

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)**

**SUBMITS**

**RESPONSE TO THE QUESTIONNAIRE ON THE RIGHTS OF OLDER PERSONS WITH DISABILITIES**

**SUBMITTED TO THE SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES (TOWARDS THE MANDATE’S REPORT FOR THE 74TH SESSION OF THE GENERAL ASSEMBLY ON THE RIGHTS OF OLDER PERSONS WITH DISABILITIES)**

**31ST MAY 2019**

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**Questionnaire on the rights of older persons with disabilities - Kenya**

1. **Please provide information on the legislative and policy framework in place in your country to ensure the realization of the rights of older persons with disabilities, including both persons with disabilities who are ageing and older persons who acquire a disability later in life.**
	1. **Legislative Framework in Kenya**
		1. **The Constitution**

Under Article 57, the Constitution of Kenya obligates the state to take measures to ensure Older Persons’ rights to participate fully in the affairs of society, to pursue personal development, to live in dignity, respect and protection from abuse; and together with the family, the obligation to provide care and reasonable assistance to Older Persons. Although this Article refers to older persons in general, it by implication includes older persons with disabilities.

Article 10 (2) (b) underlines the states obligation to protect marginalized groups to ensure that they enjoy the right to human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalization. Older persons with disabilities constitute a marginalized group and are therefore protected under this Article.

Article 21 (3) obligates State organs and public officers to address the needs of Older Persons and other vulnerable groups when it comes to the implementation of rights and fundamental freedoms. This by implication includes the group of older persons with disabilities.

Article 27 (4) promotes and safeguards equality and non-discrimination of Older Persons based on age as well as non-discrimination on the basis of disability. Although these are two different grounds for non-discrimination, older persons who suffer from disabilities face double discrimination and are protected under this Article.

Article 43 (3) obligates the state to provide appropriate social security to persons who are unable to support themselves in order guarantee their socio-economic rights. This can be interpreted to mean older persons with disabilities.[[1]](#footnote-1)

Article 54 of the Constitution is entirely on the rights of persons with disabilities. The article guarantees persons with disabilities a variety of rights including the right to be treated with dignity and respect, to access educational facilities, to reasonable access to all places and to access materials and devices to overcome constraints arising from the person’s disability.

* + 1. **Other Legislation**

The Persons with Disabilities Act[[2]](#footnote-2) safeguards the rights of persons with disability in Kenya and provides for the realization of these rights. Section 15(6) of the Act provides that the minimum age of retirement age for persons with disability shall be 60 years. This protects older persons with disability from unfair/forced retirement while ensuring they have the right to fully participate as productive members in society.

Section 33(2)(e)(ii) of the Act provides that older persons with disabilities are entitled to be paid allowances from the National Development Fund for Persons with Disabilities if they have no other source of income.[[3]](#footnote-3)

The National Hospital Insurance Fund (NHIF) Act establishes the NHIF Fund to receive contributions and make payments out of the Fund to declared hospitals in accordance with the provisions of the Act.[[4]](#footnote-4) The Act does not specifically mention older persons but Section 15 defines contributors to the Fund as persons ordinarily resident in Kenya who have attained the age of 18 years and whose monthly income meets a prescribed minimum whether they are salaried or self-employed. By implication this includes not only older persons, but older persons with disabilities so long as their monthly income meets the prescribed minimum.

The National Social Security Fund (NSSF) Act establishes the NSSF Fund to provide basic social security for its members and their dependents for various contingencies.[[5]](#footnote-5) It does not specifically mention older persons but Section 2 of the Act defines a member as including any person who is registered as a member of the Pension Fund; by implication this includes older persons with disabilities who are pensioners as members.

The Pensions Act[[6]](#footnote-6) provides the right to pension for all public officers meaning those who have served in the public service. It does not specifically mention older persons much less older persons with disability but by implication it makes provision for payments to be made to retirees in their old age regardless of ability or lack thereof.

The Care and Protection of Older Members of Society Bill 2018 is a national legislative bill yet to be enacted as an Act of Parliament. It seeks to provide a framework for the care of older members of society; to establish a framework for the empowerment and protection of the elderly and the maintenance of their well-being, safety and security. Section 4(d) provides one of the guiding principles of the Bill as the protection of older members of society from discrimination on any ground including age, health status or disability. The Bill therefore takes into account the plight of older persons with disabilities.

