

Access to Justice

A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (6 to 9 April 2020)

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1. Introduction

This discussion paper on access to justice 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. Access to Justice

Access to justice research in April 2019 estimated the global outlook:

- 1.5 billion people cannot obtain justice for civil, administrative, or criminal justice problems;
- 4.5 billion people are excluded from the opportunities the law provides, such as employment and housing;
- 253 million people live in extreme conditions of injustice; and

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- Altogether 5.1 billion people, two thirds of the world’s population, face at least one of these justice issues.²

Older persons obviously form a significant part of this picture – though the nature and extent of their ‘share’ of the problem is largely unknown. The United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) recently noted how the absence of dedicated access to justice rights for older persons has caused them to rely on other status or specific mentions of old age in other instruments.³

2.1. Background

Key background issues include:

- What is meant by access to justice;
- The rights-based perspective on access to justice;
- The role of access to justice within the rule of law; and
- The role of access to justice within the development agenda.

Only brief summaries are given against each background aspect.

2.1.1. What is Access to Justice

Access to justice is a cross-cutting right that must be understood and interpreted in line with other principles such as equal recognition before the law. It is a right that enables and enhances other rights such as the right to health as it guarantees judicial and administrative protection of that right.⁴

Access to justice often includes the concept of legal needs. Access to justice and legal needs are different but in practice the terms tend to merge, especially in the context of their functions.⁵ People do not need legal services in and of themselves. Their need is of the ends which legal services can bring about. This may be in the form of specific legal remedies, reconciliation with another party, or, quite simply, a sense of fairness or closure from some dispute.⁶

The right to access to justice (or ‘to access justice’) is expressed variously as a freestanding right or as a collection of freestanding rights. Traditionally, these rights generally guarantee equal access to an independent and impartial process and the opportunity to receive a fair and just trial when that individual’s liberty or property is at stake. Access to justice involves judicial recourse, but also the availability of other accessible, affordable, timely and effective means of redress or remedy.

The normative formulation includes:

- Effective and non-discriminatory access to justice:
 - Fair procedures for dispute resolution; and
 - Effective remedies for human rights infringements;

² The World Justice Project, World Justice Forum Report 2019, April 29-May 2 2019 The Hague, Netherlands, p.16.

³ A/HRC/41/32.

⁴ See for example Pautassi L. (2018). Access to Justice in Health Matters: An Analysis Based on the Monitoring Mechanisms of the Inter-American System. *Health and human rights*, 20(1), 185–197.

⁵ Louis Schetzer, Joanna Mullins, Roberto Buonamano, Access to Justice & Legal Needs A project to identify legal needs, pathways and barriers for disadvantaged people in NSW Background Paper, August 2002, 5.

⁶ Pascoe Pleasance, A Buck, et al., Local legal need, Legal Services Research Centre, London, 2001.

- Take into account customs, traditions, rules and legal systems;
- Through impartial and competent judicial and administrative bodies;
- In a timely, affordable and effective manner, and in the language of the persons concerned;
- Provide prompt remedies including rights of appeal, restitution, indemnity, compensation and reparation;
- Supported by legal assistance includes additional measures such as legal aid; and
- Include effective mechanisms of prevention.⁷

The OHCHR has noted the right of access to justice has developed over time in international and regional human rights instruments, although it was not explicitly formulated until the adoption of the Convention on the Rights of Persons with Disabilities.⁸ The OHCHR reported the Convention not only clarifies what access to justice means for persons with disabilities, but also upholds equal and effective participation at all stages of and in every role within the justice system as a core element of the right to access to justice. The Convention thereby expands this right beyond the notions of a fair trial and effective remedies which have been the principal features put forward by human rights instruments and their monitoring bodies.⁹

The World Justice Project describes those who cannot access justice as:

- People who cannot obtain justice for everyday civil, administrative or criminal problems;
- People who are excluded from the opportunities the law provides; and
- People who live in extreme conditions of injustice.¹⁰

2.1.2. The Human Rights-based Approach

From a rights-based perspective, access to justice refers to “the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems, for grievances in accordance with human rights principles and standards.”¹¹ A human rights-based approach (HRBA) requires:

*an assessment of both claimholder and duty-bearer on three particular aspects, namely: capacity, accountability and empowerment. Capacity refers to the ability of both stakeholders to solve problems, perform functions and set and achieve objectives. Consequently, capacity development requires both the accountability and empowerment of both stakeholders. Claimholders need to strengthen their capacities to become accountable in the exercise of rights; duty-bearers often need to be empowered to be able to fulfil their obligations more effectively.*¹²

Therefore, assessment of rights-based access to justice includes dimensions of capacity, accountability and empowerment.

⁷ A/RES/73/165

⁸ A/HRC/37/25, p.4.

⁹ Ibid, p.3.

¹⁰ World Justice Project, Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World, 2019, pp.7-8.

¹¹ https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/democratic_governance/RBAP-DG-2012-Sharing-A2J-Experience.pdf

¹² Ibid.

