

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?

There is no specific definition of the right to work and access to labour market for older persons in Kenya. The retirement age is however capped at 60 years in Kenya.

If such a definition is not available, how should it be defined considering relevant existing national, regional and international legal frameworks?

The right to work and access to the labor market for older persons should be defined as; the equitable distribution of opportunities to enable older persons attain secure and sustainable livelihoods through freely chosen productive employment and work without any age-based discrimination

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 unenumerated work.*
- i) *Access to prompt remedies and redress when older persons' right to work and access to the labor market is denied.*

General principles of human rights espoused in the Constitution including prohibition of discrimination on the basis of age, are applied in the labour market. The Kenyan Constitution expressly prohibits any

form of discrimination based on age and the equal protection and equal benefit of the law to all persons in Kenya.¹

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?

The state should ensure absolute abolition of any age-based discrimination both in law and practice and put in place adequate mechanisms to guarantee a practical realization of the Rights of older persons as provided for under Article 57 of the Constitution.² This may include among others the following measures;

- a. *The full implementation of policies and legislations related to older persons*
- b. *Promote healthy and active aging reinforced by access to free and comprehensive health care for older persons.*
- c. *Enhance the social security programmes e.g., cash transfers available for older persons*
- d. *Recognize gender variations in aging and adopt age-specific opportunities addressing older persons*
- e. *Provide incentives for employers to offer opportunities for the older persons*
- f. *Enhance holistic adult learning programs to develop and build the skills of older persons for labour market placement.*
- g. *Enhance continuous awareness on the plight of elderly persons and best practices in remedying their situation*

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 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?

See response to question 3

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?

In defining the responsibility of non-state actors in the context of the right to work and access to labour market for older persons, the principles of Human Rights Based Approach (HRBA) should apply to

¹ Article 27 of the Constitution. Available at: <http://kenyalaw.org/kl/index.php?id=398>

² Article 57 provides that “the State shall take measures to ensure the rights of older persons: -
(a) to fully participate in the affairs of society;
(b) to pursue their personal development;
(c) to live in dignity and respect and be free from abuse; and
(d) to receive reasonable care and assistance from their family and the State”

address the challenges in the sector. The Non-state actors are equally obligated to respect the rights of older persons and provide appropriate and adequate remedies in the event of a breach.

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?
 - *Lack of political good will and competing state priorities especially at a time when the country is facing high level of unemployment among the youth. As such; the priority would not be on older persons and their right to work.*
 - *Lack of public understanding on the rationale for the framework*
 - *Lack of robust mechanisms and safeguards to guarantee actual implementation of the framework*

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 right to access justice for older persons should be defined as; “the right for older persons to have unlimited access to expeditious and comprehensive dispute resolution mechanisms through formal and informal systems”. The state should, in appreciation of the vulnerabilities of older persons, be obligated to actively support older persons in their quest to access justice.

Scope of the right

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 non-judicial 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, counselling 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.

General principles of human rights espoused in the Constitution including Article 48 (guarantees access to justice for all) - this includes older members of the society. Additionally, Article 27 (1) of the Constitution ensures equality of all citizens. It stipulates that '[e]very person is equal before the law and has the right to equal protection and equal benefits of the law'. Article 27(4) identifies age as one of the prohibited grounds of discrimination. Article 48 of the 2010 Constitution guarantees access to justice for all, this includes older members of the society. The Article stipulates that required fees in this regard shall be reasonable and must not be set to impede access to justice. Article 50 also provides for the right to a fair trial for all. Moreover, Article 57 provides that the State is obligated to protect the rights of older persons and ensure their freedom to: full participation in the affairs of society, pursue their personal development, live in dignity and free from abuse, as well as receive appropriate care from the State and family.

Section 12 (f) of the Persons Deprived of Liberty Act No. 23 of 2014, provides that older members of society deprived of liberty are held in accommodation appropriate to their special needs and age

Kenya and Africa in general has a culture of respect for the elderly and this works in favour of older persons as they seek public services.

State obligations

2. 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?

States should come up with adequate safeguards through policy and/or legislative frameworks and ensure appropriate and well-resourced implementation mechanisms. In Kenya, for instance, there are several avenues to secure enjoyment and monitor implementation of the rights of older persons to access justice. These include;

- a. *Kenya National Commission on Human Rights (KNCHR)*
- b. *National Gender and Equality Commission (NGEC)*
- c. *The State Department of Labour and Social Protection and;*
- d. *Judiciary*
- e. *Formal recognition of the existence of Traditional Dispute Resolution Mechanisms as avenues of/alternative justice systems*
- f. *Operationalization of the National Legal Aid Service (NLAS) through legislation with the obligation to enhance access to justice for all with a bias for the vulnerable*

Special considerations

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?

The following considerations are key in ensuring the older persons access justice;

- a. *Enhanced awareness especially on the formal justice mechanisms*
- b. *Implementation (including continuous transformation of Traditional Dispute Resolution Mechanism through infusion of human rights principles and standards) to complement the formal justice systems and ensure older persons have access to a “seat of justice” well understood by and close to them*
- c. *Operationalization with adequate support to the NLAS to support especially the older persons in their access to justice endeavours.*

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?

Best practice: Institutionalization of the rights for older persons.

Challenge: Lack of political goodwill and inadequacies in financing the sector, focusing on older persons. Technology and digitization of formal justice mechanisms – majority of the older persons live in rural areas that either have poor internet accessibility and can also ill afford such services.