* 1. **Policy Framework in Kenya**

The guiding policy on older persons in Kenya is the National Policy on Older Persons and Ageing as reviewed and adopted in January 2014. This is a comprehensive policy document which provides overall national guidance for dealing with all issues pertaining to the realization of older persons rights.

In reference to the rights of older persons with disabilities the policy provides for the government to put in place programs for social protection which include social assistance which comes from cash transfers that target older persons and persons with severe disabilities.[[7]](#footnote-7)

Furthermore the policy considers cross-cutting issues on older persons explicitly from the disability angle. It specifically recognizes older persons with disabilities and sets out this marginalized group as a target group of the entire policy. It provides that as follows:

Older Persons and Disability

When persons grow older they tend to experience impairment conditions and illnesses that have significant long-term effects on an individuals ability to carry out day-to-day activities. This results into them being Older Persons with disability. On the contrary, there are those persons who have lived with disabilities throughout their lifetime whose condition is intensified by Old Age. This policy therefore targets both categories of Older Persons with disability, with a gender perspective.[[8]](#footnote-8)

The policy also provides that government shall with relevant stakeholders ensure all data and statistics on older persons is disaggregated by age and sex and includes disability status.[[9]](#footnote-9) This is to ensure that older persons with disabilities as a disadvantaged group within an already marginalized group; are recognized and catered for.

Prior to the adoption of the National Policy on Older Persons and Ageing 2009, issues of Older Persons were addressed through the Government Sessional Paper No. 7 of 1971 on Social Welfare, which provided broad guidelines for targeting Older Persons and other vulnerable groups. There was also a commitment by the government in the National Development Plan 2002-2008, which included an annual budgetary allocation for disadvantaged persons.[[10]](#footnote-10)

There is no specific government policy which deals exclusively with the rights of older persons with disabilities in Kenya.

1. **Please provide information on discrimination against older persons with disabilities in law and practice.**

Refer to Question Number 5

1. **Please provide information and statistical data (including surveys, censuses, administrative data, literature, reports, and studies) related to the realization of the rights of older persons with disabilities in general, as well as with particular focus in the following areas:**
* **Exercise of legal capacity**

Section 43(4)(e) of the Sexual Offences Act presumes people with ‘mental impairment’ cannot give consent for intimate sexual relationships; this may include older persons, especially those with cognitive disabilities. This section denies the right of persons with disabilities to exercise legal capacity with regard to making decisions on intimate sexual relationships. While the section applies to both men and women, women are disproportionately affected because culturally, women with disabilities are seen as asexual.

Section 11(2)(c) of the Marriage Act presumes that persons with any ‘mental disorder or mental disability whether temporary or permanent’ cannot give consent to marriage; this section denies the right of persons with psychosocial disabilities and persons with intellectual disabilities to marry and found a family. This includes older persons with these disabilities. Section 73(1) (g), allows annulment of marriage on grounds that a person ‘suffers recurrent bouts of insanity’, while section 66(6)(g) makes ‘insanity’ a ground of divorce. All these sections deny the right to exercise legal capacity in making the decision to marry and found a family in a manner that is discriminatory on grounds of disability, and apply also to older persons with disabilities.

* **Admission procedures to social or healthcare services, including involuntary admissions;-**

Part VII of the Mental Health Act governs emergency admission of persons with psychosocial disabilities, including older persons with psychosocial disabilities. According the section 16 of the Act, emergency admission may be initiated by: a police officer of or above the rank of inspector; the officer in charge of a police station; an administrative officer; a chief or an assistant chief. A police officer of or above the rank of inspector, an officer in charge of a police station, an administrative officer, a chief or assistant chief may take or cause to be taken into his custody the following persons:

1. any person whom he believes to be suffering from mental disorder and who is found within the limits of his jurisdiction; and
2. any person within the limits of his jurisdiction whom he believes is dangerous to himself or to others, or who, because of the mental disorder acts or is likely to act in a manner offensive to public decency; and
3. any person whom he believes to be suffering from mental disorder and is not under proper care and control, or is being cruelly treated or neglected by any relative or other person having charge of him. [[11]](#footnote-11)