2.1.3. Importance within the Rule of Law

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.¹³

The OHCHR has described the relationship as follows:

*... Access to justice is a core element of the rule of law. It is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights. Access to justice encompasses the right to a fair trial, including equal access to and equality before the courts, and seeking and obtaining just and timely remedies for rights violations. Guaranteeing access to justice is indispensable to democratic governance and the rule of law as well as to combat social and economic marginalization.*¹⁴

The General Assembly declared the importance of the right to access to justice within the Rule of Law:

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard, we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

*15. We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.*¹⁵

The World Justice Project's 2019 report described access to justice as "a fundamental component of rule of law, and the failure of justice systems to meet justice needs compounds inequality, erodes trust in institutions, and renders societies vulnerable to a populist backlash against core rule of law norms, as we see in too many parts of the world today."¹⁶

2.1.4. The Development Agenda

Access to justice is an important part of the UN's development agenda. The Sustainable Development Goals (SDGs) at Goal 16 prescribe 12 targets, each with their own indicators.¹⁷ Target 16.3 is to "Promote the rule of law at the national and international levels and ensure equal access to justice for all". Target 16.3's indicators include:

- **16.3.1** Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms; and
- **16.3.2** Unsensitized detainees as a proportion of overall prison population

According to available data for Target 16.3, rule of law and access to justice continued to face significant challenges in 2018.¹⁸ In one in three countries' rule of law score declined in 2018, with

¹³ <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

¹⁴ A/HRC/37/25, p.3.

¹⁵ A/RES/67/1*

¹⁶ The World Justice Project, World Justice Forum Report 2019, April 29-May 2 2019 The Hague, Netherlands, p.5.

¹⁷ <https://sustainabledevelopment.un.org/sdg16>

¹⁸ SDG16 Data Initiative, 2018 Global Report, July 2018, p.9.

the greatest number of countries seeing declines in the areas of fundamental rights and constraints on government powers.¹⁹

A key message of the ODI 2018 report was that:

*Access to justice is associated with economic growth and social development and its provision is a core state function. But billions of people have limited access to justice. Donor support for justice systems is low in most countries and has fallen by 40% globally in the last four years. Thinking on long-term scaled-up funding for accessible justice is in its infancy.*²⁰

The SDG16 Data initiative 2018 report noted:

While there is growing recognition that access to justice is foundational to economic and social development – due in large part to the inclusion of Goal 16 in the SDGs – much of the conversation around policy planning, budgeting, and performance indicators has focused on criminal justice, as demonstrated by the current official indicators endorsed by the IAEG for Target 16.3. However, a growing body of literature shows that a majority of people’s legal problems are civil, rather than criminal problems.^{19,20} In 2016, UN Member States agreed that an indicator focused on “access to civil justice” should be considered as a more meaningful measure of Target 16.3.²¹

2.1.5. Legal Assistance and Legal Aid

Legal assistance is a critical part of the right to access to justice. Legal assistance in criminal law, and engagement with legal aid is set out in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.²² They restate:

*1. Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.*²³

The Guidelines also note the need for special measures to ensure meaningful access to legal Aid for older persons.²⁴ The Guidelines note that the design of nationwide legal aid schemes should consider the needs of specific groups.²⁵ Although criminal justice is a pressing issue, findings from legal needs surveys reveal that the most frequent legal problems faced by older persons, are civil ones.²⁶

2.2. Recognition of the Right

Recognition of the right is found in a range of normative standards including:

- International Law;

¹⁹ Ibid.

²⁰ ODI, Achieving Equal Access to Justice for all by 2030, Working Paper 537, July 2018, p.1.

²¹ SDG16 Data Initiative, 2018 Global Report, July 2018, p.11.

²² A/RES/67/187; United Nations Office on Drugs and Crime, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Vienna, June 2013.

²³ Ibid, paragraph 1.

²⁴ Ibid, Principle 10, paragraph 32.

²⁵ Ibid, paragraph 57.

²⁶ Pleasence P. *et al.* (2013), Paths to Justice: A past, present and future road map, Nuffield Foundation and Centre for Empirical Legal Studies, p. 62.

- International Commentary;
- Regional Standards; and
- Statements.

2.2.1. The Right to Access to Justice in International Law

The Universal Declaration of Human Rights (UDHR) recognises a broad conception of the right:

*“everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.*²⁷

The International Covenant on Civil and Political Rights (ICCPR) provides for the same right in more detail by requiring each State Party to the Covenant to undertake:

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

*c. To ensure that the competent authorities shall enforce such remedies when granted.*²⁸

The Covenant also includes a comprehensive article on equality before courts and tribunals.²⁹ It includes criminal and other proceedings at article 14(1):

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*³⁰

The Committee has interpreted article 14 to include a number of due process guarantees including those described in General Comment No.32 (2007) on the right to equality before the courts and tribunals and to a fair hearing.³¹ Paragraphs 14(2) to 14(5) creates substantive and procedural guarantees within the criminal law systems.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a similar provision. Nevertheless, a State Party seeking to justify its failure to provide any domestic legal remedies for violation of economic, social and cultural rights would need to show either that such remedies are not appropriate means within the terms of article 2/1 of the ICESCR or that, in view of the other means used, they are unnecessary.

