

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?

Polish legislation does not contain a definition of the right to work and access to the labour market for older persons. The definition should be formulated as follows: Older persons have the right to work, which includes the right to the opportunity to gain their living by work which they freely choose or accept, and the state will take appropriate steps to safeguard this right.

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.

Older people should be treated equally in respect of establishing or terminating an employment relationship, of employment conditions, conditions for promotion and access to training in order to improve professional qualifications, regardless, in particular, of sex, age, disability, ethnic origin, nationality or state of health. This principle should apply irrespectively of whether work is provided under an employment contract or under another type of contract¹.

- b) Elimination of all forms of ageism and age discrimination from the workplace and organizational cultures.

The State Party undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, in particular with a view to eliminating any stereotypes and prejudice against older persons in access to employment, specific occupations and vocational training, as well as to working conditions, including pay.²

- c) Provision of reasonable accommodation to older persons in the workplace.

States Parties shall safeguard and promote the realization of the right to work of older persons by taking

¹ See: Council Directive 2000/78/EC of 27 November 2000.

² Resolution of the Human Rights Council, A/HRC/RES/48/3.

See also: Article 2 of the CONVENTION No. 111 OF THE INTERNATIONAL LABOUR ORGANISATION concerning Discrimination in Respect of Employment and Occupation, adopted in Geneva on 25 June 1958; Article 10(C) of the CONVENTION on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979; Article 12(1) of the Istanbul Convention - Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011.

appropriate steps, including through legislation, to ensure that reasonable accommodation is provided to older persons in the workplace. Reasonable accommodation shall include appropriate measures, where needed in a particular case, to enable an older person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer³.

- d) Affirmative action programs to promote the hiring of older persons.

With a view to implement in practice the principle of equal treatment of older persons in working life, States Parties may maintain or adopt measures to prevent their unequal treatment or equalize their opportunities.⁴

- 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 unenumerated work.

Access to prompt remedies and redress when older persons' right to work and access to the labor market is denied.

The State Party shall:

(a) Protect the rights of older persons, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances; (b) Ensure that older persons are able to exercise their labour and trade union rights on an equal basis with others; (c) Enable older persons to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; (d) Promote employment opportunities and career advancement for older persons in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment⁵

State obligations

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

States Parties should be required to adopt appropriate national legislation, conduct information campaigns, provide support services and ensure the effectiveness of measures of protection against discrimination in employment, including on the grounds of age.

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

³ Article 27(1)(l) of the Convention on the Rights of Persons with Disabilities, and Article 5 of Directive 2000/78

⁴ Article 3 of Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women.

⁵ Article 27(b) to (e) of the Convention on the Rights of Persons with Disabilities.

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?

Legal regulations should be oriented towards flexibility of contract conclusion with older workers in informal sector. Yet, the legislator's intervention seeking to ensure a guaranteed level of remuneration, working time standards or the right to rest would not be without significance. Of importance is also insurance protection, for example, against a low basis of contributions co-funded by the state.

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 State is under the obligation to ensure that the rights guaranteed by this Convention are realized both in the public and private sectors.

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?

Ageism, especially in access to labor market.

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?

1. State Parties shall ensure that judicial and/or administrative procedures, and, where they deem it appropriate, conciliation procedures, for the enforcement of obligations under this Convention are available to all persons who consider themselves wronged by reason of a breach of rights guaranteed to them under this Convention, even after the legal relationship in which the breach is alleged to have occurred has ended.

2. State Parties shall ensure that associations, organisations or legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Convention are complied with, may engage, either on behalf or in support of the applicant, with his or her

approval, in any judicial and/or administrative procedure provided for the enforcement of this Convention.⁶

3. Older persons should have access to the system of justice on an equal basis with others. Where the need arises, the State should ensure assisted decision-making, personal assistance and remove barriers, including in transport, digital technologies and infrastructure, that may impede such access.

Scope of the right

4. 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 or disability;

(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) The Act of 19 July 2019 on Ensuring Accessibility for Persons with Special Needs⁷ provides that public bodies, including courts and public prosecutors' offices, shall ensure accessibility for persons with special needs by applying the principles of universal design or reasonable accommodation (Article 4(1)). Also, public bodies, as part of ensuring such accessibility shall, in their planned and conducted activities, provide for measures taking account of the needs of persons with special needs, and for removal and prevention of the use of barriers (Article 4(2)). In the said Act, a person with special needs is defined as a person who, due to their external or internal features or internal characteristics, or circumstances in which they find themselves, needs to take additional steps or apply additional measures to overcome a barrier in order to participate in various spheres of life on an equal basis with other persons (Article 2(3)). The Act sets out minimum accessibility requirements with regard to architectural, information and communication accessibility (Article 6). Furthermore, the obligation to ensure digital accessibility was imposed on public bodies by the Act of 4 April 2019 on digital accessibility of websites and mobile applications of public bodies⁸.

(f) Access to legal services, including legal assistance, legal aid, counselling and hotlines, on an equal basis with others ;

(g) The Act of 5 August 2015 on free-of-charge legal aid, civic counselling and legal education⁹

⁶ Article 9, Directive 2000/78.

⁷ (Journal of Laws [Polish: Dziennik Ustaw] of 2020, item 1062, consolidated text).

⁸ (Journal of Laws of 2019, item 848).

