



**ISSUE PAPER: NO 39**

**PROJECT 148**

**DOMESTICATION OF THE UNITED NATIONS  
CONVENTION ON THE RIGHTS OF  
PERSONS WITH DISABILITIES**

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## INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

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The researcher assigned to this investigation, who may be contacted for assistance, is Ms T Prinsloo.

## PREFACE

The aim of this issue paper is to serve as a basis for Commission deliberations on the topic of the domestication of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

The issues presented in this issue paper have been raised to identify and define issues, which need further debate. The comment of any person on an issue contained in the issue paper or in respect of a related issue, which may need inclusion in the debate, is sought. Such comment is of vital importance to the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked “confidential”. Respondents should be aware that the Commission may be required to release information contained in representations under the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comment, representations or requests to the Commission by no later than **31 May 2021**. Respondents are not restricted to the questions posed and issues raised in this paper and are welcome to draw other matters to the Commission’s attention, provided they are related to this topic. The allocated researcher will endeavour to assist with any difficulties and/or questions related to making submissions. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher assigned to this project, Ms T Prinsloo.

This document is available on the Commission’s website at: <http://salawreform.justice.gov.za>.

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## ACRONYMS

<b>ACT</b>	<b>AUSTRALIAN CAPITAL TERRITORIES</b>
<b>ABA</b>	ARCHITECTURAL BARRIERS ACT (USA)
<b>ADA</b>	AMERICAN WITH DISABILITIES ACT (USA)
<b>AHRC</b>	AUSTRALIAN HUMAN RIGHTS COMMISSION
<b>AU</b>	AFRICAN UNION
<b>BCEA</b>	BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997
<b>CBO</b>	COMMUNITY BASED ORGANIZATION
<b>CEDAW</b>	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
<b>COIDA</b>	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993
<b>CPA</b>	CRIMINAL PROCEDURE ACT 51 OF 1977
<b>CTH</b>	COMMONWEALTH (OF AUSTRALIA)
<b>CRIPA</b>	CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (USA)
<b>DOJ&amp;CD</b>	DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES
<b>DPO</b>	DISABLED PEOPLE'S ORGANISATION
<b>DSD</b>	DEPARTMENT OF SOCIAL DEVELOPMENT
<b>ECHR</b>	EUROPEAN CONVENTION ON HUMAN RIGHTS
<b>EEA</b>	EMPLOYMENT EQUITY ACT 55 OF 1998
<b>EHRC</b>	EQUALITY AND HUMAN RIGHTS COMMISSION (UK)
<b>EU</b>	EUROPEAN UNION
<b>ICT</b>	INFORMATION AND COMMUNICATION TECHNOLOGY
<b>ICCPR</b>	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
<b>ILO</b>	INTERNATIONAL LABOUR ORGANIZATION
<b>INDS</b>	INTERGRADED NATIONAL DISABILITY STRATEGY OF 1997
<b>ITU</b>	INTERNATIONAL TELECOMMUNICATION UNION
<b>LRA</b>	LABOUR RELATIONS ACT 66 OF 1995
<b>LGBTIQ+</b>	LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX, QUEER AND OTHERS
<b>NIHRC</b>	NORTHERN IRELAND HUMAN RIGHTS COMMISSION
<b>M&amp;E</b>	MONITORING AND EVALUATION
<b>MTSF</b>	MEDIUM TERM STRATEGIC FRAMEWORK
<b>NAP</b>	NATIONAL ACTION PLAN (NAP) TO COMBAT RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCES
<b>NDA</b>	NATIONAL DISABILITY AGREEMENT (AUSTRALIA)
<b>NDS</b>	NATIONAL DISABILITY STRATEGY (AUSTRALIA)
<b>NDP</b>	NATIONAL DEVELOPMENT PLAN 2030
<b>NDRM</b>	NATIONAL DISABILITY RIGHTS MACHINERY
<b>NGO</b>	NON-GOVERNMENTAL ORGANIZATION
<b>OSDP</b>	OFFICE FOR THE STATUS OF DISABLED PERSONS
<b>OHCHR</b>	OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
<b>PEPUDA</b>	THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000
<b>PPPFA</b>	PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT 5 OF 2000
<b>SABS</b>	SOUTH AFRICA BUREAU OF STANDARDS
<b>SAHRC/HRC</b>	SOUTH AFRICAN HUMAN RIGHTS COMMISSION
<b>SALRC</b>	SOUTH AFRICAN LAW REFORM COMMISSION

<b>SANS PART S</b>	SOUTH AFRICAN NATIONAL STANDARDS (SANS) – PART S – FACILITIES FOR PERSONS WITH DISABILITIES.
<b>SASL</b>	SOUTH AFRICAN SIGN LANGUAGE
<b>SDA</b>	SKILLS DEVELOPMENT ACT 97 OF 1998
<b>SDG</b>	SUSTAINABLE DEVELOPMENT GOALS
<b>SDLA</b>	SKILLS DEVELOPMENT LEVY ACT 9 OF 1999
<b>SHRC</b>	SCOTTISH HUMAN RIGHTS COMMISSION
<b>SORMA</b>	THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 of 2007
<b>TACT</b>	TECHNICAL ASSISTANCE GUIDELINES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES
<b>TAG</b>	THE TECHNICAL ASSISTANCE GUIDELINES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES
<b>UA</b>	UNIVERSAL ACCESS
<b>UD</b>	UNIVERSAL DESIGN
<b>UN</b>	UNITED NATIONS
<b>CRPD</b>	UNTED NATIONS CONVENTION ON THE RIGHST OF PERSONS WITH DISABILITIES
<b>WA</b>	WESTERN AUSTRALIA
<b>WHO</b>	WORLD HEALTH ORGANIZATION
<b>WHO</b>	THE 1980 INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS. (ICIDH).
<b>WHO</b>	THE 2001 INTERNATIONAL CLASSIFICATION OF FUNCTIONING, DISABILITY AND HEALTH (ICF)
<b>WIPO</b>	WORLD INTELECTUAL PROPERTY ORGANIZATION
<b>WPRPD</b>	WHITE PAPER ON THE RIGHT OF PERSONS WITH DISABILITIES

## EXECUTIVE SUMMARY

### A. Mandate for Investigation

1. The SALRC received a request to investigate the domestication of the United Nations Convention on the Rights of People with Disabilities (CRPD) from the Department of Justice and Constitutional Development (DOJ&CD) in May 2018.

2. The CRPD provides for the protection and inclusion of the rights of persons with disabilities into society as well as the obligations of States party to the CRPD. South Africa ratified the CRPD without reservation on 30 November 2007.<sup>1</sup> South Africa has also signed and ratified the Optional Protocol (Protocol) to the CRPD. Although South Africa is bound by the reporting obligations derived from Article 35(1) of the CRPD, neither the CRPD nor the Optional Protocol to the CRPD has been incorporated into South African law.

### B. Process of The SALRC

3. The SALRC follows a three-stage process interspersed with public consultation.<sup>2</sup>

4. The first stage of the process is the development of an issue paper. This paper sets out the issues pertaining to the subject of the investigation. It ask for comments on these issues to create the scope of what needs law reform. This project is in this stage.

5. The discussion paper is developed on the strength of the responses received on the issue paper. This paper then, on the strength of the responses, develops a preliminary view and again goes out for public consultation.

6. The responses on this paper will then result in the formulation of a final view in the form of a report and a draft bill, if applicable.

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<sup>1</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en)

<sup>2</sup> South Africa Law Reform Commission Report 2018/2019 Chapter 2

## C. How to translate the CRPD into South African law

7. The manner in which the CRPD is to be integrated into South African law is through the concept of equality. The rule is that every single person in the world should have equal access to societal good. There are two schools of thought on equality, i.e. the medical model and the social model.<sup>3</sup>

### 1. The medical model of equality

8. This model theorises that all people are the same in every way. There is no difference between their social and economic standing. Everyone starts from the same place in obtaining societal goods. The environment and personal situations of every person are the same. There is no need for accommodation of difference. Therefore, all have equal access to society and its gains.

### 2. The social model of equality

9. This model is aware of the fact that difference exists in society. Not all have equal access to social goods. There are a myriad of circumstances that make individuals different from each other and their surroundings. Not everyone experiences the world the same way.

10. To reach a level of equality for everyone in society despite these differences, accommodations have to be made to ensure that everyone gets the access to the same chances. This model rejects the fact that everyone is the same and makes accommodations for evening out the differences. This is called substantive equality or equality of outcomes.

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<sup>3</sup> Ngwena 1 Ngwena, C “South African Journal on Human Rights - Deconstructing the definition of 'disability' under the Employment Equity Act: social deconstruction” *South African Journal on Human Rights*, Volume 22, Issue 4, Jan 2006; Ngwena 2 Ngwena, C “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. part I (defining disability)” *Stellenbosch Law Review*, Volume 16, Issue 2, Jan 2005; Ngwena 3 Ngwena, C “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” *2004 Journal for Juridical Science* 29(2); Ngwena 4 Ngwena, C “Deconstructing the definition of 'disability' under the employment equity act: legal deconstruction” *South African Journal on Human Rights*, Volume 23, Issue 1, Jan 2007; Ngwena 5 Ngwena, C “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. part II: reasonable accommodation” *Stellenbosch Law Review*, Volume 16, Issue 3, Jan 2005

## D. History of the CRPD

11. The story of the development of the CRPD is one of increment stages to reach equality of outcome for persons with disabilities.

12. Ngwena<sup>4</sup> states that the Standards Rules are the embodiment of the social model. Even though non-binding, "... the Standard Rules provide a practical framework for removing the real factors that impede the participation of people with disabilities in the workplace and in other spheres, given political willingness on the part of governments." It can be seen as being transformative in protecting the human rights of persons with disabilities.

13. The first five articles of the CRPD pay homage to this principle:

13.1 "*Article 1 – Purpose*<sup>5</sup> deals with the protection and promotion of equality and respect for persons with disabilities, It also creates a definition of disability:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

13.2 *Article 2 – Definitions*<sup>6</sup> deals with the definitions of communication, language, and discrimination based on disability, reasonable accommodation and universal design.

13.3 *Article 3 – General principles*<sup>7</sup> states that the CRPD is built on respect for dignity, autonomy, independence, difference and acceptance, non-discrimination, equality of opportunity and equality between genders, inclusion in society, accessibility, and respect for the rights of children with disabilities.

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<sup>4</sup> Ngwena 3 175 – 176

<sup>5</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html>

<sup>6</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>

<sup>7</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-3-general-principles.html>

13.4 *Article 4 – General obligations*<sup>8</sup> sets out the obligations of States in ensuring the provision of the rights and freedoms for persons with disabilities whilst eradicating discrimination on the ground of disability.

13.5 *Article 5 – Equality and non-discrimination*<sup>9</sup> indicates the responsibility of States to ensure the legal capacity of persons with disabilities before and under the law. States are obliged ensure reasonable accommodation to ensure persons with disabilities are treated equally. Such measures are not considered discrimination under the Convention.

## **E. The South African Constitution<sup>10</sup>**

14. The Constitution of South Africa is based on equality of outcomes. It is the supreme law of the country (Section 2) and provides for a Bill of Rights that bind the State and private individuals (Section 8). Section 7 states that:

This Bill of Rights...enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

15. These rights are limitable in terms of section 36 of the Constitution or through some provisions of the Constitution. The Bill of Rights should be protected by the State.

16. It makes provision for equality in section 9 thereof:

### 9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

<sup>8</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-4-general-obligations.html>

<sup>9</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-5-equality-and-non-discrimination.html>

<sup>10</sup> Constitution of the Republic of South Africa, 1996 (hereinafter The Constitution)

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

17. The CRDP and the Constitution make provision for the protection of disability as a substantive equality outcome. Disability cannot be defined as it is contextual and a definition depends on the type of protection needed by persons with disabilities.

18. The disability issue in terms of an equality matter needs to be addressed in South African jurisprudence.<sup>11</sup> Already in existence is the Employment Equity Act 55 of 1998 and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which make provision for reasonable accommodation outside the area of labour law. It is clear that there is a need for protection of persons with disabilities against discrimination and degradation.

19. The CRPD also has a definition of disability and it includes that the denial of reasonable accommodation is discrimination.

20. Reasonable accommodation is the embodiment of substantive equality. It is the non-discrimination principle and is necessary for substantive equality. It is needed to treat persons equally. It is the constitutional principle for determining unfair discrimination.

21. Reasonable accommodation in South Africa stems from sections 9(3) and 36 of the constitution. It is illustrated in *MEC for Education and Others v Pillay and others*<sup>12</sup> where it was applied in other context than the work environment.

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<sup>11</sup> The matter is addressed in the articles by Ngwena supra. The text here is a summary of those articles and on **Jutastat in Employment Equity Law** **Author:** JL Pretorius Bcom LLB BA (Hons) LLD (UFS) Professor of Public Law, Director of The Centre For Human Rights Studies, University of the Free State; ME Klinck Biur LLB BA (Hons) (UFS) Director: Research, Compliance and Consultancy, Foundation for Professional Development, South African Medical Association; CG Ngwena LLB LLM (Cardiff) Professor of Law, University of The Free State **Last Updated:** August 2019 - SI 19.

<sup>12</sup> 2008 (1) SA 474 (CC) 488

22. Reasonable accommodation is also available in PEPUDA: failing to provide reasonable accommodation is unfair discrimination and it is taken into account the fairness /unfairness assessment in section 14. This inclusion makes it a general anti-discrimination duty in terms of all prohibited grounds to be included in factors to determine fairness and proportionality. The limits of reasonable accommodation is that the burden should not be disproportionate to the accommodation made. The interface between reasonable accommodation and affirmative action is the Employment Equity Act 55 of 1998.

23. Reasonable accommodation does not create an advantage. It overcomes a specific instance of unfair discrimination. It is the individualised assessment of disadvantage and the need to establish equality.

24. The bridge between such discrimination and the provision of access to all societal goods for persons with disabilities is the provision of reasonable accommodation to prevent discrimination based on disability.

## **F. What does the CRPD provide in this regard?**

25. To identify the areas where persons with disabilities can be discriminated against, the Committee for the Rights of Disabled Persons have issued non-binding persuasive guidelines that will influence the creation of legally binding norms for the protection of persons with disabilities in the States party to the CRPD. If a State has become such a party, it has to implement and enforce the provision of the CRPD in its territory. Provision is made for reservations to not adhere to provision. This is normally based on the legal position in a State regarding relevant provisions, which will make adherence thereto impossible. South Africa has not made any reservations. Therefore, all provisions have to be implemented or domesticated.

26. State parties to the CRPD have to report to the Committee on progress in or initiatives taken to implement or domesticate the CRPD. The Committee then delivers its concluding observations on these reports. This is tailored on recommendations on how to improve the implementation of the CRPD in a State party.

## **G. What does South Africa have that responds to the provisions?**

27. The legislation, common law, case law and policies in operation in South Africa in relation to the protection of persons with disabilities have to be identified and compared with the CRPD provisions, existing General Comments and Statements delivered by the Committee. This includes the involvement of institutional organisations and organisations of persons with disabilities in implementing the CRPD and continuous involvement with the functioning of the State party in protecting the rights of persons with disabilities.

## **H. Benchmarking in other divisions**

28. Other countries have gone through the domestication process of the CRPD. Their experience, legislation and policies enacted to domesticate the CRPD is an example for South Africa. Keeping in mind that the legal systems of countries differ, the applicable measures can be transplanted into South African law.

29. The selection of the countries in the document were done based on the common legal heritage with South Africa.

## **I. Benchmarking with international law**

30. International and regional instruments had been identified that can influence the meaning of the interpretation of provisions. Of importance is the *Protocol to the African Charter on Human and People's Right on the Rights of Persons with Disability in Africa* adopted in 2018 and the *Pan African Model Law on Disability* in 2019.

## The Final Result

31. What is clear in the issue paper stage of this investigation is that the CRPD should be domesticated because of the ratification. This is accomplished in terms of section 231 of the Constitution.

### J. The process of domestication

32. Section 231 of the Constitution defines the process of domestication as signature and signing of treaties by the executive where after the treaty becomes binding on the international level if it has been approved by both houses of parliament.<sup>13</sup>

33. The next step is further action by the legislature to make the treaty applicable to domestic law<sup>14</sup> either through automatic incorporation or a specific act of adoption.<sup>15</sup> Section 231(4) states that a treaty has to be incorporated by an Act of parliament for it to have legal status in national law. Automatic incorporation is relevant with section 231(3) in terms of self-incorporating treaties. This means that such treaties can only be tabled in Parliament for it to become binding in South African law. The provisions thereof does not need independent investigation and incorporation.

34. The CRPD will then be domesticated through an Act, which provisions would have to be fleshed out in terms of its provisions in relation to South African equality law.

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<sup>13</sup> Hennie Strydom, Kevin Hopkins "International Law" in Stuart Woolman, et al (Eds) *Constitutional Law of South Africa Second Edition* (original service) Juta 30-4.(hereinafter Strydom and Hopkins)

<sup>14</sup> Strydom and Hopkins 30-4.

<sup>15</sup> Strydom and Hopkins 30-6 - 30-7.

## CALL FOR COMMENT: QUESTIONNAIRE

1. The SA Law Reform Commission (SALRC) has published its *Issue Paper* on the *Domestication of the United Nations Convention on the Rights of Persons with Disabilities*, which defines the current problems and the area for investigation.
2. The SALRC requests you to give your comments and recommendations on what you think needs to be done to address and remedy the problems the SALRC has identified in the *Issue Paper*.
3. To guide your comments and recommendations, the SALRC has prepared the *Questionnaire* below, which focuses on key problems and how they might be addressed.
4. You are requested to give your inputs on each question in the *Questionnaire* below, or to just those that you feel most strongly about, or you are more familiar with.
5. Before you comment, you might like to read more about the issue itself in specific parts of the SALRC *Issue Paper* that this *Questionnaire* is part of.
6. To make it easier for you to find information on the issue you want to comment on in the *Issue Paper*, the relevant pages are given in the *Questionnaire*.
7. Please follow the numbering used by the *Questionnaire* below so that the SALRC will know what specific issue you are responding to, and are most concerned about.
8. You are welcome to respond to other issues you feel should have been in the *Issue Paper* or in the *Questionnaire* below.
9. Your comments and inputs are valuable to the SALRC. Thank you for your interest and concern and for taking the time to read and respond.
  
10. It is of utmost importance to provide the public with the issue paper as soon as possible. This issue paper and an easy read version of discussion points for workshops are available on the website of the SALRC to ensure preliminary access to and accessibility for all interested persons. The issue paper will be made available in an easy read format as soon as possible after publication. The issue paper and discussion points will also be made available in braille in due course. Workshop recordings will be available on the website and social media of the Department of Justice and Constitutional Development after it has taken place.

