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Position Paper #2
Comments on the Persons with Disabilities and the Legal Aid Bill, 2010
(Kenya)

We extend our utmost appreciations to the drafting committee for the amendments to the provisions on application by person with mental disabilities for legal aid, and on liability of someone representing the aided person, as was previously provided for under Article 12 and 44 respectively. We are pleased to see derogation from the principle of upholding legal capacity removed, and liability handled fairly.

We would like to suggest, however, to strengthen a number of provisions in the Bill in order to ensure that persons with disabilities have equal access to these services, including accommodations to procedures. We also provide comments on a number of other issues raised in the Bill. Below we detail our proposals for amendments.

Accessibility of and accommodations to procedures

Article 7(1)

The Bill under Article 7(1) (a) positively obliges the service to ensure that inter alia legal aid is “accessible”. In this regard, the Bill stipulates several duties of the service one of which is (i) “take appropriate measures for promoting legal literacy and legal awareness among the public and, in particular, educate vulnerable sections of the society about their rights and duties, under the Constitution and other laws”.

Whereas this training is imperative for the effective provision of legal aid, it only targets the users of the service and excludes the service providers. For legal aid to be fully accessible to marginalized groups, among them persons with disabilities, there is an identical need to train service providers in the effective provisions of legal aid to marginalized groups.

We propose that an extra clause be added under Article 7(1) obliging the service to train and educate legal aid service providers, police, and prison services on how to ensure that legal aid services are accessible to marginalized groups (in the Bill: “vulnerable groups” – see below our proposal to use “marginalized groups” instead), as follows:

“take appropriate measures for training and educating legal aid service providers, police and prison services on ensuring the accessibility of legal aid services to marginalized groups;”

Article 40

Article 40 provides for the process of informing individuals in custody of their right to legal aid, obtaining and recording their response and providing and ensuring the completion of an application form.

At such a critical point in the process, the article should go further to guarantee that persons with disabilities in custody can access legal aid on an equal basis with others. 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 their understanding of their right, 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. The article should include explicit mention of accommodations that can enable such persons to access and fully complete applications for legal aid.

We therefore suggest insertion of clause 5 in this language:

“The officer-in-charge of a prison, police station or other place of lawful custody shall ensure that the right to apply for legal aid and the application for the same are explained and provided in language, both spoken and written, that a person understands, and in an accessible format such as sign language, Braille and plain, non-technical language appropriate to the individual’s needs.”

Article 91

Article 91 provides general guidelines for the development of regulations that will ensure the effective implementation of the Legal Aid Act. Whereas under clause (2)(j) this article provides that the regulations shall prescribe the manner in which applications by minors and other special groups shall be dealt with, it does not provide in any respect the need for the process of applying for legal aid to be accessible. We suggest that this article be amended by adding at the end of clause (j) –

“including guidelines to ensure that the application process for legal aid is accessible to persons with disabilities;”

Clarification on provision regarding referral to psychosocial services

Article 61 provides that a legal aid service provider where appropriate may refer a grantee to a relevant state or non-governmental psycho-social support service provider. The language used in this article is ambiguous. The nature of psycho-social support cited, the category of persons that may be referred for these services, and the overall intention of this provision remain unclear. We are concerned that this authorization to refer grantees to psycho-social support services may open the door to diverting out of the legal aid system applicants who may seem “difficult” to the system.

We request for clarity on this matter.

Eliminating discriminatory grounds for removal of chairperson or committee member from office

Articles 9(1)(f) and 20(1) 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 for physical or mental incapacity, respectively.

Removal of a person from office on grounds of “physical or mental infirmity/incapacity” is discrimination on the basis of disability. If the grounds of removal from position are inability to discharge the duties of the position, the language should say just that. We thus suggest that the provisions should read as follows:

Article 9(1):

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

Article 20(1): Delete clause (a)

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

Proposal to use “marginalized groups” rather than “vulnerable groups”

The Bill uses the phrase “vulnerable groups” to refer to persons who have by reason of their age, ethnicity, beliefs, origins or impairments been marginalized by society. The term “vulnerable groups” implies that vulnerability is inherent in these persons rather than a consequence of attitudes and barriers in society, and may result, as is often the case with people with disabilities, in assuming incapacity of the groups’ members or mitigating the onus on society to change. We propose that this phrase be substituted by the term “marginalized groups” to reflect the societal aspect of the vulnerability.