⁹ (Journal of Laws of 2021, item 945, consolidated text)

provides for the possibility of free-of-charge legal aid, civic counselling and mediation to be used by persons who cannot afford paid assistance of a lawyer (Article 4(1)). Such free legal assistance is provided on the grounds of the person's declaration of impossibility to bear the costs of paid advice (Article 4(2)). The scope of free legal assistance covers: provision of information about the person's existing legal situation, rights and obligations, including in connection with pending preparatory, administrative, court or administrative proceedings; indication to the person in question of the means by which his/her legal problem can be solved; drafting letters, including a letter requesting exemption from court fees, or appointment of an ex-officio proxy for court proceedings, or a lawyer, legal adviser, tax adviser or patent counsellor for administrative court proceedings; informing the person in question about the costs of the proceedings and financial risks related to bringing the case to court; and provision of free mediation (Article 3(1)).

(h) 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;

(i) 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;

(j) 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;

(k) 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;

(l) 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

(m) Access to prompt remedies and redress when older persons' right to access justice is denied.

All above mentioned elements should be taken into account in the new Convention on the Rights of Older Persons. In particular, everyone shall have the right to recognition everywhere as a person before the law irrespective of age. State parties reaffirm that older persons have the full capacity to perform acts in law on equal basis with others and undertake adequate measures to assure access for older persons to assistance required to enjoy this right.

State obligations

5. 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?

The state should ensure, for older persons, periodic consultations or representative surveys the scope of which would include also access to justice.

Special considerations

6. 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?

Implementation

7. 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?

Main challenges:

- Legal incapacitation remains a solution provided for in the Polish legal system, and may be ruled by a court due to functional limitations connected with advanced age.
- Difficult access to ex officio lawyer. An older person each time has to provide reasons for his/her request to be represented by a professional lawyer. This can be a barrier for older persons with disabilities. Therefore, to reduce this barrier, other mechanisms that take into account the autonomy of older persons should be considered.
- Physical access to courts has become very difficult during the pandemic. The changes in law have reduced the number of open hearings, increasing the number of closed hearings and hearings held remotely, which entails many difficulties.
- A separate problem is the performance, by employees of social welfare homes, of the role of legal guardians of incapacitated persons.¹⁰
- Another problem that has been identified is insufficient supervision over social welfare homes by family court judges. In Poland, only social welfare homes for mentally ill people or people with intellectual disabilities are subject to mandatory control of patients' legality of stay and conditions of stay. However, older people with a mental illness may be placed also in other types of institutions which are not regularly monitored by family court judges. The solution is disadvantageous for some residents of social welfare homes. In practice, it enables depriving a person of his/her liberty in a manner that is not subject to verification and can be unlimited in time, e.g. if decision on the placement in the home has been made by a court order or if the person is incapacitated. Thus, the solution ignores the need to guarantee personal liberty to every person and the possibility to request, in direct contact with a visiting judge, the verification of the person's situation. The Resolution no. 43/173 of the UN General Assembly of 9 December 1988 provides that, in order to supervise strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons, appointed by and responsible to a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment (Principle 29.1).

A possible solution would be to adopt a provision according to which residential care establishments, both private and public-sector ones, would be subject to control by a competent and independent body.

¹⁰ See: Report on the CPT visit to Latvia carried out in 2016, [CPT/Inf (2017) 16]; point 157.

Establishments in which older persons are placed based on a court decision, an administrative decision or other decision should be subject to additional and mandatory control by a court.

- Another problem is the insufficient safeguard of the right of access to information and to complaint filing mechanisms.

In the visited institutions, the representatives of the National Mechanism for the Prevention of Torture find situations in which patients or residents are not informed about the rules and regulations of the establishment, the charter of patients'/residents' rights, or the procedures implemented in the establishment, e.g. relating to deposit storage or to measures taken with regard to aggressive residents/patients. In the case of legally incapacitated persons, such documents are usually signed by the resident's/patient's legal guardian, without informing the resident/patient of the document contents. There are also cases of establishments which have not developed a confidential complaints procedure or the procedure developed violates the principle of confidentiality. As an example, complaints registers are made available in publicly accessible places, or such registers are kept by a staff member who has direct and regular contact with the residents/patients. The National Mechanism is also concerned about cases in which the residents/patients are not clearly informed about complaint procedures. In many establishments, in common spaces there are no contact details of human rights institutions which residents/patients can contact in case of violation of their rights.

Existing standards:

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) emphasizes that access to complaints mechanisms constitutes a fundamental safeguard against torture at all places where people are detained. Effective complaints mechanisms can not only allay tensions between persons deprived of their liberty and staff but also, by ensuring that complaints are taken seriously, contribute to building positive relationships. The Committee also points out that information about the right to lodge a complaint and about avenues of complaint should be provided both orally and in writing, in a manner easily understood by the user. It is recommended that appropriate information tools be developed (e.g. posters in communal areas, a section on complaints procedures in the establishment's house rules, information leaflets, information videos) Moreover, in the CPT's view, direct and confidential access to complaints bodies should be secured (e.g. by installing locked complaint boxes accessible to complainants in appropriate locations, to be opened only by persons specially designated to ensure the confidentiality of the complaints). Staff members directly supervising persons deprived of their liberty should have no possibility to filter their complaints.

Proposed change: Older persons should, immediately upon their placement in a residential care establishment, be informed orally and in writing about their rights including, in particular, access to a confidential complaints mechanism. Older persons should also have access to contact details of human rights institutions.

The right direction for developing the support system is its deinstitutionalisation and the development of community-based support measures that respect the individual's right to independent living in accordance with personal preferences. The State should ensure access to justice for older persons regardless of place of residence.