

Position Paper on Provisions Addressing Persons with Mental Disabilities in the Legal Aid Bill, 2012 (Kenya)

Call to Amend the Bill

Legislating the Legal Aid Bill provides an opportunity to ensure access to justice for persons with insufficient means to pay for legal services, and those marginalized or more vulnerable than others to injustice.

Persons with disabilities are at greater risk of violation of their rights. Persons with disabilities are also disproportionately represented among the poor. The Legal Aid Bill should guarantee them independent access to apply for legal aid, as well as where necessary and required – support and accommodations in applying.

We are concerned, however, that some of the Bill’s provisions deny rather than ensure access to justice for persons with disabilities.

- *Article 12* of the Bill restricts “persons with mental disabilities” from applying for legal aid in civil proceedings, and requires that others apply on their behalf.
 - Curtailing persons with disabilities’ independent access to legal remedies infringes on their access to justice.
 - Assuming incapacity to apply for legal aid conflicts with Kenya’s obligations as a State party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), according to which persons with disabilities’ enjoyment of full legal capacity on an equal basis with others should be recognized.
 - From the perspective of consistency with the legislative framework, it is inappropriate to regulate legal capacity in each law separately. Instead, the issue should be addressed appropriately in a general law on legal capacity.

Accordingly, reference in Article 12 to “a person who... has a mental disability” should be removed.

- The Bill lacks provision on accommodations and support in applying for persons with all types of disabilities, including intellectual disabilities and psychosocial disabilities. Such measures should be provided with regard to the articles dealing with the application process, such as *Article 13(2) and (4)*.
- The Bill does not take due consideration of the heightened exposure of persons with disabilities to rights violations and over-representation among the poor, in determining eligibility for legal aid (*Articles 5-8*), regulating the liability of aided persons (*Article 44*) and other exemptions (such as waiver of condition on legal aid grant in *Article 15*).

We therefore appeal to amend the Bill as noted above, and provided in detail below.

I. Retaining Independent Access to Applying for Legal Aid

A. Article 12 in the Bill

Article 12 of the Legal Aid Bill provides:

- (1) An application for legal aid in respect of civil proceedings for a person who is under eighteen years of age or has a mental disability shall be made on that person's behalf by a person of full age and capacity.
- (2) Whenever proceedings are required to be brought or defended by a next friend or guardian *ad litem*, an application for legal aid in respect of a civil matter for a person who is under eighteen years of age or has a mental disability shall be made by the person's next friend or guardian *ad litem*, or by a person intending to act in that capacity.

B. Article 12 of the Bill denies access to justice

Preserving persons with disabilities' independent access to legal remedies is crucial to ensuring their access to justice. The ability of persons with disabilities to independently access the justice system should particularly be protected and not be contingent upon application by others on their behalf. By denying a person with a disability the option to apply on his or her own behalf for legal aid, this provision denies access to justice to persons with disabilities.

Persons with disabilities may be exposed to rights violations and abuse within their close circles. There may be instances of a conflict of interest within close circles, including family and guardians:

- In our recent tour with the Kenya National Commission on Human Rights to the second largest psychiatric hospital, Moi Referral and Teaching Hospital, we found out that some of the patients were still confined there simply because they had been rejected by their families and were no longer accepted within their community.
- Those charged with applying for legal aid on behalf of the person may be in direct conflict of interest with the person:
 - Personswith a disabilities' right to administer or inherit property or other assets from a parent or deceased spouseis often challenged in court on the basis of legal capacity by close family and relatives for their own benefit (expropriation).
 - In cases of inheritance of land or assets, where other parties are beneficiaries to the same case with a person with disability, whether directly (as brothers, sisters, uncles, aunts) or indirectly (as friends and friends of the relatives), it may notbe in their interest to apply for legal aid for the person with a disability, since it may directly harm their own case.

- The very broad grounds that according to the Mental Health Act (section 26) justify the appointment of a guardian (“any person suffering from a mental disorder”), and the neglect of the Act to provide oversight over the suitability of who is appointed (“any near relative or...any other suitable person), further increase the risk of conflict of interest.

These situations demonstrate the importance of preserving independent access to the courts. A key part of that is having access to requesting legal aid. It is not reasonable to expect family members, relatives or even community members to necessarily apply for legal aid for persons with disabilities, and certainly not reasonable to make application by others on behalf of persons with disabilities a condition for receiving legal aid.

C. Article 12 of the Bill does not conform to the CRPD

In line with Kenya’s obligations as a State party to the (CRPD),¹ the State must proceed from the position that persons with disabilities enjoy full legal capacity on an equal basis with others.

According to CRPD Article 12, support may be needed to exercise one’s legal capacity. For example, in the context of applying for legal aid, a person with a disability may require support from someone who can help him or her understand the terms of the representation agreement or the support he or she may receive from the legal aid lawyer. Examples of support may be presenting full information regarding the case in a way which can be understood by the person, for the person to make their own decision.

In such a situation, the State is obligated to ensure access to support. The need for support cannot, however, be grounds for denying a person’s independent access to apply for legal aid on his or her own behalf.

In contrast to the CRPD, Article 12 of the draft Legal Aid Bill assumes only a model of substituted decision-making, where the individual himself or herself is denied capacity to act, and another must step in his or her shoes to exercise a certain right. This will further heighten the vulnerability of “persons with mental disabilities” to violations of their rights, especially taking into consideration the vested interests others charged with applying in their name may have in the process, as well as societal stigma, discrimination and abuse towards persons with mental disability in general.