From section 16(1) of the Mental Health Act[[12]](#footnote-12) it is clear that the Act takes a status approach to legal capacity in that on the basis of suspected existence of ‘mental disorder’, a person is deemed as being incapable of making a decision on whether or not to seek mental health treatment and a substituted decision-maker (police officer of or above the rank of inspector, officer in charge of a police station, administrative officer, chief or assistant chief) steps in to make that decision for that person. From the elaboration of the grounds for emergency admission above, the basis upon which the police officer, administrative officer, chief or assistant chief (who are not medical professionals) decide that a person is suffering from a mental disorder is not defined. In addition, the manner in which the police officer, administrative officer, chief or assistant chief objectively would reach a conclusion that a person is ‘likely to act in a manner offensive to public decency’ is also not defined. Furthermore, it seems that the fact that a person is being treated cruelly by his relatives should be cause for prosecution of the offending relatives and not the emergency admission of the person to a mental hospital. From the foregoing discussion, it is submitted that the threshold for emergency admission (and subsequent forced treatment) under the Act is too low, and the eligibility for emergency admission too loosely construed.

According to section 14 of the Mental Health Act, a person ‘who is suffering from mental disorder and is likely to benefit by treatment in a mental hospital but is for the time being incapable of expressing himself as willing or unwilling to receive treatment, may, on a written application under this section, be received into a mental hospital as an involuntary patient for treatment’.[[13]](#footnote-13) The threshold for involuntary admission (and subsequent forced treatment), therefore, is predicated on three conditions: a) the person is suffering from a mental disorder;[[14]](#footnote-14) b) the person is likely to benefit by treatment; and c) the person is incapable of expressing himself as willing or unwilling to receive treatment. The Act does not mention how any of the three conditions above are to be gauged. The Act does not stipulate whether the assessment of only one doctor is sufficient and/or that a second opinion on the existence of the above conditions is required.

* **Older persons with disabilities living in institutions;**

**National Standards and Guidelines on the Establishment and Management of Institutions for Older Persons**

These are standards and guidelines issued in March 2018 by the Ministry of Labour and Social Protection specifically by the State Department of Social Protection, Pensions and Senior Citizens. As suggested by their title these standards and guidelines set out requirements for the establishment of institutions for older persons. They also guidelines on the management and operation of such institutions.

Section 7 of the Standards and Guidelines provides generally for the rights and fundamental freedoms of older persons in institutions. Clause 7.1. specifically provides for the rights of older persons with disabilities. It reads as follows:

‘In order to adequately cater for older persons with disability, a medical assessment report from a recognized health facility should be availed. The institutions should ensure that all residents with disabilities are registered with the National Council for Persons with Disability (NCPWD) for them to access the benefits as provided for by the Persons with Disability Act (2003). The institutions should also put measures in place to ensure that the infrastructure is accessible by providing for ramps and guides. Sign language interpreters and braille materials should also be availed.’[[15]](#footnote-15)

* **Access to support to live independently in the community;**

**The Older Persons Cash Transfer Program**

The Older Persons Cash Transfer (OPCT) Program was started in 2007. It started as a pilot in 3 districts, in Thika and Nyando and later implemented in Busia, under the Rapid Response Initiative (RRI)-2007.It is funded by the Government of Kenya. Its objective is to provide regular and predictable cash transfer to poor and vulnerable older persons (65 years and above) in identified deserving households. OPCT is a national program and currently covers 203,011 households (FY 2015/16). The amount paid is KES 2,000 per household per month delivered every two months through appointed payment agent - currently the Equity Bank and Kenya Commercial Bank. The Eligibility Criteria is as follows:

* Older persons must be 65 years and above
* Must be poor and vulnerable
* Beneficiary/Household must not be enrolled in any other Cash Transfer program
* A member of the household must not be receiving any pension and/or regular income
* A member of the household must not be in any gainful employment[[16]](#footnote-16)

There is no mention of disability in the eligibility criteria as this program targets the much wider group of older persons in general. Nevertheless older persons with disability are included although they are not given any additional allowance or special considerations under the program.

* **Access to free or affordable healthcare;**
* **Access to free or affordable rehabilitation goods and services;**
* **Access to social protection schemes; and**
* **End of life and palliative care.**

1. **Please provide information on the existence of long-term care services in your country and describe to what extent they promote the autonomy and independence of older persons with disabilities.**

1. **Please describe how is access to justice guaranteed for older persons with disabilities. Please provide information on jurisprudence, complaints or investigations in relation to violence, abuse and neglect against older persons with disabilities.**

The Kenya National Commission on Human Rights (KNCHR) receives, processes and investigates complaints in regard to human rights violations. The Complaints and Investigations Directorate carries out this work. It receives all petitioners who have complaints to make.

