organizational cultures. c) Provision of reasonable accommodation to older persons in the workplace. d) Affirmative action programs to promote the hiring of older persons. e) Access to career development, technical and vocational guidance programs, placements services and vocational and skills development. f) Access to flexible or gradual retirement schemes and flexible working practices for older workers. g) Promotion of older persons' self-employment and entrepreneurship. h) Favorable, fair, and safe working conditions when undertaking formal, informal or unremunerated work. i) Access to prompt remedies and redress when older persons' right to work and access to the labor market is denied.

In addition to the legal provisions mentioned above, the 2014 Council of Europe Recommendation on the rights of older persons mentions that older persons should not face discrimination in

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<sup>1</sup> See [The Right to Work in Old Age - How the EU Employment Framework Directive still leaves older workers behind](#), March 2021 and AGE input to OEWG12 – [access to work](#)

employment, training, working conditions, membership of trade unions or retirement. Member States should include the promotion of participation of older persons in the labour market in their employment policies and pay specific attention to safety and health problems of older workers. A 2011 Resolution of the Parliamentary Assembly of the Council of Europe encouraged member states to adopt legislation to prohibit age discrimination in the labour market. It also recommended social protection, flexible work arrangements, training and lifelong learning, health promotion and the organization of voluntary activities as means to promote active aging.<sup>2</sup>

Key gaps in this framework include the unequal protection of age discrimination in the field of employment, which allows for different forms of unfair practice to continue; the limited understanding of how the right to work could be applied beyond legal retirement/pensionable age ; the very little/scant attention given to the informal sector; the lack of clarity about the share of responsibility between states and employers; the lack of obligation to provide reasonable accommodation(s) for older workers<sup>3</sup> and in general the lack of explicit obligations for positive action, measures to eliminate of ageism and the development of fair working conditions and inclusive, diverse workplaces.

The right to work in older age merits a comprehensive approach, which takes a life-course perspective, addressing employer, worker and wider societal barriers to fully enjoying this right and extends to both public and private sector. The key normative elements of this right should include:

- 1) **Equality and non-discrimination**, based on a substantive model of equality that allows for positive action and reasonable accommodation to redress existing disadvantages, addresses employer barriers to employing older workers, but does not stigmatize older people as different or their work being of less value. It must also aim to eliminate prejudice against older workers, repeal discriminatory laws and practices and transform exclusionary institutions, such as forced retirement (age), informal employment and the lack of adequate and comprehensive social protection from birth to death.
- 2) **Autonomy and choice** facilitated through an integrated and holistic approach to career and life-course management, while at the same time identifying risk factors and disadvantages at different life stages, including how these are experienced by diverse groups. It requires interventions empowering people of all ages to have fulfilling working lives; presupposes the availability of comprehensive social security systems and involves investing in employability and improving employment opportunities and working conditions for the workforce as a whole, as opposed to focusing primarily on those entering and exiting from the labour market. Interventions should cover promotion of training and life-long learning at all ages, encouragement of job rotation, mid-career reviews, regular skills assessments and validation, support for professional reorientation and second careers
- 3) **Inclusion, participation and remedy**, so that older persons can participate actively in the formulation, implementation, monitoring and evaluation of employment policies, including an equal right to organize collectively and to engage in genuine dialogue with employers and governments and also a right to access appropriate remedy and redress.

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<sup>2</sup> <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17961&lang=en>

<sup>3</sup> Under EU law the right to reasonable accommodation only exists for the ground of disability

## State obligations

3. What are the measures that should be undertaken by the State to respect, protect and fulfill the right to work and access to the labor market for older persons, regarding the normative elements as provided above?

State parties should ensure:

- The elimination of ageist assumptions and prejudice, including internalized ageism, through research, awareness-raising, education, inter-generational interventions, change of organizational culture and so forth
- 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; prohibition of discrimination on the ground of age in access to goods and services, which are necessary to exercise professional duties, such as motor insurance or any other good or service
- The repeal of discriminatory laws and regulations (including discriminatory health and safety or insurance laws)
- The prohibition of mandatory retirement ages under the law and the equalization of retirement ages for women and men
- The right to flexible or gradual retirement schemes and flexible working practices for older workers, which allow them to continue working beyond legal retirement/pensionable age and to gain combined income from work and retirement
- The legal duty of employers to accommodate the workplace and working conditions to the changing needs of older workers as well as support to employers in form of guidance, training and financing to accommodate workplaces;
- Labour policies account for the needs and characteristics of older persons, and workplaces must be suitable in terms of working conditions, environment, work hours, and organization of tasks and may include affirmative action programs, for example to support the long-term unemployed to return to employment, career assistance and training so that older persons can maintain their jobs, and provision of support for workers with caregiving responsibilities, support for reintegration and rehabilitation after periods of disease or acquisition of a disability
- The development of age-inclusive and age-diverse workplaces through occupational health and safety rules and other supporting measures to develop sustainable and inclusive workplaces, as well as promotional campaigns in favour of age diversity
- Older persons are able to exercise their labour and trade union rights
- Older persons have access to career-development, technical and vocational guidance programmes, placement services, and vocational and skills development training.
- Promotion of opportunities for older persons for self-employment and entrepreneurship, and provision of both appropriate support and effective measures to protect the rights of older persons working in the informal sector.