11. Please post / e-mail / fax your typed / written responses to the SALRC at:  
The Secretary  
South African Law Reform Commission  
Private Bag X668  
PRETORIA 0001  
Tel: 012 622 6316  
Fax: 0864841293/0866826894  
Email: [disabilityresponse@justice.gov.za](mailto:disabilityresponse@justice.gov.za)  
Attention: Ms T Prinsloo

# THE QUESTIONS THE SALRC INVITES YOUR SUBMISSIONS ON ARE THESE:

## 1. Need for an Act

1.1 Why do you think an Act regulating disability rights across the public and private sectors is necessary, other than it is required after the ratification of the CRPD? (Chapter 2 p 10 – 45)

## 2. Scope of an Act

2.1 Do you think all areas or only some areas of law should be reviewed to promote and provide for dignity, equality and no unfair discrimination of persons with disabilities and for the identification and eradication of barriers to the equal enjoyment of rights and freedoms by persons with disabilities? (Chapter 3 p 46 – 65; Chapter 5 p 97 – 104 and Chapter 6 p 105 – 144)

## 3. Type of Act

3.1 The CRPD is divided into substantive law and organisational requirements. (Chapter 10 p 193 – 195 ) To give effect to both of these in line with the UN Handbook suggestions (pages 192 - 198), which of the following are suitable:

- (a) A general anti-discrimination act that focuses on all disability-related Constitutional rights: equality and no unfair discrimination (section 9), dignity (section 10), and all relevant further rights in the Bill of Rights (sections 10 – 35)?
- (b) A specific disability act dealing only with industry regulators and Chapter 9 state institutions charged with ensuring the protection of rights of persons with disabilities?
- (c) Or a form of legislation that
  - (i) deals with industry regulators and Chapter 9 institutions, but also
  - (ii) gives effect to the Constitutional rights of persons with disabilities to equality and no unfair discrimination, dignity, and all the relevant further rights in the Bill of Rights, focusing on their influence on disability rights and in addition is it necessary to,

- (d) amend existing legislation to delete provisions that are unfair barriers / unfairly discriminate on the ground of disability, and to enact new provisions aligned to CRPD and Constitutional obligations?
- (e) promulgate regulations, or publish helpful Codes of Good Practice under legislation to guide and support regulators and those with a duty to comply?

We would really appreciate knowing your choice and reasons for the choice you make.

3.2 What should be the role of the South African Human Rights Commission (SAHRC), other chapter 9 institutions and provincial and local government?

3.3 How should the CRPD be monitored?

3.4 How do you feel the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which prohibits unfair discrimination (and will in future promote equality) on the ground of disability can support and fit into the broader disability discourse?

3.5 How could a possible future Act advance to the National Action Plan (NAP) goal to combat racism, racial discrimination, xenophobia and related intolerances?

3.6 Would you like to refer us to examples of an Act regarding disability or discrimination or any other related topic?

#### **4. Existing Acts (Chapter 6 p 105 – 148)**

4.1 Are there any other pieces of legislation that deal with disability or that create barriers to persons with disabilities that you are aware of besides those mentioned in this paper?

4.2 Do you have any critique or positive comments on any of the existing fragmented and unconnected legislation that covers many different areas and fields? Please let us know your concerns.

4.3 Do you have proposals as to how to mainstream disability in the legislative framework?

## **5. Criminal and Civil law** (Chapter 6 p 124 section D 3 – 4; p 129 – 133 section E)

5.1 Are you aware of the civil law remedies that persons with disabilities can rely on to take action to seek redress if their rights have been breached? Do you feel these civil law remedies are effective and adequate? Would you like to suggest others?

5.2 Are you aware of the criminal law offences that persons with disabilities can rely on to penalise, punish and prevent persons who act in a criminal manner toward persons with disabilities? Do you feel the criminal law offences are effective and adequate? Would you like to suggest others?

5.3 What acts or omissions by a person, by a legal entities' employees / directors or by the State would you consider to amount to criminal misconduct conduct, and how would you suggest that such acts should be regulated?

5.4 Do you have a concern around what the law says (Chapter 6 p 129 – 136 Par E – F) about the capacity of a person with a disability to commit a crime, and about the state's ability to hold them responsible for it?

5.5 Do you have a concern about what the law says about the autonomy and dignity of a person with a disability with regard to making his or her own decisions? (Chapter 4 p 77 par 4.37 – p 79 par 4.43; chapter 6 p 121 – 124)

5.6 Is there anything in terms of the criminal and civil aspects of the common law regarding its impact on persons with disabilities that you want to see changed, improved or strengthened? If so, what?

## **6. Harmful practices** (Chapter 4 p 73 par 4.24,4.25; p 76 – 77 par 4.34; Chapter 6 p 140 par 6.141 – p 143 par 6.148)

6.1 How do you suggest the issue of harmful practices that may be informed by tradition, belief, culture, religion and the like-that are experienced by persons with disabilities, be dealt with in the process of domestication of the CRPD?

6.2 Do you have concerns about human trafficking of persons with disabilities (page 141 section 5) and do you have suggestions in this regard?

6.3 Do you have concerns about mistreatment and abuse of persons with disabilities, with regard to for example chaining, imprisonment, isolation, segregation and trading in body parts of persons with disabilities? Do you have suggestions in this regard?

## **6. Specific criminal offences (Chapter 6 p 136 - 144 Par G)**

7.1 Do you feel that there should be new types of specific criminal offences enacted because the victim thereof is very a vulnerable person and subject to exploitation and abuse due to a disability and therefore should be entitled to greater protection against harm?

7.2 If you do, let us know what such an offence/s should look like and what the penalty on conviction should be (imprisonment, fine, community service or any other punishment).

7.3 What kinds of conduct – either an intentional act or an omission to act – of a criminal nature do you recommend should be covered? Should the conduct (either an act or omission, or both) be linked to breaches of constitutional rights alone, or be extended to albinism, hate crimes, hate speech, harassment and victimisation?

7.4 Do you feel that very serious conduct that persons with disabilities can be subjected to should be “criminalised” because of the vulnerability of the persons and the harm they suffer? For example, acts and omissions of harm and abuse arising from tradition, belief, culture, religion and the like relating to albinism, serious mental illness, intellectual disability, witchcraft, grave-robbing, chaining, imprisonment, isolation and segregation?

7.5 Criminalisation of specific conduct brings the rights and interest of the most vulnerable persons with disabilities into sharp focus. What further protection do you feel is needed or would be justified?

7.6 How should the law deal with unborn children that are presenting with a disability in the womb?

7.7 Do you have comments or suggestions on each of the observations made by the UN in the *United Nations in South Africa Committee on the Rights of Persons with Disabilities: Concluding Observations on the Initial Report of South Africa*?

- 7.8 You can read a summary of the UN observations at p 71 section D.
- 7.9 You can consider its observations for specific CRPD articles on the following pages:
- on *Article 5: Equality and Non-discrimination* - page 71, section D(1)(a);
  - on *specific disability legislation being lacking* at page 71 section (c) at par 4.19;
  - on *Article 6: Women with Disabilities* - page 72 section 2, par 4.22 – 4.25;
  - on *Article 7: Children with Disabilities* - page 73 - 75, section 3(a) par 4.26 – 4.30
  - on *Article 9: Accessibility* - page 75, section 5(a), pa 4.32 – page 76 par 4.33
  - on *Article 10: Right to Life* - page 76 - 77, section 6, par 4.34 – 4.35;
  - on *Article 12: Equal Recognition before the Law* - page 77 – 79 section 8 par 4.37 – 4.43;
  - on *Article 13: Access to Justice* - page 79 - 80, section 9(a) par 4.44 - 4.46;
  - on *Article 14: Liberty and Security of the Person* - page 80, section 10 par 4.47 – 4.50;
  - on *Article 15: Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment* - page 81, section 11, par 4.51 – 4.53;
  - on *Article 16: Freedom from Exploitation, Violence and Abuse* - page 82, section 12, par 4.54 – 4.56;
  - on *Article 17: Protecting the Integrity of the Person* - page 83, section 13(a), par 4.57 – 4.58;
  - on *Article 19: Living Independently and being Included in the Community* - page 84 section 14, par 4.59 – 4.60;
  - on *Article 20: Personal Mobility* - page 84, section 15, par 4.61 – 4.62;
  - on *Article 21: Freedom of Expression and Opinion, and Access to Information* - page 85, section 16(a), par 4.63 – 4.66;
  - on *Article 24: Education* - page 86, section 17(a), par 4.67 – 4.70;
  - on *Article 25: Health* - page 87, section 18, par 4.71 – 4.73;
  - on *Article 28: Adequate Standard of Living and Social Protection* - page 88, section 20, par 4.77;
  - on *Article 30: Participation in Cultural Life, Recreation, Leisure and Sport* - page 93, section 22, par 4.87 – 4.90;
  - on *Article 31: Statistics and Data Collection* - page 94, section 23, pa 4.91 – 4.92;
  - on *Article 33: National Implementation and Monitoring* - page 94, section 25, par 4.94 – 4.95.

7.10 Do you agree with the observations? If you do not, let us know why not, and if you do let us know, why you do.

7.11 Do you have any suggestions or recommendations on how to comply with the UN observations?

## **7. White Paper on the Rights of Persons with Disabilities**

8.1 Do you identify any gaps between the 2015 *White Paper on the Rights of Persons with Disabilities* (see Chapter 2 p 35, Chapter 3 p 46 – 50 and Chapter 5 p 101 - 104) and the legislative framework (see pages 105-144)?

8.2 Do you have some recommendations for how these gaps need to be filled?

8.3 How do you envision the implementation of the White Paper?

8.4 As the White Paper states that it builds on the existing initiatives in terms of disability, how and where can the 1997 *Integrated National Disability Strategy White Paper* (see Chapter 3 p 51 – 53) be used?

8.5 What is the link between the 2015 White Paper, *the National Development Plan 2030 Persons with Disabilities as Equal Citizens (Equal Citizens plan)* (chapter 3 p 46 – 53; 54 - 56) and the 1997 *Integrated National Disability Strategy*? (Chapter 3 page 51 section C)

8.6 How should the *UN Committee on the Rights of Persons with Disabilities'* seven general comments (Chapter 2 p 12- 17; 38 – 44; Chapter 3 p 50; Chapter 6 p 107 par 6.10; p 108 par 6.14; p 109 par 6.17; p 110 par 6.19; p 111 par 6.22) and the White Paper be combined?

## **8. Barriers to Equal Dignity, Treatment and Participation (Chapter 4 p 66 – 95)**

9.1 Barriers to equal dignity, equal treatment and equal participation of persons with disabilities can arise from environmental factors; due to policies, procedures and how things are done; and because of attitudes and perceptions.

9.2 What barriers can you identify that cause or have the effect to differentiate impermissibly between persons with disabilities and other persons and therefore discriminate unfairly?

9.3 How should these barriers be identified, addressed and eradicated?

9.4 Can you think of any other pieces of legislation that directly or indirectly deal with disability or that create barriers to persons with disabilities besides those mentioned in this paper?

9.5 Do you feel that the common law (principles established in decisions of the Courts) may create barriers for persons with disabilities? Let us know how you feel this can happen and how you feel it can be rectified?

## **9. De-institutionalisation and Incarcerated Persons with Disabilities** (Chapter 4 p 73 par 4.26 – p 75 par 4.30; p 80 par 4.47 – p 88 par 4.60; p 86 section 17)

10.1 What are your views and recommendations on the requirement of de-institutionalisation as indicated in the CRPD *Article 14: Liberty and Security of the Person* (page 78, section 10(b))?

10.2 What are your views and recommendations on the situation of persons with disabilities in institutions and places of detention and the monitoring of conditions in such places?

## **10. Insurance, Pensions, Workman's Compensation and Social Grants**

11.1 Is the current legislation relating to insurance coverage, eligibility, exclusions, underwriting and assessment of persons with disabilities fair, justifiable and sufficient? (chapter 6 p 111 par 6.23)

11.2 Is the current legislation relating to retirement funds and pensions that aim to afford a level of retirement security for persons with disabilities fair, justifiable and sufficient?

11.3 Is the current legislation relating to compensation for occupational injuries and diseases, which compensate employees disabled by occupational injuries and diseases fair, justifiable and sufficient? (Chapter 4 p 87 par 4.74; Chapter 6 p 113 par 6.31)

11.4 Are the current measures relating to social grants, that that aim to provide a level of social security to persons with disabilities fair, justifiable and sufficient? (Chapter 4 p 84 par 4.59; Chapter 6 p 110 – 111 par 6.21)

## **11. Gender based violence**

12.1 What do you feel are the problems surrounding gender-based violence against persons with disabilities? (Chapter 4 p 72 – 73 section 2; p 77 section 8 par 4.37 – 4.39; p 81 section 11 – p 83 section 13)

## **12. Foreign law as a Guideline for Domestication (Chapter 9 p 145 – 191)**

13.1 With reference to the approach to CRPD, domestication that has been taken by other African and Western countries (pages 151-188), what solutions are feasible for South Africa?

13.2 What principles and approaches that they followed would work well for South Africa's CRPD domestication?

## **13. International law as a Guideline for Domestication (Chapter 1 p 7 – 9; chapter 7 p 145 – 148)**

14.1 The 2018 *African Charter on Human and People's Right on the Rights of Persons with Disability in Africa* and 2019 *Pan African Model Law on Disability* are important.

14.2 What weight should be given to these two African treaties in terms of informational purposes and for creating a possible Act?

14.3 Do you think that there may be provisions in the CRPD that clashes with our South African Constitution and/or our national legislation and common law?

## **14. Security services (Chapter 4 p 79 section 9 – p 83 section 12)**

15.1 Do you have views and recommendations about the manner in which members of the public and private security services perform their duties and how they interact with persons with disabilities? If you have concerns in this regard, please describe your concerns. Do you have thoughts and recommendations about how problems can be rectified?

15.2 Are you concerned about the conditions relating to persons with disabilities in all detention facilities, including police cells, prisons, remand centres, and mental hospitals?

## **15. Asylum and refugees**

16.1 What are your concerns about the treatment of disabled displaced persons that are refugees and asylum seekers in, for example, labour law, detention? (Chapter 2 page 14 par 2.19)

## **16. Other**

17.1 Are there any resolutions taken by civil society that this investigation needs to be aware of?

17.2 What is your understanding of “on an equal basis with others” in relation to the CRPD?

17.3 What are your proposals for ensuring that articles 3 and 4 of the UNCRD are included in the proposed legislation?

17.4 The SALRC has noticed that the following topics are of extreme importance in the discussion on the right of persons with disabilities and therefore has been flagged for the purposes of eliciting comments that indicate whether the current situation in law are acceptable or whether you feel that law reform should take place in favour of persons with disabilities:

1. elder abuse especially when an elderly persons suffers from dementia;
2. euthanasia;

3. the treatment in prison (remand detainees and convicted offenders) of mentally ill persons;
4. abortion of a foetus in vitro on the grounds of the foetus having a disability;
5. intellectually disabled children, persons with head injuries or sufferers from Down syndrome in terms of capability of giving evidence;
6. liability for omissions (criminal and civil) when dealing with vulnerable persons and elderly vulnerable persons;
7. insurance discrimination issues;
8. the Life Esidimeni Debacle; and
9. any offensive language.

# ORIGIN OF INVESTIGATION

## CHAPTER 1: HISTORY OF INVESTIGATION AND MANDATE

### A. Determination of scope

1.1 The request to investigate the domestication of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) was received by the SALRC on May 2018 from the Department of Justice and Constitutional Development (DOJ&CD). The request deals with the manner in which the CRPD should be incorporated into domestic law. The request was as follows:

... to commence with an in depth investigation into proposals for the efficacy of developing single disability legislation or a cut across statute to give effect to disability rights and further proposals for the domestication of the CRPD.

1.2 Following the above-mentioned request, the SALRC commenced with a pre-investigation. A draft pre-investigation paper was tabled at the SALRC Commission meeting held on 16 March 2019. The Commission considered and endorsed the recommended outcome of the pre-investigation i.e. that a request should be made to the Minister to place an investigation into the domestication of the CRPD on to the research programme of the SALRC. The Minister acceded to this request on 23 April 2019.

### B. PROCESSES OF THE SALRC

1.3 The SALRC was established by the South African Law Reform Commission Act 19 of 1973 (the SALRC Act).

1.4 The SALRC deals with complex, crosscutting investigations where innovative constitutional reform is necessary or legislative coordination is needed. Often times this falls outside the mandate of a specific department. The role of the SALRC is clearly displayed in this case as the process of domestication of the CRPD is struggling to get off the ground 13 years after it has been ratified.

1.5 A pre-investigation (as a first step in the process) is undertaken to decide on the merits of the investigation. If approved, it is placed on the research programme of the SALRC (as has happened in this case).

1.6 Project leaders and advisory committees (if established for the project) guide the researchers (which are part of the SALRC secretariat) in their work.

1.7 Once a project has been assigned, research identifying relevant national, international and foreign law is started. Consultation with project leaders and advisory committee members (if appointed) is continuous. Once a specific stage of the product of the SALRC is reached, whether it may be an issue paper or discussion paper, the public is widely consulted.

1.8 Advisory committee members are appointed in terms of Section 7A(1)(b) of the SALRC Act (by the Minister of Justice and Correctional Services) and ensure public involvement. They are absolute experts in their field and provide valuable guidance in the development of a transparent and consulted project. Project leaders provide advice, steer the researcher in the appropriate direction and evaluates the research.

1.9 An issue paper is the first stage in solving the problem. It sets out current problems and defines the area of investigation. It then asks for submissions from the public on what needs to be done. Distribution is as wide as possible. Once submissions are received, it is evaluated in the light of the relevant law. Such research then creates a discussion paper.

1.10 This paper sets out the existing problems and suggests possible solutions in the way of preliminary recommendations. It may contain draft legislation. Consultations once again take place to ensure public buy-in for further development. The discussion paper, like the issue paper, is made freely available.

1.11 The next step is the reporting stage. Submissions received on the discussion paper are consolidated to reach the final recommendations. This is contained in a report. It can be accompanied by a draft Bill. The report is then forwarded to the Minister for Justice and Correctional Services.

1.12 It has to be emphasised that the Commission engages in extensive public consultation to ensure effectiveness and relevancy of its products. Although this is time-consuming, it is one of the most important aspects of every investigation to ensure public consensus with the developments.<sup>16</sup>

## C. Process on the Domestication of the CRPD

1.13 This paper constitutes the issue paper. An advisory committee for this complex area has been appointed.

## D. CRPD as an international instrument

1.14 The nine core international human rights treaties<sup>17</sup> create legal obligations for States once they ratified or acceded to it.<sup>18</sup> The *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) is one of the nine core treaties. South Africa ratified the CRPD on 30 November 2007 without any reservations.

1.15 Grobbelaar-du Plessis and Nienaber indicate that when becoming a party to an international or regional human rights treaty, state parties agree to be bound by the provisions of the treaty.<sup>19</sup> South Africa, as state party to the CRPD and the Optional Protocol, is obligated to take all legislative, administrative and other measures to implement the rights recognised in the CRPD<sup>20</sup> and to take all measures, including legislative measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against

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<sup>16</sup> South Africa Law Reform Commission Report 2018/2019 Chapter 2

<sup>17</sup> United Nations Human Rights Office of the High Commissioner *The United Nations Human Rights Treaty System Fact Sheet No 30/Rev.1 United Nations New York and Geneva, 2012.* (hereinafter Treaty system Factsheet) 1 Some treaties are: *The International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention of The Right of Persons With Disabilities and The International Convention for the Protection of All Persons from Enforced Disappearances.*

<sup>18</sup> Treaty System Fact Sheet 19

<sup>19</sup> Grobbelaar-du Plessis I and Nienaber A “Disability and Reasonable Accommodation: *HM v Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities)” 2014 (30) SAJHR 372 (hereafter Grobbelaar Du Plessis and Nienaber)

<sup>20</sup> art 4 (1)(a) of the CRPD

persons with disabilities.<sup>21</sup> The authors further add that all legally binding international human rights treaties, including the CRPD, have monitoring mechanisms to foster accountability by state parties, and to ensure that they fulfil their commitments and obligations.<sup>22</sup> The CRPD fosters accountability through article 35, which states that a state party must submit a comprehensive report on the measures taken to give effect to its obligations and report on the progress made in the implementation of the standards contained in the CRPD.

1.16 It is important to note that the CRPD, in article 36.4, obliges South Africa to make the reports (initial and concluding observations) widely available to the public and facilitate access to the suggestions and general recommendations to the initial report of South Africa.