Access to justice is also recognized under Declaration on the Rights of Indigenous Peoples,³² the Convention on the Rights of Persons with Disability (CRPD),³³ and the United Nations Convention on the Rights of the Child (UNCRC).³⁴

²⁷ Art.8.

²⁸ Art.2(3).

²⁹ Art.14.

³⁰ Art.14(1).

³¹ CCPR/C/GC/32

³² Article 40.

³³ Article 13

³⁴ Articles 37 and 40.

2.2.2. International Commentary

The importance of the right to access to justice is reinforced by its inclusion in commentary and general comments:

- The Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993;³⁵
- Committee on the Elimination of Discrimination against Women General Recommendation No. 33 on women's access to justice;³⁶ and
- Committee on the Rights of persons with Disability General Comment No.1 (2014) Article 12: Equal Recognition before the Law.³⁷

Each of these comments has application to older persons.

2.2.3. Regional Instruments

Regional instruments on the rights of older persons reflect various formulations of the right to access to justice include:

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (the African Protocol) at article 4;
- Inter-American Convention on Protecting the Human Rights of Older Persons (the Inter-American Convention) at article 31; and
- Various European human rights standards including European Union (Charter of Fundamental Rights, Article 47 (right to an effective remedy) Charter of Fundamental Rights, Article 51 (field of application) Charter of Fundamental Rights, Article 52 (3) (scope of interpretation of rights and principles) Treaty on European Union (TEU), Article 4 (3) TEU, Article 19) and Council of Europe (ECHR, Article 6 (right to a fair trial) ECHR, Article 13 (right to an effective remedy) ECHR, Article 35 (admissibility criteria) ECHR, Article 46 (binding force and execution of judgments)).

Access to justice is a free-standing right in the Inter-American Convention:

Article 31

Access to justice

Older persons have the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against them or for the determination of their rights and obligations of a civil, labor, fiscal, or any other nature. States Parties shall ensure effective access to justice for older persons on an equal basis with others, including through the provision of procedural accommodations in all legal and administrative proceedings at any stage.

State Parties shall ensure due diligence and preferential treatment for older persons in processing, settlement of, and enforcement of decisions in administrative and legal proceedings.

Judicial action must be particularly expedited in instances where the health or life of the older person may be at risk. Likewise, States Parties shall develop and strengthen public policies and programs to promote:

a. Alternative dispute settlement mechanisms;

³⁵ Paragraph 27.

³⁶ CEDAW/C/GC/33, see paragraph 8.

³⁷ CRPD/C/GC/1

b. Training in protection of the rights of older persons for personnel associated with the administration of justice, including police and prison staff.

The Inter-American Convention describes the rights and obligations of a criminal, civil, labor, fiscal, or any other nature.

In the African Protocol the right to access to justice is combined with the right to equality before the law:

Article 4 Access to Justice and Equal protection before the law

States Parties shall:

- 1. Develop and review existing legislation to ensure that Older Persons receive equal treatment and protection;*
- 2. Ensure the provision of legal assistance to Older Persons in order to protect their rights; and*
- 3. Ensure that law enforcement organs at all levels are trained to effectively interpret and enforce policies and legislation to protect the rights of Older Persons.*

In the Council of Europe's Recommendation on the Promotion of the Human Rights of Older Persons it is described within administration of justice:

VII. Administration of justice

51. In the determination of their civil rights and obligations or of any criminal charge against them, older persons are entitled to a fair trial within a reasonable time within the meaning of Article 6 of the European Convention on Human Rights. Member States should take appropriate measures to accommodate the course of the judicial proceedings to the needs of older persons, for example by providing, where appropriate, free legal assistance and legal aid.

52. The competent judicial authorities should display particular diligence in handling cases in which older persons are involved. In particular, they should duly take into account their age and health.

53. Member States shall ensure that detention of older persons does not amount to inhuman or degrading treatment. The assessment of the minimum level of severity for a treatment to be considered inhuman or degrading depends on several factors, including the age and health of the person. Consideration should be given to alternatives to detention of older persons.

54. Member States shall safeguard the well-being and dignity of older persons in detention. In particular, they should ensure that the health of older persons is monitored at regular intervals and that they receive appropriate medical and mental health care. Moreover, member States should provide older persons in detention with conditions appropriate to their age, including appropriate access to sanitary, sports, education and training and leisure facilities. Member States should ensure social reintegration of older persons after release.³⁸

2.2.4. Statements & Reports

A range of statements and reports are relevant to the right to access justice:

- The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels includes a statement on the importance and components of access to justice,³⁹

³⁸ Recommendation CM/Rec(2014)2.

³⁹ A/RES/67/1.