## Special considerations

4. What special measures and specific considerations should be considered in developing the normative content of the right of older persons to work and access to labour market, such as



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protection and regularization of older workers in informal sector, equal remuneration for work of equal value particularly for older women as well as recognition of unpaid work often carried out by older women?

Specific action may be necessary when the position of older workers and the real conditions of work available to them are fundamentally different to those of other age groups. Often such measures include legislative and social policy frameworks aiming to address socio-economic disadvantage, such as under-representation in jobs, under-payment for work of equal value, or limitations on access to credit, insurance, education, information, technology or similar resources<sup>4</sup>. Interventions may also be necessary to address the high risk of long-term unemployment among older workers. Targeted policies and programmes for sub-groups of older workers may be needed to address intersectional challenges<sup>5</sup>

The availability of social protection systems that provide income security during career breaks or reduction of working time for education and unpaid work, such as caregiving, will also be necessary to address existing inequalities<sup>6</sup>. This would involve laws and policies that allow people to combine paid with unpaid forms of work and to gradually transition to retirement, but also the calculation of caregiving time to build pension rights. The introduction of personal training accounts (in combination with a right to paid educational leave) and age management plans can help with reskilling and in-work training, the adaptation of human resources practices in order to allow regular evaluations of goals and skills and to enable flexible and dynamic careers and transfer of skills in other areas. More focus on intergenerational learning, mentoring and transmission of knowledge will also be beneficial for workers of all ages and employers alike. Workspace adaptation, health promotion and safety strategies should equally be available for workers at different stages of their career. Safe and ergonomic places of work are important for workers of all ages and abilities and can help prevent injury, reduce the risk of disease onset and minimise health deterioration. Health promotion, preventive measures and assessing health risks on an individual basis could also delay functional decline and facilitate longer worker lives. Data should also be available to measure progress in the employment of older workers.

5. How should the responsibilities of non-State parties such as private sector be defined in the context of the right to work and access the labour market for older persons?

The examples given above demonstrate that the responsibility is shared between governments and employers/private sector to equally respect, protect and fulfill the right to work in old age.

## Implementation

6. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to work and access to the labor market for older persons?

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<sup>4</sup> Fredman, Sandra. "Substantive equality revisited." *International Journal of Constitutional Law* 14, no. 3 (2016): 712-738.

<sup>5</sup> International Labour Conference (ILO). *Employment and social protection in the new demographic context*. International Labour Organisation, 2013.

<sup>6</sup> Leichsenring, Kai. "Ageing 4.0—Towards an integrated life-course approach to population ageing." *Policy Brief* 2018 9 (2018).



Main challenges are the existence and persistence of discriminatory laws and practices. Some good practices exist, but these are isolated cases, rather than part of a strategic, holistic framework to improve opportunities to access work and equally protect this right in old age.

## Access to justice

### Definition

1. What is the definition of the right of older persons to access justice in the national legislation in your country? Or how should such a right be defined, considering existing national, regional and international legal framework?

The Charter of Fundamental Rights of the European Union guarantees the right of everyone to an effective remedy and to a fair trial, including legal aid for those who lack sufficient resources (art. 47-50). This right is also guaranteed by the European Convention of Human Rights, Article 6 (right to a fair trial), and Article 13 (right to an effective remedy)

The right to access justice must be defined as including not only procedural aspects (i.e. fair and effective remedies), but also as an enabling right, which empowers older people to have rights awareness and knowledge about the tools that are available for them to access justice. This also encourages them to seek redress. It should guarantee equal and effective participation at all stages of and in every role within the justice system. Access to justice should involve not merely judicial recourse, but also the availability of other accessible, affordable, timely and effective means of redress or remedy. Legal assistance and accommodation of the needs of older persons (e.g. in terms of accessibility, language, information, time of proceedings, non-digital means, and so forth) are integral parts of this right. Access to justice should also involve substantive and procedural guarantees for non-biased judicial proceedings and rulings, such as for instance ageism consciousness and awareness training for judiciary and legal professionals and also the repeal of discriminatory laws.