## E. Reporting obligations and the Concluding Observations

1.17 South Africa submitted its first Report on 26 November 2014 and received certain comments with which South Africa has to comply.<sup>23</sup> Committees established under each treaty are responsible for overseeing the implementation of each treaty.<sup>24</sup> The Committee for the CRPD is called the Committee on the Rights of People with Disabilities (CRPD Committee).<sup>25</sup>

1.18 The function of all committees is to receive and comment on reports from State Parties on their implementation of the treaty.<sup>26</sup> The CRPD Committee issues guidelines to States to help State Parties in preparing these reports, as well as draft general comments to guide the interpretation of the treaty.<sup>27</sup>

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<sup>21</sup> art 4 (1)(b) of the CRPD

<sup>22</sup> *From Exclusion to Equality Realizing the Right of Persons with Disabilities Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*/United Nations Department of Economic and Social Affairs (hereinafter Handbook) 2007 25; Grobbelaar and Nienaber

<sup>23</sup> United Nations in South Africa Committee on the Rights of Persons with Disabilities: Concluding Observations on the Initial Report of South Africa. <http://www.un.org.za/committee-on-the-rights-of-persons-with-disabilities-concluding-observations-on-the-initial-report-of-south-africa>. Accessed on 25 October 2018.(hereinafter Concluding Observations)

<sup>24</sup> Treaty System Fact Sheet 19

<sup>25</sup> Treaty System Fact Sheet 20

<sup>26</sup> Treaty System Fact Sheet 21

<sup>27</sup> Treaty System Fact Sheet 21

1.19 Other sources of information such as shadow reports by NGO's are accepted.<sup>28</sup> The State Party then appears before the Committee and responds to questions by the Committee. The result hereof is the adoption of "concluding observations" and recommendations that give advice on the further actions necessary to implement the treaty nationally.<sup>29</sup>

1.20 South Africa has ratified the Optional Protocol to the CRPD.<sup>30</sup> The Protocol creates two procedures for strengthening the implementation and monitoring of the CRPD. It creates a procedure to allow individuals to bring petitions to the Committee regarding the breaching of their rights by a State Party. Once a State Party has ratified the Protocol, it allows the Committee to undertake investigations into the territory of the State Party regarding serious violations of the CRPD.

## F. History of the CRPD

1.21 The CRPD was developed through the following documents:<sup>31</sup>

1. Declaration of the Rights of Disabled Persons (1975)
2. The World Programme of Action Concerning Disabled Persons (1982)
3. Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care (MI Principles, 1991)
4. The Standard Rules on the Equalization of Opportunities for Disabled Persons. (1993)<sup>32</sup>

1.22 The final recognition of the rights of persons with disabilities came a long way. Two models – the medical model and the social model – have been instrumental in developing conceptualisation of disability under the law and human rights.

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<sup>28</sup> Treaty System Fact Sheet 27

<sup>29</sup> Treaty System Fact Sheet 28

<sup>30</sup> United Nations Disability Department of Economic and Social Affairs. <http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> Accessed on 26 October 2018. Mr Dube states that the Protocol must be included in the proposed act.

<sup>31</sup> Handbook 9 -10; 15

<sup>32</sup> Handbook 11; These Standard Rules became the non-binding principles by which States regulated their disability obligations as it aimed to enable persons with disabilities to live in society the same way as able bodied persons.

1.23 The medical model sees persons with disabilities as persons with impairments who are in need of charitable assistance. On the other hand, the social model sees disability as the outcome of the interaction between a person with an impairment or a person regarded as such and the socio-economic environment. Understanding of disability under international law has moved through a long journey that began with the medical model of disability to the present time, which embraces a social model.

1.24 A declaration was adopted in 1969 by the General Assembly of the UN called “Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI).”<sup>33</sup> The purpose hereof was to call for the complete integration of disabled persons with disabilities in society.<sup>34</sup> The problem was that the medical model still dominated the Declaration.

1.25 The next step in the journey was the 1975 Declaration on the Rights of the Disabled Person.”<sup>35</sup>

1.26 The UN states in the 70 Years document that this declaration recognised the human rights of persons with disabilities. It states the following:<sup>36</sup>

disabled persons” have rights to medical, psychology and functional treatment in order to enable them to develop their capabilities and skills to the maximum, with the goal of social integration.

1.27 The journey continued with the “Year of Disabled Persons” and the “World Programme of Action Concerning Disabled Persons (WPA).” The 70-year document states the WPA catered for “equalization of opportunities for persons with disabilities, and the effective measures for the prevention of disability and rehabilitation.”<sup>37</sup>

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<sup>33</sup> The United Nations and Disability: 70 Years of the Work Towards A More Inclusive World Division for Social Policy and Development United Nations Department of Economic and Social Affairs January 2018, New York (hereinafter 70 year document) [https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/01/History\\_Disability-in-the-UN\\_jan23.18-Clean.pdf](https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/01/History_Disability-in-the-UN_jan23.18-Clean.pdf)  
Accessed on 11 November 2020.

<sup>34</sup> 8

<sup>35</sup> 9

<sup>36</sup> 10

<sup>37</sup> 10

1.28 Of great importance in this journey is the establishment of the “The Standard Rules on Equalization of Opportunities for Persons with Disabilities.”<sup>38</sup>

1.29 Ngwena<sup>39</sup> states that the Standards Rules are the embodiment of the social model. Even though the Standard Rules were non-binding, they provided a practical framework for removing the environmental factors that impede the participation of persons with disabilities across sectors, given political willingness on the part of governments.<sup>40</sup> The Rules were transformative in protecting the human rights of persons with disabilities by focussing on removing barriers rather than on the impairment. The CRPD was signed on May 2008.<sup>41</sup> The CRPD also relates to the Millennium Goals and the Sustainable Development Goals.

## G. Sustainable development goals

1.30 “SDG” stands for the 2030 Agenda for Sustainable Development.<sup>42</sup> The Preamble of this document states the following:

... The 17 Sustainable development goals and 169 targets...seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are interrelated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.

1.31 Part of the new agenda is the empowerment of vulnerable persons. These includes “all children, youth, persons with disabilities (of whom more than 80 percent live in poverty), people living with HIV/AIDS, older persons, indigenous people, refugees and internationally displaced persons and migrants.”<sup>43</sup>

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<sup>38</sup> 11

<sup>39</sup> Ngwena, C “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue”*2004 Journal for Juridical Science* 29(2) 175 – 176 (hereinafter Ngwena 3)

<sup>40</sup> Ngwena 3 175 - 176

<sup>41</sup> 70 Year Document 17

<sup>42</sup> “Transforming our world: the 2030 Agenda for Sustainable Development” A/RES/70/1 United Nations *sustainable development.un.org*  
<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

<sup>43</sup> Par 23

1.32 The document identifies the following areas of development:

1. Education (par 25)
2. Provision of common access to sex education and reproductive health care (Par 26)
3. It also deals with the “prevention and treatments of non-communicable diseases, including behavioural, developmental and neurological disorders, which constitute a major challenge for sustainable development.”( Par 26)
4. It further states that policies will be adopted to intensify entrance into energy transport and infrastructure. (Par 27)
5. It also aims to make changes to how society deal with goods and services.
6. It identifies another important international meeting: *United Nations Conference on Housing and Sustainable Urban Development in Quito*.(Par 34)

1.33 Given the amount of overlapping between this document and the CRPD, an investigation regarding recent national programmes and legislation dealing with these goals will be needed.

## **H. Statement by the Committee on the Rights of Persons with Disabilities: Inclusion and Full Participation of Persons with Disabilities and their Representative Organizations in the Implementation of the Convention: Promoting Inclusive Urban Development<sup>44</sup>**

1.34 This document states that because of economic and population growth, including factors relating to the environment and humanity; challenges in the human environment are noticed. The existing metropolitan communities are insufficient for persons with disabilities. Access to the all environment including the physical, informational and electronically as well as access in emergencies are not created for use for persons with disabilities. Such inaccessibility is discrimination against persons with disabilities.

1.35 The need for accessibility is noticed in the “New International Framework for Development, Transforming our World: the 2030 Agenda for Sustainable Development” (September 2015).

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<sup>44</sup> Adopted during the Committee’s 19th session, held, from 14 February to 9 March 2018 in Geneva

1.36 The document notes the prevalence of disability in the Sustainable Development Goals, specifically in:

Goal 11 on making cities and human settlements inclusive, safe, resilient, and sustainable, emphasizing, among other issues, the importance of accessibility and inclusion for persons with disabilities in urban development contexts.

1.37 It states that the removal of barriers was called for in “The Outcome Document of the 2013 High Level Forum.”

1.38 In this document, the Committee on the Rights of Persons with Disabilities indicated that there is a need to consider accessibility, independence, adequate living standards and social assistance, employment, and inclusion on all levels of society (political, cultural and in terms of recreation and sport). This is necessary to plan new environments. It is important to have persons with disabilities and their organisations involved in every step of the design of such environment to ensure that it is inclusive.

1.39 South Africa has developed the “South Africa’s Implementation of the 2030 Agenda for Sustainable Development.”<sup>45</sup>

1.40 Goals 4, 8, 11 and 17 deals specifically with disability:

1. Goal 4: “Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.”<sup>46</sup>
2. Goal 8: “Decent Work and Economic Growth.”<sup>47</sup>
3. Goal 11: “Make cities and human settlements inclusive, safe, resilient and sustainable.”<sup>48</sup>
4. Goal 17: “Strengthen the means of implementation and revitalize the global partnership for sustainable development.”<sup>49</sup>

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<sup>45</sup> South Africa’s *Implementation of the 2030 Agenda for sustainable development. Solving complex challenged together Voluntary National Review Report (VNR) 2019* [https://sustainabledevelopment.un.org/content/documents/23402SOUTH\\_AFRICA\\_RSA\\_Voluntary\\_National\\_Review\\_Report\\_Final\\_\\_14\\_June\\_2019.pdf](https://sustainabledevelopment.un.org/content/documents/23402SOUTH_AFRICA_RSA_Voluntary_National_Review_Report_Final__14_June_2019.pdf)

<sup>46</sup> <https://www.un.org/development/desa/disabilities/envision2030-goal4.html>

<sup>47</sup> <https://www.un.org/development/desa/disabilities/envision2030-goal8.html>

<sup>48</sup> <https://www.un.org/development/desa/disabilities/envision2030-goal11.html>

<sup>49</sup> <https://www.un.org/development/desa/disabilities/envision2030-goal17.html>

## WHAT THE CRPD REQUIRES

### CHAPTER 2: THE PROBLEM THAT NEEDS TO BE SOLVED

#### A. The purpose of this chapter is:

2.1 To introduce the socially inclusive nature of the CRPD and preliminarily determine whether a definition of disability is needed.

2.2 To introduce the concepts of reasonable accommodation and discrimination from an equality viewpoint and ask whether the CRPD is consistent with the Constitution.

2.3 To ask the question whether disability has been accepted in domestic case law as a protected ground under the Constitution.

#### B. Substantive Equality, Reasonable Accommodation, Accessibility and the Implementation of Socio-economic Rights

2.4 The CRPD is a legally binding instrument setting out the protection of the rights of persons with disabilities. It clearly sets out the obligations of State Parties to promote, protect and ensure the rights of persons with disabilities. It requires State Parties to create an enabling environment so that persons with disabilities can enjoy equality in society. It conceives disability as an evolving concept and the definition of “persons with disabilities” adheres to the “social model of disability”. The definition of disability depends on the context and there is no closed definition in the CRPD. Disability is a result of the interaction between barriers in the community and with persons with disabilities.<sup>50</sup>

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<sup>50</sup> *The Convention on the Rights of Persons with Disabilities Training Guide* Professional Training Series No.19 United Nations Human Rights Office of the High Commissioner [https://www.ohchr.org/Documents/Publications/CRPD\\_TrainingGuide\\_PTS19\\_EN%20Accessibile.pdf](https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessibile.pdf) (hereafter Training guide 25; 28)

2.5 Ngwena and Albertyn in their article “*Special Issue on Disability: Introduction*”<sup>51</sup> state that:

... CRPD is animated by substantive and transformative equality. It seeks to overcome the legacy of systemic disability-related inequality and discrimination through recognizing the diversity of humankind. It creates a new vision of disability that finds concrete expression in the duty to accommodate difference under conditions of equality and human dignity. For these reasons, the CRPD now serves as a complementary reference point for any juridical discourse at the intersection between disability and equality.<sup>52</sup>

2.6 Ngwena and Albertyn identify issues of reasonable accommodation<sup>53</sup> and systemic exclusion of persons with disabilities on the grounds of socio-economic rights. They opine that society is structured around the idea of “[able-bodiedness]”.<sup>54</sup>

## C. Equality under the CRPD

2.7 Article 5 of the CRPD states:

Article 5 – Equality and non-discrimination<sup>55</sup>

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

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<sup>51</sup> Ngwena C and Albertyn C “Special issue on Disability: Introduction” (2014) 30 *SAJHR* 214 (hereinafter Ngwena and Albertyn)

<sup>52</sup> Ngwena and Albertyn 214.

<sup>53</sup> Ngwena and Albertyn 215

<sup>54</sup> Ngwena and Albertyn 217

<sup>55</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-5-equality-and-non-discrimination.html>

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

2.8 The Committee on the Rights of Person with Disabilities has issued the General Comment No 6 (2018) on equality and discrimination.

## 1. General Comment No 6 (2018) on equality and discrimination

2.9 Discrimination on the grounds of disability is time bound: it can occur in the past, at present, or in the future and include those who are presumed to have a disability and persons associated with persons with disabilities.<sup>56</sup>

2.10 The term “discrimination on all grounds” implies that all methods of discrimination and intersectionalities are to be considered. <sup>57</sup>“Equal and effective legal protection against discrimination” implies that there is positive duty on States to provide protection against discrimination of persons with disabilities through prohibitive legislation. <sup>58</sup>

2.11 Appropriate legal remedies should be developed. Discrimination can also be systemic and States should create remedies that does not sound in money. Discrimination can also be perpetrated by private entities and as such, the protection against discrimination should extend to hold them accountable.<sup>59</sup>

2.12 The provision of reasonable accommodation is an immediately realisable right. It differs from universal design or accessibility, which is a systemic duty of the State, applicable to all persons with disabilities. Reasonable accommodation is provided for an individual person. It starts when an individual person or his or her representative request it when a situation is inaccessible despite universal design or to exercise his or her right. The duty

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<sup>56</sup> Par 20 p 5

<sup>57</sup> Par 21 p 6; It would seem that a type of anti-discrimination act is required. Is PEPUDA enough?

<sup>58</sup> Par 22 p 6; Is it necessary to rewrite PEPUDA? What would be the content of such a rewrite? What will be the political impact of providing for a ground of discrimination on socio-economic grounds? This will imply that not only disability discrimination but all other discrimination be covered.

<sup>59</sup> Par 22 p 6; See footnote supra about what should the content of a possible rewrite of PEPUDA be. It also does seem that other options besides a single anti-discrimination act could be possible.

bearers should consult with the requestor or provide it without being requested once it is clear that a reasonable accommodation is necessary.<sup>60</sup>

2.13 The costs of reasonable accommodation should not be borne by the disabled person. The burden of proof of undue hardship rests on the duty bearer.<sup>61</sup>

2.14 Article 5(4) requires the creation of positive or affirmative measures that ensure *de facto* equality for persons with disabilities.<sup>62</sup>

2.15 The General Comment sets out the preferred interpretation of equality and discrimination by the Committee on the Rights of Persons with Disabilities.

2.16 Article 5 is fully implementable through the following measures:<sup>63</sup>

1. harmonizing legislation and practices with the Convention;
2. repealing that which is not aligned with the Convention;
3. changing and abolishing customs and practices that discriminate;
4. create anti-discrimination laws if it is non-existent;
5. create disability discrimination protection laws, which should be broad in personal and material scope and have effective remedies. The definition of disability to be used in such laws should perceive disability as a social phenomenon that:

... includes those who have long-term physical, including psychological, intellectual or sensory impairment, and should include past, present, future and presumed disabilities, as well as persons associated with ... disabled people.

2.17 To obtain remedies, persons with disabilities should not have to prove that they are “disabled enough.” These laws should focus on the prevention of acts of discrimination rather than on a specific group.

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<sup>60</sup> Par 23 - 24 p 6; Article 5(3) Reasonable Accommodation; Can reasonable accommodation be used in an equality act in a prescriptive way?

<sup>61</sup> Par 25 p 7- 8

<sup>62</sup> Par 28 – 29 p 8

<sup>63</sup> Par 73 p 17 - 19

2.18 This legislation should also cover both the public and private spheres including:

1. Education;
2. Employment;
3. Goods and services;
4. Segregated education;
5. Institutionalization;
6. Denial or restriction of legal capacity;
7. Forced mental health treatment;
8. Denial of the provision of sign-language instructions and professional sign – language interpretation; and
9. Denial of Braille or other alternative and augmentative modes, means and formats of communication.

2.19 Anti-discrimination legislation should contain:

1. protection from retaliation;
2. protection from re-victimization or being unduly inhibited when asking for a remedy;
3. the burden of proof should shift to the respondent if it is presumed that discrimination has taken place;
4. insure protection measures where intersectionality of discrimination (women and girls with disabilities) take place;
5. asylum and refugees that are persons with disabilities should be included; and
6. equitable engendered accessibility measures should be provided.<sup>64</sup>

2.20 The protection of persons with disabilities against discrimination should be on par with the rest of the population. Persons of disabilities, which are victims of discrimination, have to have access to remedies that are fit for purpose. This include access to effective, fit of purpose administrative processes and, if appropriate, access to legal aid. States should provide such access.

2.21 To ensure Convention compliance, training and the development for awareness raising surrounding the CRPD should be developed and instituted. Representative organisations and persons with disabilities should be included in such development.

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<sup>64</sup> Par 73 p 17 – 19; The common law provision is that he who avers should proof. The burden of proof is identified in the Constitutional analysis as stated in *Harksen v Lane* hereunder. It is also stated in PEPUDA.

2.22 Disability discrimination claims should be monitored in comparison with other discrimination claims through data disaggregated by:

1. sex;
2. age;
3. identified barriers; and
4. sector in which discrimination occurred.

2.23 This should include information of cases in and out of court and where prosecutions were successful.

2.24 States should also intervene effectively in public situations where the rights of persons with disabilities are breached by public or private actors. Remedies here should involve class actions.

2.25 States should develop appropriate “policy and strategy” in consultation with the disability sector, human rights bodies and other concerned stakeholders. They should increase the knowledge by persons with disabilities on the availability of the rights applicable to them and adopt monitoring mechanisms, and effective data collection systems.

2.26 The monitoring mechanisms established under article 33, should be independent, inclusive of persons with disabilities and have the required resources.

2.27 All support services must be appropriate to the specific circumstance of the person with the disability.

2.28 Obligations therefore are:

1. Commitments by States to the provision of the rights of persons with disabilities to “non-discrimination and equality.”<sup>65</sup> through enforcement measures like:
  - a. Awareness-raising amongst persons with disabilities of the existence of their rights and remedies;
  - b. Rendering the rights in the Convention actionable in courts and providing persons discriminated against access to justice;
  - c. Protecting against retaliation in the case of a complaint or the enforcement of a remedy;

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<sup>65</sup> Par 30 p 8

- d. Facilitating access to courts and other institutions to bring a claim through various interested entities;
- e. Creating evidential rules that eradicate stereotypical exclusion for redress;
- f. Effective sanctions for a breach of the equality right, and effective remedies should be available; and
- g. Making available appropriate legal aid.<sup>66</sup>

2.29 It is of importance to identify those persons with disabilities that suffer under intersectional discrimination and that need more measures to ensure equality.<sup>67</sup>

2.30 Effective consultation with persons with disabilities' organisations in terms of articles 4(3) and 33(3) in terms of the implementation of the Convention should take place.<sup>68</sup>

2.31 The collection of appropriate data and research information should be to "identify inequalities, discrimination, practices and patterns of disadvantage, and analyse the effectiveness of measures promoting equality." Data differentiation should be according to impairment, sex, gender identity, ethnicity, religion, age and other layers of identity.<sup>69</sup>

2.32 Article 2 of the CRPD defines discrimination based on disability, reasonable accommodation and universal design:<sup>70</sup>

#### Article 2 – Definitions

For the purposes of the present Convention:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

"Language" includes spoken and signed languages and other forms of non-spoken languages;

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<sup>66</sup> Par 31 p 9

<sup>67</sup> Par 32 p 9

<sup>68</sup> Par 33 p 9 - 10

<sup>69</sup> Par 34 p 9

<sup>70</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

## **D. Transformative justice: Equality and the legislative framework**

### **1. Equality models**

2.33 According to Ngwena, understanding equality in the disability context requires appreciating that equality jurisprudence has been dominated by two main models of equality – formal equality and substantive equality.<sup>71</sup> The CRPD and the Constitution subscribe to substantive equality. Substantive equality resonates with the social model of disability that permeates the CRPD.

