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Position Paper #3

Comments on the Persons with Disabilities and the Legal Aid Bill, 2012 (Kenya)

Eliminating discriminatory grounds for removal from office

General

We extend our appreciation to the drafting committee for the continuous support to the upholding of rights of persons with disabilities through enhancing their access to legal aid. Particular notice is taken of the recent amendments to the Legal Aid Bill aiming at improving accessibility and providing accommodations to enable persons with disabilities to enjoy their right to legal aid.

Physical/mental infirmity or incapacity – discriminatory grounds

Through this position paper we would like to address one remaining concern, and that is the loss of office on grounds of physical or mental disability, as provided for in Clauses 9(1)(f) and 20(1) in the draft bill (April 2012 version). The two clauses provide that a person will lose his/her position as chairperson or member of the service and committee if he/she is unable to discharge the functions of his or her office by reason of physical or mental infirmity, or physical or mental incapacity, respectively.

Removal of a person from office on grounds of “physical or mental infirmity/incapacity” legitimizes (or is at risk of being understood as legitimizing) the perception of a physical or mental disability as grounds for removal from office, and as such constitutes discrimination on the basis of disability. It is unfortunate that the above grounds still exist in most laws of Kenya in this era of promoting equality for persons with disabilities. These are archaic remains from

the era before Kenya ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) and began aligning its national laws with the CRPD. The drafting committee has the opportunity to lead the way on this particular issue by replacing this discriminative language with neutral, non-discriminative language in the Legal Aid Bill. Examples already exist in other jurisdictions for such an alternative.

The alternative: Neutral, non-discriminatory grounds

If the grounds of removal from office are inability to discharge the duties of the position, the language in the Kenya Legal Aid Bill should say just that. We thus suggest that the provisions should read as follows:

Clause 9(1):

~~“(F) is unable to discharge the functions of his or her office by reason of physical or mental infirmity.”~~

Clause 20(1): Delete clause (a)

~~(a) of physical or mental incapacity;~~ [alternative wording may be: “inability to discharge the functions of the office”]

Examples from other jurisdictions for use of non-discriminatory grounds

The use of non-discriminatory grounds in the context of losing office has already been used by several jurisdictions in the era of the UN Convention on Rights of Persons with disabilities. Below are Examples of Countries and laws that have taken on the progressive language:

Such provisions exist in legal frameworks on the African Continent. For example:

The Ghanaian Constitution

Article 60(8) of this Constitution provides “Whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office, the Vice-President shall perform the function of the President until the President returns or is able to perform.” The Constitution does not specify the ground for inability of the president to execute his duties, and instead focuses on the ability or inability to fill the role – whatever the reason may be for that.

Zambia Mental Health Bill

The Zambia Mental Health Bill also refrains from discriminatory language. The Bill provides in Section 9(5)(3):

- (1) A vacancy shall exist in the Mental Health Commission when:
 - a) A member ceases to hold a qualification/ position by virtue of which that member was appointed.
 - b) A member has been absent for three (3) consecutive meetings without prior notification.
 - c) A member submits a written notice one month prior to the date of resignation to the Chairperson of the Commission and the resignation is accepted.
 - d) When a member dies.
 - e) When a member is declared bankrupt.
 - f) When a member is convicted of a criminal offence under any written law and sentenced to a term of imprisonment exceeding six months without the option of a fine.

The Zambia bill is work in progress but clearly reflects nondiscriminatory standards.

Israel

The Israeli Community Rehabilitation for Persons with Psychosocial Disabilities Act (2000), sections 7-9, cite various grounds for removal from office, related to expiration of service before end of term of office and removal of office before end of term.

The grounds for expiration of term before the end of term are:

- The person resigned.
- The person has been convicted of an offense that by its nature or the particular circumstances make it inappropriate for the person to continue filling the role.
- The person ceases to work in the governmental body or other agency which he or she is representing on the committee.

The grounds for removal before end-of-term are:

- If the person is prevented on a permanent basis from filling the role.

None of the grounds are disability-related.

We thus call upon the drafting committee to borrow a leaf from these pieces of legislation and use neutral and nondiscriminatory language in the Legal Aid Bill.