### Scope of the right, State obligations and Special Considerations

2. What are the key normative elements of the right of older persons to access justice on an equal basis with others? Please provide references to existing standards on such elements as below, as well as any additional elements: (a) The guarantee of older persons' legal capacity (legal standing and legal agency) on an equal basis with others and not denied on the basis of age; (b) Elimination of the influence of ageist stereotypes at any stage of judicial or nonjudicial proceedings, including the award of damages or compensation; (c) Access to timely legal proceedings, especially in situations of immediacy; (d) Accessibility of courtrooms, legal tribunals and other justice-related facilities to all older persons; (e) Access to legal services, including legal assistance, legal aid, counseling and hotlines, on an equal basis with others ; (f) Access to alternative, non-judicial pathways to justice, including, but not limited to, one-stop community justice centres, paralegal support, ombuds procedures or specialist commissioners; (g) Access to reasonable accommodation in all legal and administrative proceedings at any stage to facilitate older persons' effective role as direct or indirect participants in justice proceedings; (h) Adequate and appropriate training to all those working in the administration of justice and law enforcement, including the judiciary, police and prison staff, on the rights of older persons; (i) Accommodation of the needs of older prisoners, including necessary physical adaptations, protection against violence and extortion, appropriate educational and vocational opportunities, and support with reintegration into the community; (j) Equal access of older prisoners to services, including





physical, mental and cognitive health, dental, hygiene and hospice services, and social and other support services available to the general population; and (k) Access to prompt remedies and redress when older persons' right to access justice is denied.

3. What mechanisms or measures are necessary to ensure the enjoyment and to monitor implementation of the right of older persons to access justice, including State obligations to respect, promote, protect, and fulfill the right?
4. What special considerations or specific issues should be included in the right of older persons to access justice, including procedural and age-appropriate accommodations as well as responsibilities of non-State actors?

Access to justice is a core element of the rule of law, a fundamental right in itself, and an essential pre-requisite for the protection and promotion of all other human rights. It includes the right to a fair trial, equal access to and equality before the courts and seeking and obtaining just and timely remedies for rights violations. The following elements are key aspects of this right:

- Fair procedures for dispute resolution
- Effective remedies for human rights infringements
- Elimination of ageism in law and across the legal and justice systems
- Guarantee of legal capacity on an equal basis with others
- Access and justice provided in a timely, affordable and effective manner (e.g. Prevent delays/ provide resolution in a reasonable timeframe as older people do not have time to wait for lengthy periods for resolution; legal remedies and victim support, incl. necessary accommodation for victims of elder abuse, neglect and exploitation)
- Providing prompt judicial and non-judicial remedies including rights of appeal, restitution, indemnity, compensation and reparation. Some older persons may prefer non judicial means of redress and this should be possible through relevant mechanisms at national, regional and local level (ex. Ombudspersons for older persons, mediators)
- Impartial and competent judicial and administrative bodies
- Availability of legal assistance and support services- Legal aid guaranteed at all settings (regardless of income).
- Reasonable accommodation to ensure equal participation in justice proceedings and access to victim support (ex. Remote testimony, court assistants, adjust time of hearing, language/communication needs)
- Accessibility of courts and legal proceedings, including by digital/virtual means
- Information/legal literacy about rights, justice system and available redress mechanisms for older people
- Training/awareness about ageism and rights of older people for those working in justice system, law enforcement and so forth
- Accommodation and support for older prisoners
- Independent Advocacy Services should be widely available and able to provide specialist advice to older people



## Implementation

5. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to access justice for older persons?

Ageism and several physical, legal and institutional barriers lead to downplaying the severity of disputes that affect older people, lack of confidence in enforcing rights and also a perception that the law cannot solve such problems. People 55+ are less likely to be aware of the EU Charter of Fundamental Rights, to feel well informed about it and to correctly identify in which situations the Charter applies compared to younger age groups<sup>7</sup>. They are also the least likely to complain in case of violation of their human rights. Studies have also shown that only 1 out of 24 cases of elder abuse are actually being reported<sup>8</sup>. As a result, a great majority of breaches of rights in which older people are involved or experience are tolerated or suppressed. This presents a major challenge to this right and there is a need for a much more holistic application of the right to access justice. This includes consistent efforts to eliminate ageism in law and practice and to empower and build capacity among victims and rights-holders.

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<sup>7</sup> [Special Eurobarometer 487b](#), 2019

<sup>8</sup> Factsheet on elder abuse, WHO