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<sup>71</sup> Ngwena 1 Ngwena, C “South African Journal on Human Rights - Deconstructing the definition of 'disability' under the Employment Equity Act: social deconstruction” *South African Journal on Human Rights*, Volume 22, Issue 4, Jan 2006; Ngwena 2 Ngwena, C “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. part I (defining disability)” *Stellenbosch Law Review*, Volume 16, Issue 2, Jan 2005; Ngwena 3 Ngwena, C “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” *2004 Journal for Juridical Science* 29(2); Ngwena 4 Ngwena, C “Deconstructing the definition of 'disability' under the employment equity act: legal deconstruction” *South African Journal on Human Rights*, Volume 23, Issue 1, Jan 2007; Ngwena 5 Ngwena, C “Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. part II: reasonable accommodation” *Stellenbosch Law Review*, Volume 16, Issue 3, Jan 2005

## 2. Formal equality

2.34 Formal equality<sup>72</sup> is concerned with treatment that is neutral and applies to all in the same way. Everybody lives under the same rules of advancement regardless of their different circumstances, advantages or disadvantages. This means that there is no distinction between persons on the ground of an attribute or circumstances peculiar to that person or to the social group to which they belong. It is assumed that there is no difference in society in competing for economic, political, education and cultural goods. Differences and vulnerabilities are not recognised.

2.35 Persons with disabilities just like women and persons of colour are different in their experience of the same world. Therefore, they experience barriers in an environment that was designed by people that do not have these differences. In the case of persons with disabilities, the relationship between the impairment and the non-accommodating environment of society is not taken into account in this view of equality. Formal equality does not recognise underlying patterns of group-based disadvantage. In so doing, it risks reinforcing rather than redressing social disadvantage and, thus, perpetuating structural inequality.

## 3. Substantive equality

2.36 Substantive equality, on the other hand, recognises underlying patterns of group-based disadvantages. It accepts that, similarity of treatment may, in certain circumstances, reinforce rather than redress social disadvantage.<sup>73</sup> Where there is deeply embedded structural inequality, the application of neutral standards often serves to freeze the *status quo*. Substantive equality does not focus on abstract categories, but on the lives as lived and the injuries experienced by different groups in society.<sup>74</sup> It recognises the discrepancy caused by imbalances of power and privilege between groups. Ngwena states due to this imbalance, people are placed at different starting points of entry into society, including in respect of access

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<sup>72</sup> Ngwena 3 171 - 172

<sup>73</sup> J Kentridge "Equality" in Chaskalson *et al Constitutional law of South Africa* (1996) (updated) 14–4

<sup>74</sup> JL Pretorius, ME Klink & CG Ngwena (eds) *Employment Equity Law* (2001) (updated) 2.1. **Jutastat Employment Equity Law Author:** JL Pretorius Bcom LLB BA (Hons) LLD (UFS) Professor of Public Law, Director of The Centre For Human Rights Studies, University of the Free State; ME Klink Bcom LLB BA (Hons) (UFS) Director: Research, Compliance and Consultancy, Foundation for Professional Development, South African Medical Association; CG Ngwena LLB LLM (Cardiff) Professor of Law, University of The Free State Last **Updated:** August 2019 - SI 19.

to societal goods and services. Because of structural inequality, people experience different vulnerabilities under existing social structures.<sup>75</sup>

2.37 The Constitution is built on the model of substantive equality and has the goal of protecting and empowering, including, persons with disabilities as one of the historically disadvantaged and marginalised group. The development of disability jurisprudence, including the definitional aspects of “disability” should consider this goal.

2.38 Ngwena<sup>76</sup> states that the term “disability” needs to be seen in context and that a definition should be constructed to indicate who are the individuals that fall under this term. Classification is needed to define the recipients of different advantages in different contexts under the law. Disability is an evolving concept that can only be defined in relation to a specific context. One context may seek to provide protection against individual discrimination, or serve or as a tool for the advancement of disadvantaged groups (affirmative action). Another context seeks to allocate benefits and achieve social protection or security. He indicated that disability is vast in type and severity. Disability has to be defined to give meaning to the term and to define the legal norms that are needed to address a given need. The two main models of disability, namely the medical model and the social model are extremely useful for understanding formulations of disability.<sup>77</sup>

#### **4. The medical model**

2.39 The medical model<sup>78</sup> is an outcome of the medicalisation of disability. It focuses on impairment and ignores the socio-economic environment and the larger cultural context. According to the medical model, disability resides in the individual. Physical or mental limitations are treated as constituting not only the locus of, but also the explanation for, failure to participate fully in society. The affected individual is understood as needing aid and assistance in remedying the disability. Once diagnosed, disability must be cured or rehabilitated in order to integrate or assimilate the affected person into society. Disability is conceived as a departure from a biostatistical norm. It is a manifestation of physical, cognitive or sensory deficit, and thus a disease state.

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<sup>75</sup> Ngwena 3 186 - 188

<sup>76</sup> Ngwena 1

<sup>77</sup> These terms are also referred to in Chapter 1 in the development of the CRPD.

<sup>78</sup> Ngwena 1 620 – 623; Ngwena 2 220 - 222

2.40 The medical model influenced the conceptualisation of disability by the World Health Organisation (WHO) when adopting in 1980 the International Classification of Impairments, Disabilities and Handicaps. (ICIDH). The ICIDH conceived disability in terms of a tri-partite typology involving “impairment”, “disability” and “handicap”.<sup>79</sup> It defined impairment as “any loss or abnormality of psychological, physiological, or anatomical structure or function.”<sup>80</sup> The ICIDH gave the impression that the more decisive factor in terms of disabling effects is “impairment” in the sense of “any restriction or lack of ability to perform an activity in the manner or within the range considered normal for a human being.”<sup>81</sup> The focus on impairment engendered criticism especially from disability advocates and theorists as it was seen as overlooking the socio-cultural environment in the construction of disability leading to the adoption, in 2001, of the International Classification of Functioning, Disability and Health (ICF) to replace the ICIDH.<sup>82</sup>

2.41 While the ICF retains “impairment” as a foundational concept, it is built around a more interactive model of disability. The dynamic relationship between health status as an *intrinsic* characteristic and the physical and social environment as *extrinsic* factors are unambiguously acknowledged to provide a more coherent view of the different dimensions of health at both biological and social levels. ICF adopts what has been described as a “biopsychosocial” model of disability.<sup>83</sup> ICF is more of a hybrid between the medical and social models. It is certainly a departure from the perceived medical orientation of the ICIDH and finds resonance with the social model of disability to the extent that it clearly takes cognisance of the fact that the environment can create disability.

## 5. The social model

2.42 The social model<sup>84</sup> deals with the factors outside a person with disabilities that create a disability. It includes the socio-cultural environment in the definition. It talks to the denial of access to social, economic and political power. Such exclusion results in a diminished access to employment, education, and housing amongst others.

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<sup>79</sup> Ngwena 2 220 - 221

<sup>80</sup> Ngwena 2 220 - 221

<sup>81</sup> Ngwena 2 220 - 221

<sup>82</sup> Ngwena 1 635 - 636

<sup>83</sup> JE Bickenbach *et al* ‘Models of Disablement, Universalism, and the International Classification of Impairments, Disabilities and Handicaps’ (1999) 48 *Social Science & Medicine* 1173

<sup>84</sup> Ngwena 2 222; Ngwena 1 633 – 637; Ngwena 4 122 - 123

2.43 The essence of the social model of disability is that disability is the outcome of the interaction between a person with an actual or perceived impairment and his/her socio-economic environment. Ultimately, disability is not an intrinsic bodily impairment residing in the individual. Rather, it is a social phenomenon of restricted or denied socio-economic participation that is the outcome of the manner in which the socio-economic environment intersects with impairments or perceived impairment in an adverse and unaccommodating manner. The point of the social model is that barriers are systematically created by the socio-economic order and stand in the way of equal participation. To eliminate disability as systemic exclusion and marginalisation, therefore, requires society to focus not so much on health care interventions to treat or rehabilitate individual bodily impairments, though such interventions are important or even essential at an individual level, but on dismantling the socio-economic barriers and holistically accommodating the needs of those with bodily impairments or perceived impairments.

2.44 It can be stated that the medical and social models fit in with the concepts of formal and substantive equality where the medical model is linked to formal equality while the social model is linked to substantive equality.<sup>85</sup>

2.45 This social model and its connection with substantive equality bring into play the topic of reasonable accommodation. It means that society has to adjust to accommodate persons with disabilities in individual circumstances. This adjustment needs to be across all socio-economic sectors.<sup>86</sup> Persons with disability have the right to participate in all socio-economic sectors on an equal basis with others. The socio-economic environment should be rendered accessible and reasonable accommodation must be provided.

2.46 Therefore, Ngwena<sup>87</sup> states that disability is a human rights issue that has horizontal and vertical application, meaning that the protection of persons with disabilities in terms of anti-discrimination legislation can be used against the public and against the State. It forces the State to accommodate persons with disabilities.

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<sup>85</sup> Ngwena 1 636 – 637; 642; Ngwena 4 127; Ngwena 5 553

<sup>86</sup> As can be seen from the Concluding Observations by the Committee on the Rights of Persons with Disabilities in chapter 4 on South Africa's adherence to the CRPD, these are the area that needed work.

<sup>87</sup> Ngwena 4 122

2.47 As mentioned in Chapter 1, the CRPD is built on the human rights of persons with disabilities. Ngwena states that the CRPD requires the realisation of equality and the elimination of discrimination. The structure with which it wants to achieve this goal is through reasonable accommodation across the range of rights identified in the CRPD.<sup>88</sup>

2.48 From the above it is clear that the myriad situations surrounding disability needs to be narrowed into something workable. In term of these obligations under the CRPD, the following is an investigation into the provision of equality in South Africa.

## **E. The Constitution and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)**

2.49 The Constitution creates a justiciable Bill of Rights with various rights that can be adjudicated on. Section 7 of the Constitution provides as follows:

7. Rights
  - (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
  - (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
  - (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

2.50 The rights created are equality, human dignity, life, freedom and security of the person, the provision against slavery, servitude and forced labour, the right to privacy, and the rights to freedom of religion, belief and opinion, freedom of expression and the right to assembly, demonstration, picket and petition.

2.51 Further rights are those to freedom of association, political rights, the rights to citizenship, freedom of movement and residence, and to freedom of trade, occupation and profession. Also covered are labour relations, aspects relating to the environment, property, housing and health care, food, water and social security. The right to health care, food, water and social security is especially important as it prominently relates to the socio-economic rights of persons with disabilities.

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<sup>88</sup> Ngwena 5 553

2.52 Children, education, language and culture, cultural, religious and linguistic communities, access to information and the rights of arrested, detained and accused persons are covered. Just administrative action and access to courts are also indicated.

2.53 All rights are applicable to all persons except where they are confined to citizens.<sup>89</sup> Section 8 of the Constitution states that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. It further states that a natural or juristic person is bound if and to the extent applicable, taking in account the nature of the rights and the nature of the duty imposed by the right. This horizontal and vertical application of the rights in the Bill of Rights is reflected in PEPUDA in the way it deals with the eradication of discrimination in Chapter 5 thereof. There is no exclusion of persons with disabilities of any right in the Bill of Rights. Section 36 deals with the limitation of rights in the bill of rights.

## 1. The Equality Clause in the Constitution<sup>90</sup>

2.54 Section 9 of the Constitution provides as follows with regard to equality:

### 9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

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<sup>89</sup> Political rights

<sup>90</sup> Project 25 Statutory Law Revision Report on Legislation Administered by the Department of Public Service and Administration September 2017 ISBN: 978-0-621-445916-6 Chapter 2 @Copyright South African Law Reform Commission First published September 2017.

Project 25 Statutory Law Revision Report on Legislation Administered by the Department of Social Development

April 2018 ISBN: 978-0-621-461138 Chapter 2 @Copyright South African Law Reform Commission First published April 2018.

National legislation must be enacted to prevent or prohibit unfair discrimination.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## 2. The definitions: section 9 explained

2.55 The specified grounds for discrimination are those mentioned in section 9 of the Constitution, namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Analogous grounds are those where discrimination is based on attributes and characteristics such that human dignity might be denied or badly affected. Such discrimination can also result in patterns of inequality.

2.56 Discrimination means differentiation based on illegitimate grounds, namely those stipulated above. By contrast, differentiation occurs where people are differently treated based on legitimate grounds. Rationality is achieved if the reasons for the law or act of separation are legitimate. A court will ascertain whether the purpose of the law justifies differentiation.<sup>91</sup>

2.57 The fairness of discrimination is determined by the following factors: the “position of the complainants in society” and “whether they have suffered patterns of disadvantage”. Other factors are “the discrimination is based on a specific ground”, the “nature of the provision or power and the purpose sought to be achieved” by the provision; the “extent to which the discrimination has affected the rights and interests of the complainant”, and “whether this has led to an impairment of their fundamental dignity.”<sup>92</sup>

2.58 *Harksen v Lane* sets out the above the quintessential analysis for determining unfair discrimination:<sup>93</sup>

- a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation

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<sup>91</sup> Currie I and de Waal J Association with Lawyers for Human Rights and the Law Society of South Africa *The Bill of Rights Handbook* 5<sup>th</sup> ed Juta, 2005 239 – 259. This case was heard under the Interim Constitution, Section 8. The Judgements is still sound under the Constitution of South Africa Act 108 of 1996.

<sup>92</sup> *Harksen v Lane NO and Others* 1998 (1) (SA) 300 (CC) 324.

<sup>93</sup> Par 50

of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
  - (b) (i) firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (b) (ii) if the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

2.59 These rights can be limited according to section 36, but only in very specific circumstances and not all rights are limitable. All courts can hear discrimination based claims but equality courts have been established under PEPUDA.

2.60 It can be assumed that the exercise of these rights by persons with disabilities have an impact on the eradication of barriers that prevent them from enjoying a fulfilling life as mandated by Article 1 of the CRPD.

### **3. The State’s obligation: section 9(4)**

2.61 Section 9(4) imposes the obligation on the State to enact legislation that can prevent or prohibit unfair discrimination. As a result, the PEPUDA has been enacted.

2.62 PEPUDA aims:

To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

2.63 PEPUDA states in its preamble amongst others that:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; and that

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

2.64 In *MEC for Education: Kwazulu-Natal and Others v Pillay*,<sup>94</sup> Chief Justice Langa of the Constitutional Court held as follows regarding PEPUDA:

[39] Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by s 9(3) and (4) of the Constitution, which read:

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

The Equality Act is clearly the legislation contemplated in s 9(4) and gives further content to the prohibition of unfair discrimination. Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, of course, religion and culture. Although this court has regularly considered unfair discrimination under s 9 of the Constitution, it has not yet considered discrimination as prohibited by the Equality Act. Two preliminary issues about the nature of discrimination under the Act therefore arise.

[40] The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote, and fulfil the rights in the Bills of Rights'. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is

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<sup>94</sup> 2008 (1) SA 474 (CC) 488

consistent with the Constitution and claims must be decided within its margins.

2.65 Referring to the above Pillay case, Strassheim adds the following in terms of reasonable accommodation outside the Employment Equity Act.

2.66 Mr Strassheim indicated that, in the context of disability, the right to reasonable accommodation, and the duty to provide it has central roles. The Constitutional Court<sup>95</sup> has ruled that a failure to provide reasonable accommodation is unfair discrimination, that reasonable accommodation promotes equal opportunity and enjoyment, that society is designed for the “*able-bodied*”, that “*positive action*” is required to promote diversity and that identifying appropriate reasonable accommodation is “an exercise in proportionality”. Furthermore, that reasonable accommodation is key in discrimination fairness, that accommodation is indicated where a neutral rule has marginalising effects and that accommodation is indicated in context of conflicting interests. The following is his exposition of the Pillay case.

#### 4. Failure to accommodate as unfair discrimination

2.67 The Constitutional Court has recognised that in employment,<sup>96</sup> “failing to take steps to reasonably accommodate the needs” of people on the basis of race, gender or disability will amount to unfair discrimination.”

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<sup>95</sup> MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

<sup>96</sup> MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

“[71] It is therefore necessary to consider both the content of the idea of reasonable accommodation and its place in the Equality Act. [72] The concept of reasonable accommodation is not new to our law-this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion. The Employment Equity Act defines reasonable accommodation as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment” ... and recognises making reasonable accommodation for designated groups as an affirmative action measure. There is also specific mention of the concept in the Equality Act. It recognises that “failing to take steps to reasonably accommodate the needs” of people on the basis of race, gender or disability will amount to unfair discrimination. The Equality Act places a duty on the state to “develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation” and permits courts to order that a group or class of persons be reasonably accommodated. Finally, section 14(3)(i)(ii) lists as a factor for the determination of fairness the question whether the applicant has taken reasonable steps to accommodate diversity.”

[The question can then be asked whether such codes (similar to the Standards under the Australian anti-discrimination act) should be developed? Should it have legally binding power or

## 5. More than negligible effort and proportionality

2.68 The Constitutional Court has considered “how far the community must be required to go to enable those outside the “mainstream” to swim freely in its waters”. The Court endorsed the Canadian Courts approach that the extent and limit of the steps required to provide reasonable accommodation is that “more than mere negligible effort is required to satisfy the duty to accommodate.”<sup>97</sup>

2.69 The Constitutional Court confirmed that:

[U]ltimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution. Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

## 6. Accommodation as factor in discrimination fairness

2.70 The importance of reasonable accommodation in the context of discrimination is clear from the Courts ruling that “reasonable accommodation will always be an important factor in the determination of the fairness of discrimination.”<sup>98</sup>

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only be persuasive?][my insert]

<sup>97</sup> MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

“[76] The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the “mainstream” to swim freely in its waters. This is an issue which has been debated both in this Court and abroad and different positions have been taken. For instance, although the term “undue hardship” is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur “a de minimis cost” in order to accommodate an individual’s religion, whilst the Canadian Supreme Court has specifically declined to adopt that standard and has stressed that “more than mere negligible effort is required to satisfy the duty to accommodate.” The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution. Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.”

<sup>98</sup> MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

“[77] It is now necessary to crystallise the role that reasonable accommodation can play in the Equality Act. As noted earlier, the principle is mentioned on a number of occasions in the Equality Act. What concerns us in this case, however, is section 14(3)(i)(ii) which states that taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination. From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination. It would however be wrong to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors

2.71 However, the Court also emphasized that the “test for fairness [is not] a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature.”<sup>99</sup>

## F. Equality according to PEPUDA

2.72 PEPUDA assists in understanding the manner in which the right to equality is implemented in South Africa. PEPUDA states in section 6 thereof that “neither the state nor any person may discriminate unfairly against any other person.”<sup>100</sup>

2.73 Prohibition of discrimination on the grounds of gender and disability exists. The act states the following with regard to disability:

9. Prohibition of unfair discrimination on ground of disability  
Subject to section 6 no person may unfairly discriminate against any person on the ground of disability, including-
  - (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
  - (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
  - (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

2.74 PEPUDA also prohibits discrimination on the grounds of race and gender in sections 7 and 8. Furthermore, there is a prohibition of hate speech, harassment and the dissemination and publication of information that unfairly discriminates.