D. Referring to capacity in each piece of legislation separately (for example in Article 12 of the Legal Aid Bill) is inappropriate

From the perspective of maintaining consistency with the overall legislative framework, it is inappropriate to embed a particular provision on legal capacity in each piece of legislation separately, as is done in Article 12 of the Bill. The risk of inconsistency is heightened, given the intention to amend the general legislation on legal capacity.

¹ Kenya ratified the CRPD on May 19, 2008.

Evidently Kenya’s legal framework on legal capacity is highly influenced by the legal framework that existed in Victorian England. It is far from reflecting the principles of the CRPD, and necessitates revision. This is aptly demonstrated among others by the fact that the presence of a “mental disability” is taken by itself to imply incapacity; by “incapacity to manage one’s own affairs” – too broad a category – justifying an order for the management of one’s affairs by others; and by failure of the Act fails to provide for less drastic steps to address a person’s need for support in decision-making, including supported decision-making as enshrined in Article 12(3) of the CRPD, and reasonable accommodations that can assist a person with a disability to make decisions.

Revision of these archaic provisions is being promoted by civil society and contemplated by the government as well. Under these circumstances, which point at the need to amend the main law addressing legal capacity, inserting separate provisions on legal capacity in various pieces of legislation would cause inconsistency and is inappropriate.

E. Changes to the Legal Aid Bill re Article 12

Based on this analysis, we appeal for the removal of the reference in Article 12 to “a person who... has a mental disability.”

II. Support and Accommodations in Applying for Legal Aid

H. General: Capturing the needs of persons with various disabilities

Currently, the Bill refers only to “persons with mental disabilities,” in the context of limiting access to applying for legal aid over which we commented above. In this section it is important to note that persons may have various and distinct disabilities which necessitate various types of accommodations and support to ensure access by all to application for legal aid. Persons with sensory (hearing, vision) disabilities, intellectual disabilities or psychosocial disabilities may have varying needs which should be captured in the context of support in the application process, including accessible formats (sign language, Braille) and plain, non-technical language appropriate to the individual person’s needs.

I. Article 13 – Response and application by person in custody

Article 13 provides for the process of informing a person in custody of their right to legal aid, obtaining and recording their response and providing and ensuring the completion of an application form. Measures should be in place to ensure understanding by persons with various communicational needs of the availability of legal aid and their right to seek it. Support may be needed to ensure the possibility for them to respond, for their response to be communicated to and understood by the officer-in-charge, and for them to successfully complete a legal aid application form.

III. Eligibility, Liability, Exemptions

J. Disability: a relevant consideration for eligibility and limiting liability

Disability, with its implications for being at risk for rights violations and insufficient economic means, is a relevant consideration, and should be given weight, when deciding on eligibility for legal aid – *Articles 5-8*, regulating the liability of aided persons – *Article 44*, and considering other exemptions – such as the possibility of waiver of conditions on legal aid grants addressed in *Article 15*.

In *Article 56* which regulates the functions and powers of the Commission, more guidance may be provided around *sub-paragraphs (g) and (k)* to ensure that “vulnerable sections in society,” including persons with disabilities, attain access to justice. Finally, listing types of groups that should be part of the civil society block on the County Legal Aid Committee, including those representing persons with disabilities, might be considered (*Article 64(2)*).

G. Clarification and amendment on liability – Article 44

We would like to make particular reference to *Article 44*, which addresses liability for an order of costs. We ask for clarification on the intent of *Article 44* and its implications for persons with disabilities. Currently worded, it calls for amendment in order to prevent putting persons with disabilities and others assisting in applying for legal aid on their behalf at added and unjustified risk of liability.

Article 44(5) provides:

If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or has a mental disability, then—

- (a) that next friend or guardian *ad litem* shall have the benefit of this section; and
 - (b) the means of the next friend or guardian *ad litem* shall be taken as being the means of the aided person.
- There does not seem to be justification to place persons with disabilities, who may be disproportionately exposed to violations of their rights and are disproportionately poor, at risk of liability for an order for costs. Such a provision is doubly questionable given how the Bill proposes to take away a person with disability’s independent access to application for legal aid on the basis of capacity (*Article 12*) – in other words, denying a person’s capacity to apply yet proposing to enforce full liability on the same person.
 - *Article 44(5)(b)* identifies between the means of a next friend or guardian *ad litem*, and the means of an aided persons, for the purpose of determining the liability of an aided person under an order for costs. The purpose of thus identifying between the

means is not clear. Once the next friend or guardian understands that they might be liable for an order for costs, and that their own means will be taken as the indicator of whether the aided person is to pay an order of cost, they will be deterred from assisting the individual in the legal aid process.

IV. Regulations on the Disability Perspective (Article 78)

Article 78 may be an appropriate place to ensure that measures such as those enumerated above, are provided for, with regard to both the necessary support in application, and the appropriate weight to be given to disability around entitlement, liability and exemptions. These may be more explicitly enumerated among the categories of issues to be regulated according to Article 78.

For example, explicit mention may be made of accommodations to the application process in sub-paragraph (e); of taking into account disability in considering classes of defendants to whom priority shall be given (sub-paragraph j); and more broadly, of inclusion of persons with disabilities among groups of “persons with special requirements” as appears in sub-paragraph (i).