- The OECD Riga Statement “Investing in Access to Justice for all!” High-Level Panel, OECD Roundtable on Equal Access to Justice Riga, Latvia, July 2018;⁴⁰
- Basic Principles on the Role of Lawyers;⁴¹
- Basic Principles on the Independence of the Judiciary;⁴²
- Guidelines on the Role of Prosecutors;⁴³
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;⁴⁴ and
- Updated Set of principles for the protection and promotion of human rights through action to combat impunity (including rights to know, justice and reparation).⁴⁵

While these statements have general application, some acknowledge age. The Riga Statement notes the interconnection between gender issues and older persons, when failure to provide access justice for women can have intergenerational effects on children or older people as women often take responsibility for their care.⁴⁶

2.3. Specific Issues for Particular Groups or Thematic Examples

There are examples of statements or principles on particular groups or themes on access to justice that apply to older persons.

2.3.1. Particular Groups that include Older Persons

Specific access to justice issues arise in respect of women. The General Assembly noted:

*16. We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.*⁴⁷

Other specific areas include women in custodial and non-custodial settings.⁴⁸

The International Convention on the Elimination of Racial Discrimination includes limited rights on accessing justice.⁴⁹

⁴⁰ <https://www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-latvia-2018.htm>

⁴¹ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

⁴² A/Res/40/32; A/Res/40/146.

⁴³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

⁴⁴ E189/65.

⁴⁵ E/CN.4/2005/102/Add.1

⁴⁶ OECD Riga Statement “Investing in Access to Justice for all!” High-Level Panel, OECD Roundtable on Equal Access to Justice Riga, Latvia, July 2018, paragraph 4.

⁴⁷ Ibid.

⁴⁸ A/C.3/65/L.5 (The Bangkok Rules).

⁴⁹ Article 5(a).

In respect of the rights of persons with disabilities, rights to access to justice are included in the Declaration on the Rights of Mentally Retarded Persons.⁵⁰ Additionally, Article 13 of the Convention on the Rights of Persons with Disabilities provides:

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.'

The Report of the OHCHR on article 13 summarised barriers faced by persons with disabilities:

4. Persons with disabilities face significant obstacles in accessing justice, including criminal proceedings and the determination of civil rights and obligations. These obstacles include denial of their legal standing and due process guarantees and the inaccessibility of the physical and communication environments during proceedings. Furthermore, national legislation often contains provisions that deny equal treatment of persons with disabilities before courts and other jurisdictional bodies.⁵¹

The OHCHR summarised the key issues arising under article 13 as including:

- Equality before the courts and right to a fair trial:
 - Accessibility and access to information;
 - Procedural and age-appropriate accommodations;
 - Right to claim justice and stand trial;
 - Presumption of innocence; and
 - Legal aid.
- Right to an Effective Remedy:
 - Duty to investigate;
 - Independent monitoring frameworks; and
 - Redress and reparation.
- Participation in the administration of justice:
 - Access to justice as an integral part of governance; and
 - Training in the fields of administration of justice and legal education.

2.3.2. Thematic Issues that involve Older Persons

Thematic examples that involve or are relevant to older persons' access to justice include:

- A range of instruments on the treatment of prisoners and detained persons;⁵²
- Declaration and Convention on the Protection of all Persons from Enforced Disappearance;⁵³
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;

⁵⁰ Paragraph 6.

⁵¹ A/HRC/37/25, p.3.

⁵² A/Res/70/175 (The Nelson Mandela Rules); A/RES/45/111 (; A/RES/43/179; A/RES/55/89; E/1984/50; A/RES/45/110 (The Tokyo Rules)

⁵³ A/RES/47/133.

- Access to Justice for the right to housing;⁵⁴
- Access to Justice for victims of crime or abuse of power;⁵⁵
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;⁵⁶
- Access to justice for migrant workers;⁵⁷
- Access to Justice by people living in poverty: Extreme poverty and human rights;⁵⁸ and
- Access to justice in the promotion and protection of the rights of Indigenous Peoples.⁵⁹

2.4. Specific Recognition of Older Persons

A commonly noted issue with protecting older persons rights is their absence in existing normative standards other than by implication. The ICCPR (art.14) and other norms such as the *European Convention on Human Rights* (art.6) applies to older persons through a broad construction of ‘other status’ provisions.⁶⁰

2.4.1. The United Nations Principles for Older Persons

The United Nations Principles for Older Persons provide limited recognition of access to justice under Care, at principle 12 which states, “12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.”⁶¹ Other principles depend on access to justice to be asserted, for example under, the principles of ‘care’:

Care

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Under the principles of ‘dignity’:

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

⁵⁴ [A/HRC/40/61](#)

⁵⁵ [A/RES/40/34](#)

⁵⁶ [A/RES/60/147](#).

⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art 14(6).

⁵⁸ [A/67/278](#)

⁵⁹ [A/HRC/24/50](#)

⁶⁰ See General Comment 18: HRI/GEN/1/Rev.9 (Vol. I); See commentary in Rodríguez-Pinzón, Diego and Claudia Martin. "The International Human Rights Status of Elderly Persons." *American University International Law Review* 18, no. 4 (2003): 915-1008.