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relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.”

<sup>99</sup> See footnote supra.

<sup>100</sup> Section 6 of PEPUDA states:

**6. Prevention and general prohibition of unfair discrimination.**

Neither the State nor any person may unfairly discriminate against any person.”

2.75 An interconnectedness<sup>101</sup> of rights exists which is obvious from the interplay between the right to equality and socio-economic rights. Conaghan<sup>102</sup> indicates that the equality issue is complex and multifaceted.<sup>103</sup> “Intersectionality” is defined as different rights converging on one subject.<sup>104</sup> The experience of the individual being discriminated against or the experience caused by the convergence of different type of rights that exists at any one-time causes multi-dimensional discrimination.<sup>105</sup> The South African Constitutional Court has addressed intersectional discrimination.

2.76 In a recent judgment, *Mahlangu and Another v Minister of Labour and Others*<sup>106</sup> the Constitutional Court underscored the place of intersectionality in equality adjudication. It said that when considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds.<sup>107</sup> The Constitutional Court should be understood as including “disability” among the other grounds. Intersectionality serves to remind adjudicators that discrimination may impact on an individual in a multiplicity of ways based on their position in society and prevailing structural dynamics (paras 76, 90). The Court said that Intersectionality is an approach that recognises that different identity categories can intersect and co-exist in the same individual thus creating a qualitatively different experience when compared to that of another individual (para 86).

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<sup>101</sup> Van Reenen 19 states that all rights in the Bill of Rights are “interconnected’ and this implies that the right to equality and dignity are the filters necessary to prevent discrimination. Bhabha shares the view of Albertyn and Ngwena and van Reenen when he states that because of the interconnectedness of rights, systemic discrimination exists.

<sup>102</sup> Conaghan 317

<sup>103</sup> Conaghan 318

<sup>104</sup> Conaghan 319

<sup>105</sup> Conaghan 320

<sup>106</sup> *Mahlangu and Another v Minister of Labour and Others*<sup>106</sup> (CCT306/19) [2020] ZACC 24 (19 November 2020)

<sup>107</sup> Par 65

2.77 South Africa had an interim Constitution in 1994 and the final Constitution was enacted in 1996 with very strong emphasis on substantive equality to redress the inequalities of the past. *Harksen v Lane*<sup>108</sup> and *Prinsloo v Van Der Linde*<sup>109</sup> indicate the place of substantive equality in South Africa by providing criteria for the determination of unfair discrimination. Essentially this criteria contains the reasonable accommodation necessary to give flesh to the application of substantive equality or equality of outcomes for disadvantaged groups and individuals.

2.78 South Africa has embraced the concept of substantive equality and the resultant requirement of reasonable accommodation in the early 1990s before the CRPD was enacted.

## G. Creating a definition of disability

2.79 Ngwena<sup>110</sup> indicated that disability is relevant in legal terms in relation to discrimination and affirmative action and allocation of benefits.

2.80 A definition of disability that reflects the lived experiences of persons with disabilities so that discrimination can be eradicated is needed. A definition of disability should have the capacity to do the following:

1. include all persons who experience disability discrimination as a social group;
2. combatting of stigma and prejudice;
3. treat persons with disabilities with respect and dignity;
4. protect against unfair treatment on the basis of a real or perceived disability;
5. encourage the institution of claims;
6. easily identify the protected group;
7. contain "impairment" or a perception thereof as an essential requirement so that the social model definition of disability can be rendered indelible;
8. apply to the full range of circumstances where disability can take place;
9. address past, present, future and imputed disabilities;

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<sup>108</sup> *Harksen v Lane NO and Others* 1998 (1) 300 (CC)

<sup>109</sup> *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997) This case set out the requirements for the determination of whether an act of state is in relation to the purpose sought to achieve it. *Harksen v Lane* concludes this constitutional analysis on the basis of proportionality or reasonable accommodation

<sup>110</sup> Ngwena 2 219 – 220 and 223 – 242; Ngwena 1 617 – 618; Ngwena 4 122 – 125; Ngwena 5 556 - 561

10. should not contain exclusions that disenfranchise from enjoying full equality and human dignity; and
11. focus on the conduct of the perpetrator and its impact rather than on the nature of disability when adjudicating discrimination.

2.81 He indicated that the purpose of a disability anti-discrimination law is to create the rights for equal citizenship for persons with disabilities. He indicated that the goal of a disability definition is to:

[R]ender a person with disabilities easily identifiable as that the focus of the juridical enquiry is on the alleged conduct and causation rather than proving membership of the protected group.

2.82 He further indicates that even though South Africa in its equality jurisprudence is making use of analogous ground in the determination of discrimination and disability, discrimination can easily be slotted into these grounds. For example on health grounds, it does not give the person with disability a voice and a legal identity. This is the crux of the social model: that a person with disability be recognised as part of society while he or she has the disability.

2.83 Therefore, a legal definition is necessary.<sup>111</sup> It should be in concert with the lived experience of a disabled person. Such a definition will enable the courts to pronounce on the content of the term in order to create the necessary reforms. The emphasis should be on the impairment and how it interacts with an indifferent society.

2.84 Ngwena further indicated that the Constitution protects disability as an equality ground. He also indicated that the Constitution in section 9(4) required mandated legislation.<sup>112</sup> This legislation has so far been primarily PEPUDA and the Employment Equity Act 55 of 1998. These themes of discrimination and affirmative action are continued in the Employment Equity Act as well as the Code of Good Practice: Key Aspects on the Employment of People with Disabilities<sup>113</sup> and the Technical Assistance Guidelines on the Employment of People with Disabilities' (Technical Assistance Guidelines).<sup>114</sup>

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<sup>111</sup> Ngwena 1 617

<sup>112</sup> Ngwena 2 215

<sup>113</sup> Ngwena 1 613

<sup>114</sup> Ngwena 1 615

2.85 Ngwena<sup>115</sup> deals with reasonable accommodation. He defines reasonable accommodation as a non-discriminatory duty. It states that reasonable accommodation is not special treatment or an affirmative action duty. It does not prefer a group and it does not give an advantage or require a quota. It is necessary to correct an unequal playing field for disadvantaged groups or individuals. In the employment environment, it is the interaction between the disability and job function. It is the measure to eradicate environment barriers that “disable” a person with disabilities. It focuses on eliminating discrimination.<sup>116</sup>

2.86 It is an individual response to and assessment of what a person with disabilities needs to function effectively in, in this instance, the workplace. If an employer fails to provide reasonable accommodation, it is an act of discrimination.

2.87 Reasonable accommodation is also present in PEPUDA with the result that the concept of reasonable accommodation is specifically inserted into the disability jurisprudence of South Africa. Ngwena stated that PEPUDA requires reasonable accommodation in all areas outside of the Employment Equity Act.<sup>117</sup>

## 1. Different definitions of disability in South Africa

2.88 The Equal Citizens Plan<sup>118</sup> defines disability as follows:<sup>119</sup> Firstly, with reference to the First Country Report on the CRPD:

South Africa aligns itself with the definition of disability as articulated in the CRPD, which refers to disability as ‘an evolving concept resulting from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

South Africa also sees the definition of disability as including of a definition

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<sup>115</sup> Ngwena 5

<sup>116</sup> Ngwena 5 536 – 540, 524 and 556 - 561

<sup>117</sup> Ngwena 5 553

<sup>118</sup> Department of Social Development, National Development Agency, SASSA, UN Partnership to Promote the Rights of Persons with Disabilities. “*The National Development Plan 2030 Persons with Disabilities as Equal Citizens.*” <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2016/02/Disability-analysis-of-the-National-Development-Plan-2030.pdf>.

<sup>119</sup> Equal Citizens Plan 7

“... which is expected to last for longer than a year, and which exists after maximum correction or control of the impairment.”

2.89 For the purpose of social security benefits, disability is defined as:<sup>120</sup>

... the loss or elimination of opportunities to take part in the life of the community, equitably with others, that is encountered by persons having physical, sensory, psychological, developmental, learning, neurological or other impairments, which may be permanent, temporary or episodic in nature, thereby causing activity limitations and participation restriction with the mainstream society. These barriers may be due to economic, physical, social attitudinal and or cultural factors.

2.90 It states that the Employment Equity Act 55 of 1998 (EEA) deals with the combination between the person with disability and the workplace and not the fact that the person has a disability. The Plan states that the EEA defines disability as follows:

People who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment

2.91 It would seem that disability definitions exists and that it is “context as well as purpose linked.”<sup>121</sup>

2.92 According to the Equal Citizen’s Plan, the National Development Plan states the following with regard to the definition of disability:<sup>122</sup>

Disability must be integrated into all facets of society, recognizing that there is no one-size-fits-all approach. In line with the priorities of the plan, people [sic] with disabilities must have enhanced access to quality education and employment. Efforts to ensure relevant and accessible skills development programmes for people [sic] with disabilities, coupled with equal opportunities for their productive and gainful employment, must be prioritized

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<sup>120</sup> Equal Citizens Plan 7

<sup>121</sup> Equal Citizens Plan 7

<sup>122</sup> Equal Citizens Plan 13 discrimination in the workplace where reasonable accommodation was ordered.

## H. The White Paper on reasonable accommodation

2.93 The White Paper on the Rights of Persons with Disabilities<sup>123</sup> in Pillar 1: “*removing barriers to access and participation*” states the following with regard reasonable accommodation.

2.94 The White Paper<sup>124</sup> states that:

Reasonable accommodation ensures that persons with disabilities enjoy, on an equal basis with others, all human rights and fundamental freedoms.

2.95 Denial thereof is unfair discrimination in terms of PEPUDA. The accommodation is specific to an individual and consist of the following:

- Make the physical environment accessible;
- Provide persons with disabilities with access to information and communication;
- Redress stress factors in the environment;
- Accommodate specific sensory requirements such as those relating to light, noise and spatial stimuli;
- Improve independence and mobility of persons with disabilities;
- Guarantee participation and supported decision-making by persons with disabilities; and
- Provide access and participation to quality education and work.

2.96 It states that reasonable accommodation measures are the following:

... inclusive of assistive devices, assistive technology, personal assistance, adaptations of the built environment, signage, captioning, text available in audio, loop systems, FM systems, alerting/alarm systems for evacuation procedures, dedicated SMS lines to all emergency service call centres, adaptation of (for example) work arrangements and the implementation of flexibility within the workplace to accommodate persons with disabilities.

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<sup>123</sup> *White Paper on the Rights of Persons with Disabilities* approved by Cabinet on 9 December 2015. Government Notice No.39792 government gazette 2016 Department of Social Development No. 230 09 March 2016 (hereafter White Paper)

<sup>124</sup> 54

## **I. Case considered under Optional Protocol H MV Sweden communication 3/2011 (Committee on the rights of persons with disabilities).<sup>125</sup>**

2.97 This case dealt with formal and substantive equality.<sup>126</sup> Example of reasonable accommodation is included in this narrative. (Article 2(4)) Violations of articles 3(b), (d), (e) and 4 (1)(d) 5(1), 5(3), 25, 26 were indicated.

2.98 A person with disabilities wanted to build hydrotherapy pool on her land, for health reasons, which part of the land was zoned for a different purpose.<sup>127</sup>

2.99 The State did not want to lift the zoning based on the requirement of equal treatment with the rest of the population. The Committee found that the health of a person is more important than the zoning rights. Reasonable accommodation should have been made.<sup>128</sup>

2.100 The article on this matter by Grobbelaar-Du Plessis and Nienaber indicated that disability equality is protected in the Constitution, the Employment Equity Act and PEPUDA but there is no disability specific legislation in South Africa. The effect of this case on South Africa is as follows:

2.101 A law applied in a neutral manner may have a discriminatory effect on persons with disabilities when their particular circumstances are not taken into consideration. To rectify this the committee called for reasonable accommodation.<sup>129</sup>

2.102 In terms of the CRPD article 2: “necessary and appropriate modification and adjustment not imposing disproportionate or undue burden ...” were needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others. Reasonable accommodation is seen in articles 2, 5, 14, 24 and 27. Failure to

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<sup>125</sup> Grobbelaar-Du Plessis and Nienaber

<sup>126</sup> 368

<sup>127</sup> 366

<sup>128</sup> 368 - 369

<sup>129</sup> 369 - 371

reasonably accommodate is unfair discrimination. This alone can create a claim under the CRPD.<sup>130</sup>

2.103 Reasonable accommodation is found in PEPUDA. Reasonable accommodation if applied create social transformation by eliminating social and economic inequalities, especially systemic inequalities. This is recognised in *MEC for Education KZN v Pillay*. It is also found in the Employment Equity Act, the relevant Codes of Conducts and the Labour Relations Act in relation to unfair dismissal on the ground of disability.<sup>131</sup>

2.104 This resulted in putting disability in the progressive substantive equality rights framework as human rights already exists in other treaties. The CRPD now expressly makes these rights applicable to persons with disabilities.<sup>132</sup>

2.105 Megrét and Msipa,<sup>133</sup> and Van Reenen, raise the issue of immediate or progressive realisation of the rights in the CRPD. Van Reenen states barriers exist that create exclusion for persons with disabilities to inclusion in society. He states that the right not to be discriminated against is not limited by resource constraints and according to him, immediate implementation is necessary. Discrimination based on socio-economic rights is challengeable, in especially the equality courts created by PEPUDA. He uses the *Grootboom* judgment<sup>134</sup> to indicate, in his opinion, that the state must consider the rights of vulnerable people in planning the distribution of socio-economic rights.

2.106 The CRPD, however, states that accessibility is created by universal design and universal access while reasonable accommodation is an individual claim against discrimination. The following is said in the General Comments in terms of reasonable accommodation and accessibility.

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<sup>130</sup> 374

<sup>131</sup> 372; 374 – 375

<sup>132</sup> 379

<sup>133</sup> Megrét and Msipa 272

<sup>134</sup> Van Reenen 20; *Government of The Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*)

## J. Accessibility and reasonable accommodation

### 1. General Comment No 2 (2014) Article 9: Accessibility<sup>135</sup>

2.107 To achieve access for persons with disabilities, all existing barriers should be continuously, systematically and gradually removed. International cooperation can be used to achieve such access. An evaluation of the current situation in terms of existing barriers can be done.<sup>136</sup>

2.108 A legislative review of laws on accessibility should be done to identify areas lacking in accessibility. If there is none, a legislation framework is to be created. The legislative review should take place in consultation with persons with disabilities' organisation and other relevant stakeholders.<sup>137</sup> The legislation should be based on universal design. The application of accessibility standards should be mandatory and sanctions should be provided for. ICT should be included in disability laws and the definition of disability as it plays a role in equitable access in "... procurement, employment and education ...". It also offers access to goods and services.<sup>138</sup>

2.109 The built environment and its accompanying laws should be accessible and accessibility standards thereon should be mainstreamed. Denial of accessibility constitutes discrimination. Accessibility should be incorporated into

[G]eneral and specific laws and equal opportunities, equality and participation  
in the context of the prohibition of disability - based discrimination.

2.110 Effective remedies are needed. During the development of accessibility standards, the diversity of persons with disabilities should be taken into account and provision should be made for gender, age and type of diversity.<sup>139</sup>

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<sup>135</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en)

<sup>136</sup> Par 27 p 8

<sup>137</sup> "...academic community... architects' associations, urban planners, engineers and designers."

<sup>138</sup> Par 28 p 8

<sup>139</sup> Par 29 p 9

2.111 Minimum accessibility standards should be established for different types of impairments. These should be developed in consultation with persons with disabilities' organisations.

2.112 ICT standards should include:

1. ITU-T Recommendation Telecommunications Accessibility Checklist for Standardization Activities (2006); and
2. ITU-T Recommendation F.790 Telecommunications Accessibility Guidelines for Older Persons and Persons with Disabilities.<sup>140</sup>

2.113 For such communications, at least a minimum level of services should be available like "... personal assistance, sign language interpretation and tactile signing ..." with the aim of gradually improving the services.<sup>141</sup>

2.114 In order to monitor and assess "private entities" in their progress when making their services accessible, legislative performance measures should be established. New goods and services should be accessible to persons with disabilities. Minimum standards need to be developed through consultation with persons with disabilities and their representative organisation, as well as through working with international organisations and other state parties. If goods and services are procured, it should be fully accessible to persons with disabilities.<sup>142</sup>

2.115 Disability discrimination should be prohibited. Such discriminatory activities are:

1. "where the service or facility was established after relevant accessibility standards were introduced,"
2. "where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation."<sup>143</sup>

2.116 Disability accessibility requirements should be included in State procurement laws and policies. Affirmative action in procurement in relation to persons with disabilities is permissible.<sup>144</sup>

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<sup>140</sup> Par 30 p 9

<sup>141</sup> Par 30 p 9

<sup>142</sup> Par 30 p 9

<sup>143</sup> Par 31 p 9 - 10

<sup>144</sup> Par 32 p 10

2.117 Plans and strategies should be developed to recognise the existing barriers and to provide the appropriate resources while setting deadlines.<sup>145</sup>

2.118 In order for society to be accessible, monitoring mechanisms should be strengthened, staff should be trained and sufficient funding should be made available to eradicate barriers. Capacity building of “local authorities” to monitor implementation of the accessibility standards is needed. States are to create effective monitoring frameworks and monitoring bodies that have the capacity and mandate to monitor enforcement and implementation of the standards, plans and policies.<sup>146</sup>

## **2. General Comment No 4 (2016) on the right to inclusive education**

2.119 The Comment<sup>147</sup> states that the responsibility of education should fall with the Education Department.<sup>148</sup> Inclusive education should be mainstreamed throughout government in a “comprehensive and intersectoral” way. This means that other departments and entities dealing with other Convention articles should take into account the interconnectedness of the Convention articles with the right to education and work accordingly.<sup>149</sup>

2.120 Departments should be held accountable and relevant accountability measures should be in place. Partnerships with a variety of other civil institutions should be sought.<sup>150</sup>

2.121 Legislation and policy for inclusive education<sup>151</sup> should be in place based on the human rights model of disability.<sup>152</sup> A timeframe for implementation should be in place as well as

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<sup>145</sup> Par 33

<sup>146</sup> Par 33 p 10

<sup>147</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en)

<sup>148</sup> Par 60 p16

<sup>149</sup> Par 61 p 16

<sup>150</sup> Par 61 p 16

<sup>151</sup> Par 63 p 16

<sup>152</sup> Par 62 p 16

sanctions for violations of the timeframe.<sup>153</sup> It states that the key elements of this framework should be:

1. adherence to international human rights standards;
2. define the term “inclusion” and set out the specific goals aimed at;
3. legislation should contain inclusive education as a human right;
4. repeal derogatory categorization;
5. guarantee disabled and able-bodied students equal access to inclusive education opportunities within the mainstream education system and guarantee the support required by individual students;
6. all new schools are to be build according to universal design principles that is obtainable trough “accessibility standards” and existing ones refurbished within a timeframe. Public procurement is encouraged;
7. introduce quality standards for performance management to track implementation. Investment is required to sponsor these initiatives;
8. in order to implement the initiatives, “... accessible monitoring mechanisms ... should be created and backed by the necessary investment;
9. recognise the need for reasonable accommodation based on the individual requirements rather than on what resources are available to provide it, and create sanctions if this is not provided;
10. all legislation impacting on inclusive education should have such education as its explicit goal;
11. a framework that makes early identification, assessing and support possible;
12. legislative planning and provision by local authorities to provide inclusive education inclusive of the appropriate languages and communication methods.;
13. legislation to ensure that the voice of disabled people and children be heard and give proper attention in all education and reduction related institutions, with available provisions to challenge and appeal decisions;
14. create cooperation between all role-players;<sup>154</sup>

2.122 Sufficient resources (financial and human) need to be committed in support of the implementation of inclusive education, which can be progressively realised: Such systems should be reformed to create the right to education<sup>155</sup> Budgets should be allocated to:

1. ensure the universal design of existing structures;

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<sup>153</sup> Par 63 p 16

<sup>154</sup> Par 63 (a) – (m) p 17

<sup>155</sup> Par 69 p 19

2. invest in teacher education;
3. make available reasonable accommodation;
4. provide accessible school transport; and
5. make available the proper learning materials required.”<sup>156</sup>

2.123 Resources should be reallocated from non-inclusive educational environments. A funding model should provide the needed support for persons with disabilities in inclusive education environments.<sup>157</sup>

2.124 Structural indicators should be created to measure the barriers to inclusive education. Process indicators should be created to monitor the progress. Outcome indicators are also to be created. Education quality can be measured through the UNESCO recommendations:

1. respect for rights;
2. equity;
3. relevance;
4. pertinence;
5. efficiency, and
6. “... affirmative action measures ...”.<sup>158</sup>

2.125 The right to education cannot be progressively implemented<sup>159</sup> but the development thereof can.<sup>160</sup> Core education rights should be immediately implemented. The core education rights are:

1. Non-discrimination.<sup>161</sup>
2. Reasonable accommodation.<sup>162</sup>
3. “Compulsory free primary and secondary education for all” based on the “Education 2030 Framework for Action.”<sup>163</sup>

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<sup>156</sup> Par 69 p 19

<sup>157</sup> Par 70 p 19

<sup>158</sup> Par 75 p 2

<sup>159</sup> Par 40 p 11

<sup>160</sup> My insert

<sup>161</sup> Par 40 (a)

<sup>162</sup> Par 40 (b)

<sup>163</sup> Par 40 (c) p 11 The term “free” means, according to the Comment, “...access to and completion of quality education for all children and youth to at least 12 years of free, publically funded, inclusive and equitable primary and secondary education, of which at least nine years are compulsory...” Par 41 (e)

4. An inclusive and equitable national education strategy should be developed for all learners at all levels.<sup>164</sup>

2.126 The goal of implementing inclusive education extends to private education institutions. The provision of inclusive education should be protected from being eroded by third parties. These measures can consist of a variety of measures to define such impact by persons with disabilities. No fees may be charged for making provision for accommodation requirements.<sup>165</sup>

### **3. General Comment No 5 (2017) on living independently and being included in the community**

2.127 State parties should provide appropriate access to justice<sup>166</sup> so that persons with disabilities can assert this right.