In the year 2016 KNCHR modified its complaints screening forms and petitioners information management system in order to categorize and capture data on petitioners’ ages and disability status. Since 2016 until 21st March 2019 KNCHR has received complaints on human rights violations from seventy-one (71) petitioners who fall in the category of older persons with disabilities.

The alleged violations fall in the categories of civil political rights, socio-economic rights and group rights. Under the category of civil and political rights twenty-two (22) older persons with disabilities made a complaint. To further sub-categorize the civil and political rights violated, most petitioners complained that their right to access justice had been violated by instances of police inaction, lack of effective judicial protection and misconduct of lawyers/advocates. Moreover under civil political rights they also complained of the following rights being violated: right to human dignity, right to life, rights of arrested persons, freedom from torture and cruel treatment, the political right to form a party, right to personal liberty and security, right to property; and right to fair trial.

Under the category of socio-economic rights forty-six (46) older persons with disabilities made a complaint. To further categorize the socio-economic rights violated most petitioners complained that their land rights had been violated by way of ownership, grabbing, trespass, evictions, compulsory acquisition and compensation. Moreover under socio-economic rights they also complained of the following rights being violated: right to an adequate standard of living, right to social security, labour rights, family rights, right to fair administrative action, right to education, child rights and older persons’ rights.

Under the category of group rights three (3) older persons with disabilities made complaints of a general nature: complaints about being conned of money by private citizens and inquiries as to how they can access funds set aside by the government for disabled persons.

Furthermore KNCHR offices throughout Kenya are wheelchair accessible in order to provide ease of access to persons with disabilities. The Commission receives complaints that are made in-person but also by phone, email, website, mail, social media, fax, public forums and referral. This provides older persons with disabilities whose rights are being violated with multiple avenues to reach the Commission and obtain redress. Most older persons with disabilities opted to lodge their complaints physically in-person. The remainder lodged their complaints by telephone and in public forums. The Commission also provides the services of a sign language interpreter for petitioners who are Deaf.

1. **Please describe to what extent and how are older persons with disabilities involved in the design, planning, implementation and evaluation of policies related to ageing and/or disability.**

1. **Please provide information on any innovative initiatives that have been taken at the local, regional or national level to promote and ensure the rights of older persons with disabilities and identify lessons learned from these.**
1. The Constitution of Kenya 2010; National Policy on Older Persons and Aging (Reviewed 2014) [↑](#footnote-ref-1)
2. Act No. 14, 2003, Laws of Kenya [↑](#footnote-ref-2)
3. Ibid [↑](#footnote-ref-3)
4. Section 5(1) of the National Hospital Insurance Fund Act, Act No. 9 of 1998, Laws of Kenya [↑](#footnote-ref-4)
5. Section 4(a) of the National Social Security Fund Act, Act No.45 of 2013, Laws of Kenya [↑](#footnote-ref-5)
6. Cap 189, Laws of Kenya [↑](#footnote-ref-6)
7. Pg 3 Clause 1.2.1 National Policy on Older Persons and Aging (Reviewed 2014) [↑](#footnote-ref-7)
8. Pg 18 Clause 2.10.2. (C) National Policy on Older Persons and Aging (Reviewed 2014) [↑](#footnote-ref-8)
9. Pg 19 Clause 2.10.4 National Policy on Older Persons and Aging (Reviewed 2014) [↑](#footnote-ref-9)
10. Pg 2 National Policy on Older Persons and Aging (Reviewed 2014) [↑](#footnote-ref-10)
11. Section 16(1) of the Mental Health Act. [↑](#footnote-ref-11)
12. Act 10 of 1989. [↑](#footnote-ref-12)
13. Section 14(1) of the Mental Health Act. [↑](#footnote-ref-13)
14. This is a status approach to capacity. [↑](#footnote-ref-14)
15. Pg. 22 National Standards and Guidelines on the Establishment and Management of Institutions for Older Persons [↑](#footnote-ref-15)
16. <http://www.socialprotection.or.ke/national-safety-net-program/125-older-persons-cash-transfer-opct> [↑](#footnote-ref-16)