For ECtHR see for example the application in E [Schwizgebel v. Switzerland](#) (application no. [25762/07](#)).

⁶¹ [A/RES/46/91](#).

2.4.2. Research and Analysis (Including Legal Needs)

The issue of older persons' right to access justice has not been subject to any significant United Nations' analysis. The Office of the High Commissioner for Human Rights' 2013 Compilation of existing international legal instruments, documents and programmes that address the situation of older persons noted limited access to justice applications for older persons including the CRPD's inclusion of age-appropriate accommodations at art.13.⁶² The OHCHR's Summary report of the consultation on the promotion and protection of the human rights of older persons noted "Issues were also raised about lack of accommodation of the needs of older persons to ensure access to justice and to information (including difficulties arising from mandatory digitalization), and the lack of measures to promote political participation."⁶³

The UN's 2012 the Expert Group Meeting on the Human Rights of Older Persons considered access to justice and noted:

Session 6 - Older persons and the justice system

The meeting discussed the rights of older persons in the justice system and their right to a remedy.

Older persons face a number of obstacles when they access the justice system as litigants, plaintiffs, defendants and jurors. When they participate in the administration of justice as litigants, older persons have right to be assisted by a legal counsel of their choice on an equal basis with others. However, participants stressed that many older people do not know how to find a lawyer or cannot afford one. Furthermore, it was stressed that where legal advice is provided on a pro bono basis, this can be of low quality.

The experts stressed that at times lawyers are not familiar with the difficulties that older persons face within the justice system. For this reason, experts highlighted the need to ensure that those working in the field of administration of justice, including police and prosecutors, be trained on how to ensure effective access to justice for older persons. In this regard, specific reference was made to articles 12 and 13 of the CRPD. Access to alternative dispute resolution for older people could also prove useful to address the challenges faced by older persons in the justice system.

Participants also discussed the accessibility requirements older persons may have. Court rooms should be accessible for older persons, and court procedures should be adapted to ensure that older persons be allowed to participate on an equal basis with others. For example, participants mentioned that judges and legal practitioners should tailor their language to the particular situation and needs of older persons participating in the proceedings. In elder abuse cases, participants stressed that an enabling environment needs to be created to facilitate the participation of older persons in the field of administration of justice and preserve the accuracy of their testimonies. The mandatory age for retirement to which judges are subject in many legal systems and exclusions of jurors on the basis of age was also discussed.

⁶² World Justice Project, Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World, 2019, p.18.

⁶³ A/HRC/24/25

The situation of older defendants and prisoners was also raised. Where older persons are accused of a crime, they need support and accommodation to be able to defend themselves effectively.

Furthermore, specific issues arise with regard to older prisoners, such as health issues, the need for mobility aids, medical and dental care, depression, stress and fear of dying in prison. Participants also discussed what forms of sentences were more suitable for older persons. Re-entry into society is also an issue of particular relevance for older prisoners, since as they may have no or limited pensions, no family and no or limited access to health care. Participants agreed that there may be a need for more targeted re-entry planning.

One of the participants suggested considering the issue of legal capacity of older persons in the light of article 12 of the CRPD, which requires States to move from substituted decision making to supported decision making. Accessibility and reasonable accommodation in all matters related to legal capacity are also required under the CRPD framework. Implementing Article 12 of CRPD has required legal reform and changes to practices including awareness-raising, new services, changing service systems, and establishing support networks including and beyond family. The CRPD does not contemplate restricting autonomy or legal capacity in order to prevent abuse or exploitation; rather, it has provisions for proactive measures aimed at prevention of all forms of violence, exploitation and abuse in Article 16 including providing information and education to persons with disabilities and their family members and carers on how to recognize and report; recovery/reintegration; prosecution; monitoring of facilities and programmes.⁶⁴

Williams (part of the EGM process) suggested barriers to access to justice included:

- Invisibility of older people;
- Failure to recognise that crimes against older people can have a disproportionate impact on their independence, development, and security;
- ‘Well intentioned ageism’ means that alternative approaches are adopted that concentrate on welfare;
- Lack of appropriate support through the criminal justice process;
- Fear of victimisation;
- Low self-esteem;
- Pre-conceived ideas about older people as witnesses;⁶⁵

The World Justice Report’s Global Insights on Access to Justice noted “With traditionally marginalized groups – including the poor, youth, women, ethnic minorities, the elderly, and migrants – reporting a greater number of legal problems, access to justice should be viewed as a main driver of inclusive development and growth.”⁶⁶ They are among the most likely to lack legal identity and suffer further exclusion as a result.⁶⁷

⁶⁴ <https://social.un.org/ageing-working-group/documents/egm/SummaryReportEGM.pdf>

⁶⁵ <https://social.un.org/ageing-working-group/documents/egm/Session%206-John%20Williams.pdf>

⁶⁶ The World Justice Project, Global Insights on Access to Justice, Findings from the World Justice Project general Population Poll in 101 Countries, 2019, p.6.