### **4. General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention**

2.128 In regard the involvement of organisations for persons with disabilities<sup>167</sup> and in terms of reasonable accommodation, the following is suggested to implement article 4(3) and 33 (4):

1. Repeal legislation, including legal capacity laws that prohibit the participation of persons with disabilities through their representative organisations.<sup>168</sup>
2. Create policy frameworks that enable the creation of and continuous operation of representative organizations. The following should be guaranteed:
  - a) independence from the state;
  - b) access to and implementation of adequate funding mechanisms;
  - c) providing support for growth;

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<sup>164</sup> Par 42 p 11

<sup>165</sup> Par 76 p 20 - 21

<sup>166</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en); Par 66 p 13

<sup>167</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/7&Lang=en)

<sup>168</sup> V Implementation at the National Level, Par 94 (a) – (u) p 17 - 19

- d) protecting representative organisations against:
  - i. intimidation
  - ii. harassment
  - iii. reprisal
- 3. Encourage the creation of umbrella organisations;
- 4. Create legislation and policies that ensure the right to participation and create regulations that create procedures for consultation at every level;
- 5. While this framework should create mandatory public hearings before decision-making.
- 6. Provisions that create the establishment of:
  - a) “clear time frames”;
  - b) “accessibility of consultations”; and
  - c) “an obligation to provide reasonable accommodation and support”.
- 7. Ensure the provision of reasonable accommodation and the accessibility of matters relating to public involvement, inclusive of persons in institutions and This should be done inclusive of DPO’who have autism. Persons with disabilities should be provided with disability and age appropriate assistance to facilitate their participation through their representative organisations. This includes developing strategies for the involvement of disabled children.

## **5. General Comment No 3 (2016) on women and girls with disabilities**

2.129 Affirmative action measures should be developed to immediately address inequalities, and guarantee equity of opportunity.<sup>169</sup> This should be done inclusive of DPO’s. There should be full accessibility to all services and facilities. Service providers should be trained on relevant human rights requirements and to notice breaches thereof.<sup>170</sup>

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<sup>169</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en)

<sup>170</sup> Par 64 (b) p 16

## **K. Type of legislation that might be needed**

2.130 Du Plessis<sup>171</sup> states that subsidiary constitutional legislation exists to give “a more concrete effect” to the Constitution and the Bill of Rights.<sup>172</sup> This author argues that such legislation is authorised by the Constitution from, for example, section 9(4) dealing with equality, and resulted in PEPUDA.

2.131 This legislation, according to him, has consequences for the interpretation and application of the legislation and the Constitution. Legislation that is constitutionally mandated might be needed to deal with the requirements of the CRPD. The existence of this type of legislation might point to the type of legislative vehicle that may be needed to affect reform.

2.132 Whether there is a need for a single cut across statute to give effect to disability rights and the domestication of the CRPD, or a need for implementation through a patchwork of legislation, law reform in the form of legislation will be needed and constitutionally authorised legislation might provide a suitable vehicle.

2.133 In the light of the opinions of Professor Ngwena<sup>173</sup> about reasonable accommodation based on the social model being the driving force in determining anti-discrimination measures, this could indicate the reason for the establishment of a general anti-discrimination act of a specific act dealing with disability discrimination on its own and mandated by the Constitution.

## **L. Issues noted for possible reform**

2.134 The creation of a vehicle to drive the development of disability rights as an equality issue.

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<sup>171</sup> L du Plessis “The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Exploratory Observation.” (2011) vol 14 No.4 *PER* 92 (hereinafter Du Plessis)

<sup>172</sup> Du Plessis 95

<sup>173</sup> See supra par F

## CHAPTER 3: THE WHITE PAPER ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE 7 UNITED NATIONS GENERAL COMMENTS

3.1 This chapter aims to set out the developments in South Africa pertaining to the development of the rights of persons with disabilities. It briefly discusses the relevant documents. It also briefly mentions the nine pillars of the White Paper on the Rights of Persons with Disabilities. It then mentions the current 7 General Comments done by the Committee on the Rights of Persons with Disabilities indicating how the CRPD can be interpreted.

### A. White Paper on the Rights of Persons with Disabilities

#### 1. Pillars

3.2 The White Paper is built on nine Strategic Pillars.<sup>174</sup> Directives<sup>175</sup> are created under each pillar to ensure the implementation of the CRPD rights for persons with disabilities in South Africa. These pillars are:

1. Strategic Pillar 1: Removing Barriers to Access and Participation
2. Strategic Pillar 2: Protecting the Rights of Persons at Risk of Compounded Marginalisation
3. Strategic Pillar 3: Supporting Sustainable Integrated Community Life
4. Strategic Pillar 4: Promoting and Supporting the Empowerment of Children, Women, Youth and Persons with Disabilities
5. Strategic Pillar 5: Reducing Economic Vulnerability and Releasing Human Capital
6. Strategic Pillar 6: Strengthening the Representative Voice of Persons with Disabilities
7. Strategic Pillar 7: Building a Disability Equitable State Machinery
8. Strategic Pillar 8: Promoting International Co-operation
9. Strategic Pillar 9: Monitoring and Evaluation

<sup>174</sup> *White Paper on the Rights of Persons with Disabilities* approved by Cabinet on 9 December 2015. Government Notice No.39792 government gazette 2016 Department of Social Development No. 230 09 March 2016 (hereinafter the White Paper) White Paper Overview by Deputy Minister. This would be the implementation of the substantive law of the CRPD in South Africa.

<sup>175</sup> The SALRC calls the "Directives" "obligations" as it is understood that it should be used for implementation.

## 2. Aims of the White Paper

3.3 The overview by the Deputy Minister indicates that the White Paper:

1. updates South Africa's 1997 White Paper on an Integrated National Disability Strategy (INDS);
2. integrates obligations of the UN Convention on the Rights of Persons with Disabilities (CRPD) and in the Continental Plan of Action for the African Decade of Persons with Disabilities (both of which South Africa has signed), with South Africa's legislation, policy frameworks and the National Development Plan 2030;
3. endorses a mainstreaming trajectory for realising the rights of persons with disabilities;
4. provides clarity on and guides the development of standard operating procedures for mainstreaming disability;
5. guides the review of all existing, and the development of new, sectoral policies, programmes, budgets and reporting systems to bring these in line with both Constitutional and international treaty obligations;
6. stipulates norms and standards for the removal of discriminatory barriers that perpetuate the exclusion and segregation of persons with disabilities;
7. broadly outlines the responsibilities and accountabilities of the various stakeholders involved in providing barrier-free, appropriate, effective, efficient and coordinated service delivery to persons with disabilities, and Guides self-representation of persons with disabilities.<sup>176</sup>

3.4 The White Paper states that implementation will be done through the result statements and outcome indicators under each of the strategic pillars.<sup>177</sup>

3.5 It was contended that the White Paper would be used to develop legislation to finalise the domestication of the CRPD.<sup>178</sup> It does not replace any existing policy in any existing sector. It seeks to become legislation to incorporate the UNCPRD into South African law though:

... a comprehensive review of gaps in existing legislations and the development of new legislation to strengthen accountability by duty-bearers and recourse for right holders.

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<sup>176</sup> White Paper Overview by the Deputy Minister

<sup>177</sup> Overview by the Deputy Minister

<sup>178</sup> Overview by the Deputy Minister as stated in the White Paper

3.6 It indicates that the specific aims are to:<sup>179</sup>

1. Provide a mainstreaming trajectory for realizing the rights of persons with disabilities through the development of targeted interventions that remove barriers and apply the principles of universal design;
2. Provide clarity on and guide the development of standard operating procedures;
3. Guide the review of all existing and development of new sectoral legislation and policies, programmes, budgets and reporting systems to bring these in line with both Constitutional and international treaty obligations;
4. Stipulate norms and standards for the removal of discriminatory barriers that perpetuate the exclusion and segregation of persons with disabilities;
5. Broadly outline the responsibilities and accountabilities of the various stakeholders involved in providing barrier-free, appropriate, effective, efficient and coordinated service delivery to persons with disabilities;
6. Guide self-representation by persons with disabilities;
7. Provide the framework for a uniform and coordinated approach by all government departments and institutions in the mainstreaming of disability across all planning, design, budgeting, implementation and monitoring of services and development programmes;
8. Provide a framework against which the delivery of services to persons with disabilities can be monitored and evaluated; and
9. Guide gender mainstreaming to ensure that women with disabilities enjoy equitable access to all women empowerment and gender equality legislation, policies and programmes.

3.7 The White Paper applies to the following:

... duty-bearers, including oversight institutions, government institutions, the judiciary, the private sector, the media, law and policy makers, public servants, frontline staff, as well as representative organizations of persons with disabilities (inclusive of parents' organizations) and non-governmental organizations.<sup>180</sup>

3.8 The private sector, the media, law and policy makers, public servants, frontline staff, as well as representative organisations of persons with disabilities (inclusive of parents' organisations) are involved.

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<sup>179</sup> Part 3: Purpose, Scope and Key Principles White Paper 36

<sup>180</sup> White Paper 36

***(a) The social model addressing disability***

3.9 The White Paper further states that the “social model”<sup>181</sup> is now the accepted way of dealing with disability issues in South Africa. It defines this model as a social construction based on the “socio-economic environment” and relates to the barriers that exist in the acceptance of, participation in and inclusion of persons with disabilities in society. The problem is the need for systemic and attitudinal change in society. It identifies the need for accessibility and mainstreaming in this area to enable the full participation, also in the transformation process, of persons with disabilities in society.<sup>182</sup>

**3. Strategic approach to realising the rights of persons with disabilities<sup>183</sup>**

3.10 The White Paper states that it utilises the social model of disability. The model is built on a rights-based, mainstreaming and ‘life-cycle’ approach based on emancipation and parity.

***(a) A Rights-Based Approach***

3.11 The White Paper indicates that this approach creates an accountability standard for government to provide the required development.

3.112 It is also stated that such an approach enhances the implementation of human rights.

***(b) A mainstreaming approach***

3.13 This part of the White Paper states that disability mainstreaming is underpinning all government actions with reference to disability rights.

3.14 It further states that mainstreaming will make universal design possible instead of providing for reasonable accommodation. It defines universal design as follows:

... which calls for all things to be designed to enable use by a wide range of people including various categories of persons with disabilities; ...

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<sup>181</sup> This model focuses on the ability of the disabled person and the eradication of barriers that prevent them from functioning in society.

<sup>182</sup> White Paper 20

<sup>183</sup> White Paper 58 - 60

3.15 It further indicates that mainstreaming is in existence on two levels: the first level is the inclusion of disability on all levels while secondly; it exists in the provision of budget to provide for reasonable accommodation measures.

## B. 7 United Nations General Comments

3.16 The 7 General Comments of the *United Nations Committee on the Rights of Persons with Disabilities* interprets the content, indicate the obligations of States, provide implementation guidelines, and introduces the intersectionality of the CRPD rights. It is soft law that has non-binding but persuasive powers, hence the term “soft law”. The comments will have an influence in the implementation of these rights and the obligations of the State, in the application thereof in South Africa. It has been surmised that South Africa will have to apply the content of the seven general comments to implement a specific right domestically in conjunction with the directives of the White Paper. These 7 General Comments are:<sup>184</sup>

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<sup>184</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en); Committee on the Rights of Persons with Disabilities General comment No. 2 (2014) Article 9: Accessibility; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en); United Nations CRPD/C/GC/3 Committee on the Rights of Persons with Disabilities General comment No. 3 (2016) on women and girls with disabilities; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en); United Nations CRPD/C/GC/4 Committee on the Rights of Persons with Disabilities General comment No. 4 (2016) on the right to inclusive education; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en); United Nations CRPD/C/GC/5 Committee on the Rights of Persons with Disabilities; General comment No. 5 (2017) on living independently and being included in the community [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en); United Nations CRPD/C/GC Committee on the Rights of Persons with Disabilities; General comment No. 6 (2018) on equality and non-discrimination; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en); United Nations CRPD/C/GC/7 Committee on the Rights of Persons with Disabilities; General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention; [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/7&Lang=en); Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women 29 August 2018; <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx>

1. Equal recognition before the law; (article 12)
2. Accessibility; (Article 9)
3. The rights of women and girls with disabilities; (article 6)
4. The right to inclusive education; (article 24)
5. Living independently and being included in the community; (Article 19)
6. Equality and non-discrimination; (article 5) and
7. The participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention. (Articles 4(3) and 33 (3)).

## **C. Integrated National Disability Strategy White Paper Office of the President 1997 (INDS)**

3.17 The INDS<sup>185</sup> was the first attempt to make an impact in the fight against disability discrimination. It was intended to generate legislation and a monitoring system dealing with disability. It states that, at that time, no legislation that focused on disability rights existed.

3.18 It was done in the time before the creation of the CRPD but in the period similar to the announcement of the Year of Disabled Persons and the Standard Rules mentioned in chapter

1. The INDS document states that its objectives were the following:

1. The facilitation of the integration of disability issues into government developmental strategies, planning and programmes;
2. The development of an integrated management system for the coordination of disability implementation and monitoring in the various line functions at all spheres of government;
3. The development of capacity building strategies that will enhance Government's ability at all levels to implement recommendations contained in the *Integrated National Disability Strategy*.
4. A programme of public education and awareness raising aimed at changing fundamental prejudices in South African society.

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<sup>185</sup> <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj1maO1xaztAhW7WxUIHbszB7QQFjADegQIAhAC&url=http%3A%2F%2Fdigitalcommons.ilr.cornell.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1144%26context%3Dgladnetcollect&usg=AOvVaw1IYRu9rwkFrc1NuHZ9MhID&httpsredir=1&article=1144&context=gladnetcollect>

## **1. Functionalities**

3.19 It created a “National Coordinating Committee on Disability (NCCD)” which acted as an advisory and coordinating body consisting of key government departments, welfare organisations and DPO’s. This structure evolved into the “Office on the Status of Disabled Persons” situated in the Presidency.

## **2. Constitutional equality**

3.20 The INDS talks about the influence of the Constitution on the disability rights cause. It explains the following, which slots in perfectly with the views of Ngwena in chapter 2:

Chapter 2 of the 1996 Constitution guarantees fundamental rights to all citizens. It includes, in Section 9, the equality clause, and the right to freedom from discrimination based on a number of social criteria. Discrimination based on disability is specifically mentioned and disabled people are thus guaranteed the right to be treated equally and to enjoy the same rights as all other citizens. The inclusion of this provision in the Constitution has far-reaching implications for preventing discrimination against disabled people in our society. It now requires practical implementation. Provision is also made for affirmative action.

3.21 It is clear, from the text and from the definitions of the medical and social model as well as the definitions of formal and substantive equality discussed in chapter 2 that the INDS is built on the social model of disability and thus created a mechanism whereby disability rights are advanced.

## **3. Policy areas**

3.22 The policy areas created in the INDS were the following: Health Care; Rehabilitation; Barrier Free Access; Transport; Communications; Data Information and Research; Education; Employment; Human Resource Development; Social Welfare and Community Development; Social Security; Housing and Sport and Recreation.

## 4. Legislation required

3.23 It also states that in 1997 there was no specific disability legislation in South Africa and therefore no protection for persons with disabilities. The INDS required legislation that protects the rights of persons with disabilities and the involvement of a magnitude of bodies.

3.24 It states the following, quite similar to the brief the SALRC has received:

Legislation, whether it is stand-alone or whether it forms part of other legislation, must be based on the principles enshrined in the Constitution. It must ensure equality, non-discrimination and protection for people with disabilities. Existing legislation must be scrutinised for compliance with the constitutional principles.

3.25 It aimed to create legislation that protects against discrimination and prevent further discrimination. Such discrimination should be operating on a horizontal and vertical level, thus meaning it protects persons with disabilities against the State and private entities.

3.26 This document identifies the lack of data on disability in South Africa<sup>186</sup> and mentions barriers as the disadvantages caused by the apartheid system, society's view of persons with disabilities as in need of care, and a weak and discriminatory legislation scheme. It further identifies barriers as poverty and exclusion, unemployment and exclusion, and exclusion through legislation.

## D. Medium Term Strategic Framework and its 14 outcomes (MTSF)

3.27 The MTSF is the exhibition of the promises made during the elections."<sup>187</sup> It has 14 outcomes, which have to be considered. This document is also relevant to the Implementation Matrix of the White Paper. These outcomes relate to the implementation of the National Development Plan 2030 (NDP) and are considered in the National Disability Rights Machinery (NDRM).<sup>188</sup> It should be taken into account in developing the documentation that implements

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<sup>186</sup> INDS Chapter 1: Situational analysis

<sup>187</sup> Programme of Action Department of Planning, Monitoring and Evaluation Republic of South Africa <http://www.poa.gov.za/Pages/MTSF.aspx>. Accessed on 10 October 2018.

<sup>188</sup> This is the official organizational structure where government and the disability sector meets.

the CRPD.<sup>189</sup> These outcomes are:<sup>190</sup> “education; health; safety; economy; infrastructure; rural development; human settlements; local government; environment; international; public service; social protection; and nation building.”

## **E. Baseline Country Report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa**

3.28 The Baseline Country Report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa (Baseline Report) approved by Cabinet on 17 April 2013 is South Africa’s First Country Report to the United Nations under the CRPD.<sup>191</sup> It identifies the relevant legislation and programmes and evaluates South Africa’s progress in the area of disability law.

## **F. The National Development Plan 2030 Persons with Disabilities as Equal Citizens (Equal Citizens Plan)<sup>192</sup>**

3.29 The *National Development Plan 2030 Persons with Disabilities as Equal Citizens* (Equal Citizens Plan) published in 2015 states that the intersection between poverty and disability is recognised in the *National Development Plan 2030* (NDP) on the basis that persons with disabilities cannot reach their full potential because of “physical barriers, information barriers, communication barriers and attitudinal barriers.” The NDP therefore included disability mainstreaming into all areas relevant to reduce unemployment, inequality and poverty.<sup>193</sup>

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<sup>189</sup> How does the MTSF relate to the White Paper in terms of implementation?

<sup>190</sup> At the time of writing the new MTSF and corresponding actions were not published.

<sup>191</sup> Initial State Party Report UN Doc CRPD/C/ZAF/1 (hereafter Baseline Report/Initial Report)

<sup>192</sup> The link between this part of chapter 14 and chapter 10 indicates the desired outcomes from the White Paper. These outcomes are relevant to this part in relation to actions that need to be undertaken in terms of the disability orientated stance of the Equal Citizens Plan.

<sup>193</sup> Equal Citizens Plan 3.

3.30 The Equal Citizens Plan aims to consider NDP targets to reduce inequality, poverty and unemployment including for persons with disabilities. It is to be used as the main guideline to ensure inclusivity, also for persons with disabilities.<sup>194</sup> The document goes on to do an analysis between the NDP and the area of disabilities.

3.31 This document states that the NDP<sup>195</sup> is concerned with the creation of “economic opportunities through investment in infrastructure, innovation, private investment and entrepreneurship.” The Equal Citizens Plan creates implementable action plans,<sup>196</sup> which include the enhancement of equality for persons with disabilities. It defines elements of a decent living, as “income through employment or social security is critical to defining living standards; adequate nutrition; transport; safe communities, and clean neighbourhoods.”<sup>197</sup>

3.32 This document states that the goals of the National Development Plan are to:<sup>198</sup>

1. increase employment;
2. raise per capita income;
3. increase the share of national income;
4. provide a comparative base of infrastructure, human resources and regulatory frameworks;
5. ensure that skilled, technical, professional and managerial posts better reflect the country’s racial, gender and disability make-up;
6. broaden ownership of assets by historically disadvantaged groups;
7. ensure the quality of education, with a strong emphasis on all tiers of education;
8. ensure affordable access to quality health care while promoting health and wellbeing;
9. provide effective, safe and affordable public transport;
10. provide sufficient energy to support industry at competitive prices and ensure access for poor households, while reducing carbon emissions per unit of power by about a third;
11. ensure that all south Africans have access to clean running water in their homes;
12. make high speed broadband internet universally available at competitive prices;
13. create a food trade surplus, with one-third produced by small – scale farmers or households;
14. ensure household food and nutrition security;
15. entrench a social security system covering all working people, and social protection for the poor and other groups in need, such as children and persons with disabilities;

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<sup>194</sup> Equal Citizens Plan 3.

<sup>195</sup> Equal Citizens Plan 6.

<sup>196</sup> How do you see these requirements linked with the White Paper in producing a final product?

<sup>197</sup> Equal Citizens Plan 7

<sup>198</sup> Equal Citizens Plan 6

16. realise a developmental, capable and ethical State that treats citizens with dignity;
17. ensure that all people live safely, with an independent and fair criminal justice system;
18. broaden social cohesion and unity while redressing the inequalities of the past; and
19. play a leading role in continental development, economic integration and human rights.

## **G. Twenty Year Review South Africa 1994-2014 Background Paper: Disability**

3.33 The *Twenty Year Review South Africa 1994 – 2014 Background Paper: Disability* (Twenty Year Review) investigates the history, the development, and continuing implementation of policies, strategies and programmes in the field of disability in terms of the view that disability is a social and cultural construct.<sup>199</sup>

3.34 The background further states that the main focus areas of disability are health, social development, education, transport, communication and employment as they relate to service delivery.<sup>200</sup> Challenges are identified as the impossibility of creating a definition for disability as disabled people cannot be defined as a homogenous group and that there is a disparity in equity of access in the allocation of resources and of services between race, geographical location, and gender in terms of persons with disabilities.<sup>201</sup> The need to understand and develop an interdependent system in terms of inclusive design, planning, implementation and monitoring is essential.<sup>202</sup>

3.35 From 1994 up until 2012, various pieces of legislation and policies influenced the disability sector. Development took place in the areas of health, social protection, education and employment.<sup>203</sup> The Constitution of South Africa, the National Education Policy Act 27 of 1996, the INDS, the Housing Act 107 of 1997, the Employment Equity Act 55 of 1998, the

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<sup>199</sup> Twenty Year Review South Africa Background Paper: Disability <https://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Review%20Documents/20YR%20Disability.pdf>. (hereinafter Twenty Year Review) 8 This review will be discussed further in chapter 4 hereunder.

<sup>200</sup> Such a cluster of main areas could be the content of a prescriptive act.

<sup>201</sup> Twenty Year Review 5

<sup>202</sup> Twenty Year Review 6

<sup>203</sup> Twenty Year Review 13 - 16

Skills Development Act 97 of 1998, the Skills Development Levies Act 9 of 1999, PEPUDA, and the *National Rehabilitation Policy 2000*, the South African Social Security Agency Act 9 of 2004, the South African Schools Act 84 of 1996 and the White Paper 6 on Inclusive Education, and (*Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System July 2001*) are mentioned. The Background Paper identifies further development, besides that described above, as the Technical Assistance Guidelines on the Employment of People with Disabilities of 2004 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Mental Health Care Act 17 of 2002, and the Code of Good Practice for the Employment of Persons with Disabilities of 2004.

3.36 During 2007-2012 the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), the ratification of the CRPD, the Children's Amendment Act 41 of 2007, the Social Assistance Amendment Act 6 of 2008 and the National Skills Development Strategy 2010 were developed.

3.37 Further legislation and policies are the Disability Framework for Local Government (2009 – 2014) and the National Land Transport Transitional Act 5 of 2009.<sup>204</sup>

3.38 From 1994-2000, the *UN Standard Rules for Persons with Disabilities 1994* and the *UNESCO SALAMANCA Statement on Special Needs Education 2001* became relevant on the international plane. Also internationally, from 2001-2006, the *UN Convention of the Rights of the Child* and the *UN Convention on the Rights of Persons with Disabilities* came into play. From 2007-2012 the *World Health Organization Community Based Rehabilitation Guidelines 2010* became relevant.

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<sup>204</sup> Twenty Year Review 17

## H. Implementation Matrix of the White Paper on Persons with Disabilities

### 1. Goal

3.39 The Implementation Matrix of the White Paper on the Rights of Persons with Disabilities deals with the reporting on progress made in terms of the implementation of the White Paper.<sup>205</sup>

3.40 The Report is the first attempt at monitoring the progress of government departments in the implementation of the White Paper.<sup>206</sup> It is stated that growing pains were experienced, but that it can be used as a baseline for future monitoring.<sup>207</sup>

### 2. Description of highlights and challenges experienced

3.41 The Report indicates that the following highlights have been achieved.

### 3. Highlights<sup>208</sup>

3.42 Human rights based information relating to albinism has been developed in an indigenous language. Training have taken place on universal design and the SANS 19499 – 2001 for infrastructure officials in the Department of Social Development on national and provincial levels as well as for public works officials in the Western Cape.

3.43 Two “National Strategic frameworks” have been developed: the National Strategic Framework on Universal Access and Design and the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities.

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<sup>205</sup> A summary of the actions undertaken by all departments on each of the focus areas of the White Paper cannot be done in this issue paper. Highlights and challenges as mentioned in the Report will be indicated. The Report is entitled “First Annual Progress Report on the Implementation of the White Paper on the Rights of Persons with Disabilities January- December 2016” Department of Social Development [www.dsd.gov.za](http://www.dsd.gov.za)

<sup>206</sup> Mr Dube indicated that the different definitions and non-disclosure of disability may be blurring the actual performance of departments. Stats SA is currently working on a project to ‘harmonise’ disability administrative data and statistics.

<sup>207</sup> 6

<sup>208</sup> 6 -7

3.44 The Justice cluster has developed measures to improve access to justice for persons with disabilities.

3.45 Two documents are mentioned in relation to transport: The Integrated Public Transport Network (IPTN) Grant and the Transport Master Plan, which makes provision for universal access. There are also the universal design requirements for the preparation of integrated transport plans. It is further stated that disability inclusion in the Integrated Urban Development Programme must inform the work of the "... 13 IPTN municipalities."

3.46 The implementation of The Screening, Identification, Assessment and Support (SIAS) Policy, in terms of education, will provide for compulsory education and improvement in learning.

3.47 In terms of the National Disability Rights Machinery, it is stated that this mechanism continues to provide for social engagement on matters of the WPRPD. It is mentioned that the mechanism must be strengthened in the provinces.

3.48 It is stated that the "... Departments of Small Business Development, and Telecommunications and Postal Services ..." have adopted measures for disability inclusion.

3.49 It is indicated that developments in collecting disability disaggregated data and statistics as well as the development of the Disability Inequality Index is reducing the gap in social inequality.

3.50 In order to advance the implementation of the CRPD "it is indicated that South Africa has taken part of various international matters like the "... ninth session of the Conference of State Parties in New York ..." and was involved in the "... development of the draft AU Protocol on the Rights of Persons with Disabilities."

## 4. Challenges<sup>209</sup>

3.51 It is indicated that enforcement of relevant measures are problematic as accountability measures are insufficient throughout all sectors and the three government spheres.

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<sup>209</sup> 7-8

3.52 It indicates the following existing challenges:

Lack of compliance with building regulations (SANS 10400 Part S), universal design standards contained in the Integrated Public Transport Network (IPTN) Grant requirements, continued exclusion of children with disabilities from compulsory education by placing them on long waiting lists or unavailability of accessible scholar transport; deprivation of decision-making and self-determination rights of many person with psychosocial, intellectual and/or severe communication disabilities, lack of access to decent, accessible housing and neighbourhoods; huge backlogs and long delays in the provisioning of even the most basic assistive devices required for mobility and communication; a downward trend in access to decent work for persons with disabilities; and a disability sector struggling to survive within the current economic climate, pose significant challenges in retain an environment in which children and adults with disabilities can thrive and participate as equal citizens.

## 5. Recommendations<sup>210</sup>

3.53 The acceptance of the White Paper in departments and institutions must be promoted. The WPRPD must be included in all departmental activities.

3.54 This should be managed by accounting officers. Each institution must have an ... approved WPRPD Implementation plan, inclusive of organisational design, reasonable accommodation support provisioning for both staff as well as external programme participants, budgets, departmental skills pans, departmental employment equity plans, equity oversight, etc.

3.55 Guidelines for the formalisation and development of public sector disability rights coordinators should be given attention to by the Department of Public Service and Administration.

3.56 The same department should fast-track formal disability training for public officials. The training should begin with a module on disability in the compulsory induction of public servants.

3.57 It is further stated that the National School of Government should develop contact and online courses on universal design and disability inclusion to implement the WPRPD and the CRPD.

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<sup>210</sup> 8

3.58 It is also stated that the Department of Planning, Monitoring and Evaluation should ensure the inclusion in the (then) “2014 – 2019 Programme of Action” and as well as the inclusion of the WPRPD into the 2019 – 2024 Medium Terms Strategic Framework.

3.59 A “... Disability Equity Work Group” should be created in “All forums of the South African Directors General (FOSAD) ...” This group then are to take responsibility for the coordination of the WPRPD.

3.60 The downward trend in the employment of persons with disabilities should be investigated by the Department of Labour. It is stated that this investigation can be the stimulus to create a better employment access strategy for persons with disabilities.

3.61 A system to clear the build-up in the provision of assistive devices, an increase in the provision of the scope of assistance devices to all persons with disabilities and improvement of the delivery time for assistive devices, should be developed by the Department of Health.

## I. Policies<sup>211</sup>

3.62 The Baseline Report identifies a variety of policies. A desktop survey identified some policies available as the *National Mental Health Policy Framework and Strategic Plan 2013-2020*, *Disability Framework for Local Government 2015-2020*, the *Technical Assistance Guidelines on the Employment of People with Disabilities* and the *Framework and Strategy for Disability and Rehabilitation Services in RSA 2015-2020*. It also identified the *Policy Guidelines for the Licensing of Residential Facilities and/or Day Care Facilities for Persons with Mental Illness and/or Severe or Profound Intellectual Disabilities* and the *Standardization of Assistive Devices in South Africa: a Guideline for Use in the Public Sector* and the *National Rehabilitation Policy 2006*.<sup>212</sup>

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<sup>211</sup> These policies have been identified from the Baseline Report but not interrogated.

<sup>212</sup> Brief desktop survey

## J. Past developments

3.63 A National Albinism Conference<sup>213</sup> was held from 25-27 October 2013. It resulted in the *Ekurhuleni Declaration of the Right of Persons with Albinism*. A call was made for the strengthening or development of legislation to eliminate hate speech and to “enforce action against violation of the rights of persons with albinism.”<sup>214</sup>

3.64 In 2016, the National Disability Rights Awareness Month, in response to Article 8 of the CRPD, was held in October.<sup>215</sup> It states that Cabinet has approved, in 2013, that October is National Disability Rights Awareness Month on a yearly basis. It also states that Cabinet has approved that 3 December of each year is the National Day of Persons with Disabilities.

### 3.65 *Department of Social Development to host national disability rights summit*

On 4 March 2016, the Department of Social Development (DSD)<sup>216</sup> and the South African disability sector announced that it would host a disability rights summit from 10-12 March 2016. The aim was to create reasonable outcomes for the White Paper. This summit will also host the first meeting of the Presidential Working Group on Disability.

3.66 In a speech by President Cyril Ramaphosa, it was indicated that the Presidential Working Group on Disability<sup>217</sup> is an important forum to advance “our transformative agenda in a collaborative and inclusive manner.” It is indicated that this group will advise the Presidency on actions for the good of the disability sector.<sup>218</sup>

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<sup>213</sup> National Albinism Conference 25 – 27 October 2013 Women, Children and People with Disabilities Department Women, Children and People with Disabilities

<sup>214</sup> Another one was held in Johannesburg in October 2019.

<sup>215</sup> This Article requires State Parties to “raise awareness through society regarding persons with disabilities, foster respect for the right of people with disabilities, combat stereotypes and harmful practices and promote awareness of the capabilities and contributions of persons with disabilities.”

<sup>216</sup> “*Department of Social Development to host national disability summit.*” [http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=781&am](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=781&am) 4 March 2016. Accessed on 9 July 2018

<sup>217</sup> Opening remarks by President Cyril Ramaphosa at the Presidential Working Group on Disability, Union Buildings <https://www.gov.za/speeches/opening-remarks-president-cyril-Ramaphosa> accessed on 1 July 2020

<sup>218</sup> The SALRC is aware of this forum.

### 3.67 *Disability summits commits to successful implementation of White Paper*

On 12 March 2016, the DSD issued a statement indicating that the disability rights summit held in Irene resulted in the Draft National Disability Rights Summit Irene Declaration. At this summit, the White Paper was converted into reasonable outcomes through practical implementation. The statement by the DSD indicates that disabled people are still being discriminated against. It stressed the fact that policies are not enforceable and a law is needed to implement the White Paper and CRPD into law.<sup>219</sup>

3.68 On 13 June 2018, the DSD issued the *Statement by Ms. Henrietta Ipeling Bogoane-Zulu Deputy Minister for Social Development of the Republic of South Africa to the 11<sup>th</sup> Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities*. It states that the African Union (AU) adopted the *Protocol to the Africa Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa* in 2018. It stated that South Africa would ratify this Protocol and incorporate it together with the CRPD. It also states that South Africa has finalised the *National Framework on Universal Access and Designs* as well as the *Reasonable Accommodation Support for Persons with Disabilities*. It stated that this documentation will guide the development and review of existing and new legislation and creates minimum norms and standards in these areas.<sup>220</sup> The statement further indicates that the collection of disability-disaggregated data for purposes of "planning, programme design, implementation, monitoring and evaluation" is needed.

3.69 Another recent development is the hosting of the Disability Awareness Month 2018 with the theme: *A disability inclusive barrier-free South Africa by 2030. Be the legacy*. This initiative is *presented* yearly.<sup>221</sup>

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<sup>219</sup> "Disability summits commits to successful implementation of white paper."

[http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=785&am](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=785&am) 12 March 2016. Accessed on 9 July 2018.

<sup>220</sup> "Statement by Ms. Henrietta Ipeling Bogoane-Zulu Deputy Minister for Social Development of the Republic of South Africa to the 11<sup>th</sup> Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities." [http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=927\\*am13](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=927*am13) June 2018. Accessed on 9 July 2018.

<sup>221</sup> In an article on the government website "Disability Rights Awareness Month 2018" it is indicated that the awareness month provides the Department of Social Development with the opportunity to raise awareness on the following issues:

- "inspire hope and confidence in the ability of South Africans and the state machinery to work together in addressing the common challenges facing persons with disabilities and society in general;

3.70 In a press release from Parliament<sup>222</sup> it is stated that the “Portfolio Committee on Women, Youth and Persons with Disabilities” has recognised the fact that a “legislative gap” with regard to persons with disabilities exists, as there is no disability act. The press release states that there are developments, like “*the White Paper on the Rights of Persons with Disabilities; the National Strategic Framework for Universal Access and Design and reasonable accommodation... and the National Framework on Self-representation of Persons with Disabilities.*” It states that the “Disability Programme in the Department of Women, Youth and Persons with Disabilities” developed these policies

3.71 The press release further states that in 2019 the focus will be on “Promoting the participation of persons with disabilities and their leadership: taking action on the 2030 Development Agenda.” This will result in the inclusion of persons with disabilities in the 2030 Agenda for Sustainable Development. It states that this Agenda identifies disability as “cross-cutting issue, to be considered in the implementation of its 17 Sustainable Development Goals.”

3.72 The press release also states that the disability sector has indicated several priorities that government should act upon, especially the domestication of the CRPD. It further states, “The Committee is aware of the African Model Law on Disability.”

3.73 In an online article, entitled *Sign language as South Africa’s 12<sup>th</sup> official language* it is indicated, “Parliament’s Constitutional Review Committee has recommended that sign language become the country’s 12<sup>th</sup> official language.”<sup>223</sup>

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- Mobilise persons with disabilities around the gains made in protecting, promoting and upholding the rights of persons with disabilities since the adoption of the Freedom Charter 60 years ago and 21 years of democracy;
  - Reach out to the diversity within the disability sector, and acknowledging that all human and socio-economic rights should be equally enjoyed by all persons with disabilities, irrespective of race, gender, age, sexual orientation, impairment, socio-economic status, educational qualification level, religion, culture, employment status or nationality; and to
  - Celebrate the release of the White Paper on the Rights of Persons with Disabilities, which advocates for measures that will hold duty-bearers accountable and strengthen recourse measures for rights-holders whose rights have been violated.”