⁶⁷ World Justice Project, Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World, 2019, p.18.

The OECD has suggested, “As people get older, the consolidation of families, arrival of children, home ownership, increased consumption and debt are associated with vulnerability to different legal issues. And, as people enter their later years, increased need for medical treatment and care and diminishing powers of decision-making are associated with vulnerability to yet different legal issues.”⁶⁸

Other research has highlighted that older person’s need specific joined up and creative approaches.⁶⁹

2.4.3. Older Prisoners and Detainees

Older prisoners have been identified as a special group of older persons within the justice system that need careful consideration. The OHCHR has noted:

Older persons in prison and access to justice

60. *The growing population of older persons in prisons poses a new set of challenges, virtually unexplored by treaty monitoring mechanisms to date. Safe conditions of confinement, in particular for those older people in need of special support, demands entirely different considerations, such as extra clothing in the winter, mobility arrangements within facilities and cells, special protection against violence and extortion within prison structure, and age-appropriate educational and vocational opportunities. Imprisoning older persons may require greater financial expense because of the specific needs related, for example, to cognitive limitations associated with conditions like dementia and chronic, disabling and terminal illnesses. Prison officials are struggling to meet these challenges, often due to a lack of resources, inadequate planning and lack of adequate training of staff.*

61. *Other issues ripe for consideration are whether the continued incarceration of older persons is a disproportionately severe punishment and whether humanitarian considerations should apply to prisoners at a certain age. Considering the purposes of punishment – retribution, incapacitation, deterrence, and rehabilitation – there may be little justification for many older persons’ continued incarceration in the prison system in certain instances. Instead, alternative forms of punishment may be preferable based on the financial, practical, and human rights considerations involved.*

62. *Beyond the prison system, access to justice more broadly requires an enhanced awareness by older persons of their legal rights, legal aid and an increased availability of effective remedies. Older persons often fear to report violations or abuses because of their dependency on the abuser, concern for repercussions, anxiety over a lack of support or lack of familiarity with reliable mechanisms. Ensuring the political participation of older persons is necessary to guarantee that States develop age-sensitive laws and policies to implement and mainstream access to the required protections.*⁷⁰

⁶⁸ OECD, OECD Expert Roundtable Background Notes, Equal Access to Justice, October 2015, p.11.

⁶⁹ Duffy, J., Basu, S. and Pearson, K.C. (Duffy, J. *et al.*) (2012), “Older People and Legal Advice: The Need For Joined Up and Creative Approaches,” in 34(1) Journal of Social Welfare and Family Law, pp.31-47.

⁷⁰ E/2012/51

2.4.4. Peasants and those in Rural Areas

The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas is a recent standard of relevance.⁷¹ Older peasants and those living and working in agricultural and rural areas and indigenous people can be particularly vulnerable. The Declaration make specific mention of older persons,⁷² and age.⁷³

Article 12 of the Declaration provides:

Article 12

1. Peasants and other people working in rural areas have the right to effective and non-discriminatory access to justice, including access to fair procedures for the resolution of disputes and to effective remedies for all infringements of their human rights. Such decisions shall give due consideration to their customs, traditions, rules and legal systems in conformity with relevant obligations under international human rights law.

2. States shall provide for non-discriminatory access, through impartial and competent judicial and administrative bodies, to timely, affordable and effective means of resolving disputes in the language of the persons concerned, and shall provide effective and prompt remedies, which may include a right of appeal, restitution, indemnity, compensation and reparation.

3. Peasants and other people working in rural areas have the right to legal assistance. States shall consider additional measures, including legal aid, to support peasants and other people working in rural areas who would otherwise not have access to administrative and judicial services.

4. States shall consider measures to strengthen relevant national institutions for the promotion and protection of all human rights, including the rights described in the present Declaration.

5. States shall provide peasants and other people working in rural areas with effective mechanisms for the prevention of and redress for any action that has the aim or effect of violating their human rights, arbitrarily dispossessing them of their land and natural resources or of depriving them of their means of subsistence and integrity, and for any form of forced sedentarization or population displacement.

2.4.5. Older Indigenous Persons

Older indigenous persons have been identified as having special needs in the justice system. In Australia, factors recognised have included historic, cultural and trauma-related issues including historical abuses such as stolen wages and institutionalization.⁷⁴

2.5. Access to Justice Indicators

Substantial research has been done on access to justice indicators, though little addresses the needs of older persons.

⁷¹ A/RES/73/165

⁷² Art.2(2).

⁷³ Art.3(1).

⁷⁴ See for example Cunneen C and Schwartz M (2009) Civil and family law needs of Indigenous people in New South Wales: The priority areas. University of New South Wales Law Journal 32(3): 725-745.

2.5.1. General Indicators

Early work in the Asia Pacific considered three indicators: Existence of a remedy; Capacity to seek remedy; and Capacity to provide effective remedies.⁷⁵

Indicators also include those enumerated by Parker:⁷⁶

- Accessibility of court processes for resolving disputes over mutual rights and responsibilities;
- Availability of adequate legal representation in criminal trials;
- Access to more informal legal processes such as small claims courts and administrative tribunals;
- Availability of legal advice;
- Public legal education

The Organisation for Economic Co-operation and Development (OECD) has suggested effective access to justice can be assessed against three (3) components:

- The nature and extent of unmet legal and justice needs and methodologies to understand people's access to justice;
- The impact of unmet legal and justice needs on individuals, the community and the state; and
- The effectiveness of specific models of legal assistance in meeting these identified needs.⁷⁷

This accords with the Taskforce on Justice's three-stage approach to improve access to justice:

1. Empower people and communities

People are empowered so that they can act when a legal need arises. They are helped to understand the law and seek a solution, with legal aid provided to the most vulnerable.

2. Access to people-centered justice services

People have access to services that are responsive to their needs and offer alternative and less adversarial pathways to justice. One-stop shops provide a range of services under one roof, while specialist services help those with more complex problems.

3. Fair outcomes

People achieve a resolution to their problem that is fair and meets standards for human rights. Remedies are appropriate and promote reconciliation. Data is used to judge whether people receive a satisfactory resolution. Grievance mechanisms listen and respond to those who feel badly treated.⁷⁸

The Justice for All Report of the Taskforce on Justice noted:

In the past, justice reforms have often focused on institutions that are distant from people and fail to serve their needs. The Task Force proposes a different approach, putting people at the center of justice systems and justice at the heart of sustainable development. A people-centered approach to justice starts with an understanding of people's justice needs and designs solutions to respond to them. It is delivered by a justice system that is open and inclusive, and that works in collaboration with other sectors such as health, education, housing, and employment.⁷⁹

⁷⁵ La Salle Institute of Governance, Background Paper on Access to Justice Indicators in the Asia Pacific Region, October 2003, p.1.

⁷⁶ Parker, Christine. (1999). Just lawyers: Regulation and access to justice. Oxford: Oxford University Press.

⁷⁷ <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>

⁷⁸ Task Force on Justice, Justice for All – Final Report. (New York: Center on International Cooperation, 2019), available at <https://www.justice.sdg16.plus/>, p.21-22.

⁷⁹ Task Force on Justice, Justice for All – Final Report. (New York: Center on International Cooperation, 2019), available at <https://www.justice.sdg16.plus/>, 16.

2.5.2. Specific Indicators

The newly mooted International Older Person's Human Rights Index (IOPHRI) places national legal aid laws within an empowerment dimension, which covers laws that focus on changing the power relationships older persons face in society.⁸⁰ It adopts access to justice as a critical measure of older persons' human rights. Similarly, the World Justice project's report *Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World*⁸¹

*Because there are a multitude of ways to conceptualize and measure justice, the justice gap assessment follows a practical approach and categorizes people around three broad types of unmet needs that arise when people cannot defend or enforce their rights, or obtain a just resolution of their justiciable problems: 1) people who cannot obtain justice for everyday civil, administrative, or criminal justice problems; 2) people who are excluded from the opportunities the law provides; and 3) people who live in extreme conditions of injustice. Having established these key categories, the justice gap can be understood as the number of people who have at least one unmet justice need. These are people who are ultimately not getting the justice they need for both everyday problems and severe injustices.*⁸²

2.6. Specific Barriers for Older Persons

One area that has seen limited specific research is on access to justice barriers for older persons. The 'Legal Needs of Older People in New South Wales' (2004) – a provincial Australian study reported older persons' particular vulnerability in dealing with conflict was a major factor in the difficulties they experience in accessing legal assistance. They noted physical and mental incapacity, dependency on others, diminished self-confidence, anxiety about the possible consequences, and ignorance of the available services were factors that presented barriers to seeking legal assistance.⁸³ Further, older persons found it difficult to identify what they need or want to know about their legal rights. The research points to a grave knowledge gap, likely made worse by digital disruption or their place on the digital continuum.

The 'Australia-Wide Legal Needs Survey' (2012) found older persons had the lowest prevalence of legal problems, low rates of taking legal advice and legal action, low rates of finalization of legal problems, and lacked knowledge and literacy of legal pathways.⁸⁴ The Law Council of Australia's 'Justice Project' (2018) provided a recent, comprehensive accounting of the barriers to accessing justice faced by older persons including:

- Ageism and age discrimination;
- Financial disadvantage;
- Inadequate social security, social protections and social supports;
- Individual psychological barriers;
- The lack of expedition in justice systems;

⁸⁰ Doron, Israel and Cox, Carole and Spanier, Benny, *Comparing Older Persons' Human Rights: Exploratory Study of the International Older Persons' Human Rights Index (IOPHRI)* (December 1, 2018). *The Gerontologist*, DOI:/10.1093/geront/gny080 . Available at SSRN: <https://ssrn.com/abstract=3294213>

⁸¹ World Justice Project, *Measuring the Justice Gap, A People-centered Assessment of Unmet Justice Needs around the World*, 2019.

⁸² *Ibid*, p.4.

⁸³ Law and Justice Foundation of New South Wales, 'The legal needs of older people in NSW', 2004; Law and Justice Foundation of New South Wales, 'Legal Information Needs of Older People', 2004, iv.

⁸⁴ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. Mcdonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia-Wide Survey on Legal Needs in Australia, Access to Justice on Legal Needs Volume 7', Law and Justice Foundation of New South Wales, 2012, 16-17.

- Social, digital and financial exclusion;
- Lack of expertise and specialist services;
- Restricted access to legal assistance;
- A paucity of specialist laws and policies;
- Power imbalances in modes of representation; and
- The loss of autonomy and independence.⁸⁵

A particular barrier older persons face is the time legal processes, especially litigation, take. While this is a universal problem, for older persons this becomes a critical issue, as in many cases the lengthening of the process means that by the time the process ends they are not alive to enjoy the outcome.

2.7. Solutions

Access to justice solutions need to be

- Based on data and evidence based;⁸⁶
- innovative and collaborative;
- focus on just outcomes;
- use technology as a tool;
- have sustainable financing.⁸⁷

Work in the USA noted that accessing legal aid services achieved positive outcomes for older persons:

Clients achieved increased security in achieving and protecting their basic needs and human rights, including food, shelter, health care, personal safety, and family relationships. The majority of the participants who responded to the survey were able to obtain legal resolution to their problem. The majority of survey participants also reported that they were better off, and over 70% reported that Legal Aid made a difference in their lives. The clients did learn what options were available to solve their legal problems. Over 70% of participants stated that they understood their options, and over 60% felt that Legal Aid helped them have their voice heard in the legal system.⁸⁸

The “location” of justice, its physical accessibility and “age-friendliness” is also of key importance. Older people are sometimes home-bound, or have issues and difficulties in physically accessing the courts (no accessible or near public transport). Once they get to the court they are “lost” in the big halls, both physically, mentally and legally. Establishing an “age-friendly” court system is essential.

⁸⁵ Law Council of Australia, ‘The Justice Project, Final Report Part 1: Older Persons’, 2018.

⁸⁶ The OECD has noted the need for selected methodologies including legal needs surveys, legal needs assessments, Collection of data on use of and satisfaction with legal and justice services, Institutional mapping projects and legal help checklists. See

⁸⁷ The World Justice Project, World Justice Forum Report 2019, April 29-May 2 2019 The Hague, Netherlands, p.5.

⁸⁸ J Goldberg and S Predeoux, ‘Maryland Legal Aid Outcomes Survey – Measuring the Impact of Legal Aid’s Services for Older Adults’, Maryland Legal Aid, July 2009, p.11.

2.8. Suggested Normative Content of the Right to Access to Justice in Older Age

Older persons have the right to access to justice on an equal basis with others, including through the provision of procedural accommodations in all legal and administrative proceedings at any stage in order to facilitate their effective role as direct or indirect participants, and prevent unnecessary delay in legal proceedings, particularly in situations of immediacy.

Older persons have the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against them or for the determination of their rights and obligations of a civil, labour, fiscal, or any other nature.

Older persons have the right to prompt, effective and appropriate remedies and redress.

State obligations

State Parties shall take steps and measures to ensure:

Legal Guarantees

- Access to justice for all older persons is guaranteed under the law
- Older persons' legal standing and legal agency is guaranteed under the law on an equal basis with others and cannot be denied on the basis of age
- Legal aid for older persons is guaranteed under the law and is not restricted on the basis of the older person's own or their family's income

Non-discrimination

- Older persons have access to legal services, including legal assistance and legal aid on an equal basis with others.
- Older persons can be equal and active participants in all aspects of the justice system, as plaintiffs and defendants as well as judges, lawyers, jury-members, members of other legal tribunals and institutions
- No stage of judicial proceedings is influenced by ageist stereotypes

Availability and accessibility

- Justice entities and related emergency and support services, such as legal aid, shelters, hotlines and counselling, are maintained, funded and affordable and available to all older persons in whichever setting they live
- Courtrooms, legal tribunals and other justice-related facilities are accessible to all older persons
- Reasonable accommodation is available to individual older persons to access justice and victim support
- Information and public education programmes about their legal rights and access to justice are made available to older persons in appropriate and accessible formats
- Facilitation of the effective role of older persons as participants at all stages of legal proceedings on an equal basis with others.
- Adequate and appropriate training on ageing and the rights of older persons for all those working in the administration of justice and law enforcement, including the judiciary, police and prison staff

Remedies and redress

- Older persons have access to prompt remedies and redress and which are appropriate, effective and holistic, including rights of appeal, restitution, indemnity, compensation and reparation
- Non-curial procedures (e.g. Ombuds procedures or specialist inspectors or commissioners) can play a role in providing remedies to older persons and in respect of ageing issues

Older prisoners

- Prison regimes accommodate 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
- Older prisoners have equal access to services, including physical, mental and cognitive health, dental, hygiene and hospice services, and social and other support services available to the general population.