*<https://www.gov.za/DisabilityRightsAwarenessMonth2018> Accessed on 24 November 2020.*

<sup>222</sup> *Committee acknowledges legislative gap within persons with disabilities 3 December 2019*

Business of parliament *<https://www.parliament.gov.za?business-parliament> accessed on 9 March 2020.*

<sup>223</sup> “*Sign language as SA’s 12<sup>th</sup> the official language*” Law for All online *<https://www.lawforall.co.za/2018/09/sign-language-south-africa> Accessed on 26 February 2020*

## CHAPTER 4: CRITIQUE: WHY LEGISLATIVE LAW REFORM IS NECESSARY

### A News articles

4.1 Various news articles identify the fact that domestication of the CRPD through a law is needed for the social inclusion of persons with disabilities. An article in the African News Agency *Disabled to Fight for their Rights*:<sup>224</sup> *Pretoria: The National Disability Summit closed at the weekend with delegates discussing the Draft National Disability Rights Summit Irene Declaration* indicated that disabled people experience “unacceptable high levels of exclusion, marginalization and discrimination.” It states that the disability sector must ensure the implementation of the White Paper. This article was in response to the *Irene Declaration* and, according to this article, that Declaration states:

policies are not enforceable and there is, therefore, a need to ensure that all obligations contained in the UN Convention on the Rights of People with Disabilities and the policy directives of this White Paper .... be captured in law.

4.2 A further view in terms of the existence of legislation is stated in another article entitled *Human rights day is being celebrated around the country but is it little consolidation for the disabled community*.<sup>225</sup>

South Africa has some key legislation that caters for people with disabilities. The reality is that these laws have not made life any easier for the disabled community.

4.3 According to this article the discrimination people with disabilities experience living in an unaccommodating society “is not a social problem but one of human rights.”

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<sup>224</sup> Jabulile S Ngwenya “Disabled to fight for their rights Pretoria: The National Disability Summit closed at the weekend with delegates discussing the Draft National Disability Rights Summit Irene Declaration.” *African News Agency News* 14 March 2016 <https://www.iol.co.za/capetimes/news/disabled-to-fight-for-their-rights-1997390>.

<sup>225</sup> “Disabled in SA still fighting for Rights Human Rights Day is Being Celebrated around the Country but it is Little Consolidation for the Disabled Community.” <https://www.enca.com/south-africa/disabled-sa-still-fighting-rights-0> 21 March 2016.

4.4 Scholarly reports like the article *The Challenges of Realizing Equal Education in South Africa*<sup>226</sup> analyse *White Paper 6 Special Needs Education: Building an Inclusive Education and Training System (2001)*. The article states that this document was the creation of new policies for a “single, undivided education system” including disabled learners.<sup>227</sup> They talk about school level barriers to inclusive education and “separate” schools for learners with disabilities.<sup>228</sup> Inclusive education aspires to, but does not necessarily occur on ground level. This is due to attitudes towards disability and the lack of teacher education in disability issues.<sup>229</sup>

4.5 In *Why we need to create a truly enabled workplace*<sup>230</sup> it is stated that “it is difficult for people with mental, physical or psychological ‘disabilities’ to find and keep work” and this becomes more difficult in times of dealing with conflict at work.

4.6 The author of this article indicates that the right to dignity and the right to access to justice are covered sufficiently in society, but that accessibility issues in terms of physical and communication matters exists. It mentions that an ILO Code of Good Practice apparently exists to design positive strategies for the management of workplace disability and that it forms part of the national legislation. They, however, feel that such documents are not applied in the workplace. It is stated that dismissals take place on grounds of:

[U]nder-performance or misconduct, rather than on grounds of their disability, which would make such a dismissal unfair ... .

4.7 This means that the real reason for dismissal is the disability and not the grounds mentioned by the employer. The provision of reasonable accommodation and a mind shift towards an enabling environment are necessary. Scholarly reports like the article *The Challenges of Realizing Equal Education in South Africa*<sup>231</sup> analyse *White Paper 6 Special*

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<sup>226</sup> Dana Donahue and Juan Bornman “*The Challenges of Realizing Equal Education in South Africa.*” Centre for Augmentative and Alternative Communication, University of Pretoria South Africa (2014) vol.34 n.2 Pretoria Jun S. Afr. j. educ. [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0256-01002014000200003](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-01002014000200003).

<sup>227</sup> Donahue and Bornman 319.

<sup>228</sup> Donahue and Bornman 321.

<sup>229</sup> Donahue and Bornman 321 – 323.

<sup>230</sup> The South African Staff & Agencies “*Why we need to create a truly enabled workplace.*” [https://www.thesouthafrican.com/read-why-we-need-to-create-a-truly-enabled-workplace/\\_2017-01-09](https://www.thesouthafrican.com/read-why-we-need-to-create-a-truly-enabled-workplace/_2017-01-09).

<sup>231</sup> Dana Donahue and Juan Bornman “*The Challenges of Realizing Equal Education in South Africa.*” Centre for Augmentative and Alternative Communication, University of Pretoria South

*Needs Education: Building an Inclusive Education and Training System (2001)*. The article states that this document was the creation of new policies for a “single, undivided education system” including disabled learners.<sup>232</sup> They talk about school level barriers to inclusive education and “separate” schools for learners with disabilities.<sup>233</sup> Inclusive education aspires to, but does not necessarily occur on grass roots level. This is due to attitudes towards disability and the lack of teacher education in disability issues.<sup>234</sup>

4.8 In *Why we need to create a truly enabled workplace*<sup>235</sup> it is stated that “it is difficult for people with mental, physical or psychological ‘disabilities’ to find and keep work” and this becomes more difficult in times of dealing with conflict at work.

4.9 A further pressing issue is the aspects relating to assisted decision-making. *Alzheimer’s South Africa*<sup>236</sup> talks about assisted decision-making. This means that some adults cannot make decisions for themselves because of some sort of disability or lack of capacity. Therefore, assisted decision-making measures providing for some sort of autonomy is needed, and protection will be necessary. According to the article, the current system of curatorship deals with the matter. It then goes on to mentions the SALRC’s *Draft Discussion Paper Relating to Assisted Decision-Making* as dealing with this issue.<sup>237</sup>

4.10 The Human Rights Commission<sup>238</sup> indicates that barriers in the form of lack of implementation of policy, spatial planning, stigmatisation and lack of resources hamper persons with disabilities in South Africa. This includes dependence on care grants issued by the State.<sup>239</sup> They further identify the lack of a definition of disability as a problem as persons

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Africa (2014) vol.34 n.2 Pretoria Jun S. Afr. j. educ.  
[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0256-01002014000200003](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-01002014000200003).

<sup>232</sup> Donahue and Bornman 319.

<sup>233</sup> Donahue and Bornman 321.

<sup>234</sup> Donahue and Bornman 321 – 323.

<sup>235</sup> The South African Staff & Agencies “Why we need to create a truly enabled workplace.”  
[https://www.thesouthafrican.com/read-why-we-need-to-create-a-truly-enabled-workplace/\\_2017-01-09](https://www.thesouthafrican.com/read-why-we-need-to-create-a-truly-enabled-workplace/_2017-01-09).

<sup>236</sup> Alzheimer’s South Africa <https://alzheimers.org.za/legal-and-financial/>.

<sup>237</sup> The SALRC has conducted an investigation into assisted decision making. Its report is available on <https://www.justice.gov.za/salrc/index.htm>

<sup>238</sup> South African Human Rights Commission *Equality Report Commentaries on Equality Race, Gender Disability and LGBTIQ+ Issues* 33 – 47 ISBN: 978-0-621-40805-8. Copyright South African Human Rights Commission (hereafter Human Rights Commission)

<sup>239</sup> Human Rights Commission 33

with disabilities are not a homogenous group and have different needs. A contrary view on the domestication of the CRPD is that the current economic situation in South Africa might make implementation of the CRPD, once domesticated, difficult.<sup>240</sup>

## B. The Baseline report

4.11 South Africa has critiqued its own performance in disability rights implementation stating that it recognises the “weaknesses in the government machinery of the State, the capacity constraints, and the lack of co-ordination with the disability sector.”<sup>241</sup> It made the following recommendations in the Baseline Report:

1. Strengthening baseline information for every article of the CRPD;
2. Strengthening its mainstreamed legislative and policy framework;
3. Targeting interventions in a coordinated and integrated manner through transversal policy and legislation as well as monitoring mechanisms;
4. Strengthening its national disability rights machinery, including creating more enabling environments for organizations of persons with disabilities;
5. Strengthening accountability and monitoring through the introduction of disability rights based indicators into the government-wide monitoring and evaluation system, and above all;
6. Accelerating implementation of policies and programmes that aim to provide equal access to persons with disabilities, including disability-specific programmes aimed at addressing barriers to participation.<sup>242</sup>

## C. Concluding observations by the Committee on the Rights of Persons with Disabilities

4.12 South Africa received concluding observations from the Committee on the rights of persons with disabilities on its initial report as stated in the document CRPD/C/ZAF/CO/1.<sup>243</sup> Negative aspects were, amongst others, related to the general obligations under the CRPD

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<sup>240</sup> Human Rights Commission 42

<sup>241</sup> Baseline Report 80

<sup>242</sup> Baseline Report 80 – 81

<sup>243</sup> United Nations Convention of the Rights of Persons with Disabilities CRPD/C/ZAF/CO/1 Committee on the Rights of Persons with Disabilities Concluding Observations on the Initial Report of South Africa (hereinafter Concluding Observations) [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5).

as well as to the specific rights. Positive responses were in terms of the prompt reaction to the “starting of investigations and arbitration procedures” to the Life Esidimeni matter.<sup>244</sup>

4.13 Under the general observations, the Committee on the Rights of Persons with Disabilities stated that it is concerned about the continuous application of the medical model in especially the education system in “the licencing procedures of residential and/or day-care facilities for persons with mental illness and/or severe and profound intellectual disabilities.”<sup>245</sup>

4.14 The absence of meaningful consultation with and participation of people with disability by authorities on all levels of government to include the point of view of persons with disabilities as well as their exclusion from decision-making processes was also mentioned.<sup>246</sup>

4.15 There is concern that that the concept and assessment procedures of disability in some national laws still reflect the medical model of disability. Which suggests that the review and required changes to local and national laws concerning disability assessment and procedures will be revised to reflect the understanding and application of the social model on disability. This will be done throughout consultation with organisations of and for people with disabilities, to redesign disability assessments and to eliminate multiple assessments, to reduce the burden on applicants, and promote consistency and transparency in such assessments.

4.16 There is concern about the absence of meaningful consultation and effective participation mechanisms to ensure that the views, opinions and concerns of persons with disabilities, particularly young persons, are included in policy formulation, including decision-making processes, by public authorities both at the national and local level. It therefore suggests that the existing Presidential Working Group on Disability, actively identify means to engage and solicit feedback and input from the youth with disabilities on the issues that are raised for the Working Group. To ensure that all State departments that deal with stakeholder consultations or any means of stakeholder engagements, understand the human rights model of disability, regular training on non-discrimination, dignity and respect, as well as the right to reasonable accommodation of persons with disabilities will be undertaken.<sup>247</sup>

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<sup>244</sup> Concluding observations 1 par II 3(b)

<sup>245</sup> Concluding observations 2; These are found in the “Guidelines for the Licensing of Residential and Day Care Facilities for People with Mental and/or Intellectual Disabilities” Government Gazette, 19 May 2017 no. 40847 49

<sup>246</sup> Concluding observations 2 par III A 6

<sup>247</sup> Input by Ms Fransolet; Concluding observations Par III A Par 4 – 7 p 2

## D. Specific articles

### 1. Article 5: Equality and non-discrimination<sup>248</sup>

#### (a) Reasonable accommodation

4.17 There is a concern that the concept of reasonable accommodation is not understood and therefore not applied, with special reference to “persons with psychosocial or intellectual disabilities, as well as persons with albinism.” The suggested solution is the improvement of understanding of the concept of reasonable accommodation<sup>249</sup> and the implementation thereof in government, as well as public and private sectors.

#### (b) Crime survivors

4.18 Another concern is that there is extensive discrimination “especially against persons with psychosocial or intellectual disabilities and persons with albinism, including persons in rural areas with disabilities.” It again suggests a solution by stating that specific legislation and policies should be developed to deal with these specific issues through the provision of adequate anti-discrimination protection.<sup>250</sup>

#### (c) Lacking legislation

4.19 The Observations indicated that specific disability legislation is lacking. This legislation should protect persons with disabilities against “multiple and intersectional discrimination.” The suggested solution is the creation of effective measures to compensate victims,<sup>251</sup> adequate rehabilitation measures and sanctions for perpetrators once discrimination has taken place.<sup>252</sup>

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<sup>248</sup> Concluding observations 2 Par III B Specific rights (arts 5 – 30) article relates to section 9 of the Constitution.

<sup>249</sup> Ms Fransolet indicates that this is about awareness raising and training.

<sup>250</sup> Ms Fransolet indicates that legislation and policies don't change attitudes. Persons need to be trained and made aware of the differences on people.

<sup>251</sup> Mr Dube indicates that his understanding is that we must have enforceable legislation that provides remedies to victims and sanctions perpetrators? Ms Fransolet indicates that regulating this will require legislation.

<sup>252</sup> Ms Fransolet indicates that this is also about the integration of not only people with disabilities but also universal access into all other spheres of government and all projects/deliverables. If people with disabilities are integrated into society, there will be a reduction of intersectoral discrimination (consider housing developments, if housing was accessible people with disabilities

**(d) PEPUDA**

4.20 A concern is the fact that chapter 5 has not yet been promulgated.<sup>253</sup>

**(e) Data**

4.21 It states that there is a deficiency of knowledge on actions that can be taken to redress discrimination, as well as statistics on discrimination cases. It suggests that the solution be the collection of data.<sup>254</sup>

**2. Article 6: Women with disabilities<sup>255</sup>**

4.22 When dealing with Article 6, the Observations indicate that South Africa should take into account “general comment No. 3 (2016) on women and girls with disabilities in its implementation of Goal 5 of the Sustainable Development Goals.” Goal 5 of the sustainable development goals wants to create equality between genders and emancipate females.<sup>256</sup>

**(a) Discrimination**

4.23 The Observations are concerned about the plight of women and girls with disabilities in that they face multiple discrimination relating to access to “education, employment and health care.” It states that women with disabilities are also excluded from life in general. The Observations suggested that the solution be the creation of anti-discrimination, violence and abuse measures, as well as legislation and policies and to make accessible information available and processes for victims for them to have access to “health, psychosocial and legal services.”

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would be able to integrate not only into the communities but into the housing scheme without “special lists or waiting periods”

<sup>253</sup> At writing of this issue paper the sections still have not be operationalized.

<sup>254</sup> Mr Dube indicates that clauses to support current strategies to harmonise administrative data and disability statistics are needed. There debates around the use of the International Classification of Function/Washington Group set of questions are still ongoing. He indicated but there is need for a harmonisation strategy.

<sup>255</sup> Concluding observations 3 Par III B sub par 10

<sup>256</sup> Ms Franslot questioned what actions can be taken to advance the Goal further?

**(b) *Traditional and Cultural Practices***

4.24 There is a concern about the lack of attention to the creation of legislation and policies,<sup>257</sup> including the lack of affirmative action to address “multiple and intersecting forms of discrimination against women and girls with disabilities, particularly against black women and girls with disabilities” and the existing discrimination in “traditional and cultural practices”. The development of such measures could help in combatting discrimination against women with disabilities, especially black women with disabilities and help create opportunities for them. Another solution suggested is the creation of affirmative action measures aimed at uplifting women and girls with disabilities as described above and awareness raising of anti-discrimination measures in relation to these practices.

**(c) *GBV***

4.25 The concern is the non-existence of prevention and combat measures regarding violence, abuse, exploitation and sexual violence and exploitation amongst others of girls and women with a disability. There is also an absence of accessible information<sup>258</sup> about the availability of “health, psychosocial and legal services for victims of violence and abuse or those who are at such risk.”

**3. Article 7: Children with disabilities<sup>259</sup>**

**(a) *Inclusive education***

4.26 There is a concern that there is no legislation dealing with inclusive education for children. The solutions suggested are the creation of legislation dealing with inclusive education for all children with disabilities in line with the “Committee on the Rights of the Child (CRC/C/ZAF/CO/2, paras. 43–45).<sup>260</sup> A review of the “*White Paper 6 Special Needs*

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<sup>257</sup> Ms Fransolet indicates that we have updated BBBEE requirements and EEA requirements, we don’t need more legislation, we need to be able to monitor and evaluate it. We need to educate our people so that women and girls (including those with disabilities) are seen and treated as valuable contributing member[s] of our society. How can we achieve this?

<sup>258</sup> Ms Fransolet indicated that South Africans need to be educated, women and girls need to know what the forms of GBV are, as well as have access to information and accessible processes so that perpetrators can be dealt with without any further risk to the victims.

<sup>259</sup> Concluding observations 4 Par III B sub par 12.

<sup>260</sup> Ms Fransolet indicated that we have the legislation as well as the superb backing of PEPUDA, schools lack technical knowledge on what do to become inclusive as well lacking the knowledge on how to teach inclusively. Schools need access to technical information and assistance, as well as additional training for our teachers.

*Education: Building an Inclusive Education and Training System (2001)*” is suggested. The result whereof should be an inclusive education system where children with disabilities have access to all schools.

**(b) Abuse in educational institutions**

4.27 “[C]ases of corporal punishment, violence, abuse, neglect and inequality involving children with disabilities, especially children with autism and children with psychosocial or intellectual disabilities, by teachers and peers” is mentioned as a concern in the Observations. The Observations suggests the creation of measures to protect children with disabilities “including children with autism, albinism or psychosocial or intellectual disabilities” from such abuse. Offenders should be prosecuted. Such developments should be in line with “target 16.2 of the Sustainable Development Goals.” It suggests an amendment of the Children’s Act to “prohibit all forms of corporal punishment in all settings.”<sup>261</sup>

**(c) Non-attendance, special education and institutionalisation**

4.28 The Observations notes a concern with the amount of children with disabilities not in school or who are in special schools. There is also concern about children with disabilities placed in children’s or other centres that is not well controlled. It is stated that these centres are for long-term institutionalisation, frequently isolated and far from home with inadequately trained staff. A solution that has been suggested is to create plans that will deal with the abuse of children with disabilities in special education.<sup>262</sup> These plans should have a monitoring component and include ascertaining the suitability of persons in the education system to work with children. A further suggested solution is to adequately maintain a National Register for Sex Offenders and National Child Protection Register.

4.29 A further solution regarding this issue is the development and implementation of prevention and early intervention programmes in communities to enable early identification of and support for children and adults with disabilities in family and community settings, to include training and continuous professional development of care/social workers and parents of children with disabilities. Increase public awareness-raising programmes to understand the

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<sup>261</sup> Input by Dr.Grobbelaar – Du Plessis; The South African Schools Act 84 of 1996 prohibits corporal punishment in section 10 as per *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)*. There had been case law where corporeal punishment is prohibited at home.

<sup>262</sup> Ms Fransolet indicated that the fundamental problem is that children with disabilities are being sent to “special schools” in the first place. We must have inclusive education. Then people who abuse children should be dealt with under the previously mentioned legislation concerning women and children.

importance of family and community-based provisions is essential and will form part of the programmes.

4.30 Goal 16<sup>263</sup> of the Sustainable Development Goals aims to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” while Target 16.2 aims to “end abuse, exploitation, trafficking and all forms of violence against and torture of children.”<sup>264</sup>

#### **4. Article 8: Awareness-raising<sup>265</sup>**

4.31 A concern is the absence of a national awareness-raising strategy to counter act the negative disregard and stereotyping of persons with disabilities, especially persons living with albinism “or psychosocial or intellectual disabilities” including in the home. This concern extends to the exclusion of persons with disabilities and their organisations in developing these awareness-raising programmes. The suggested solutions are the development of and embarking on a comprehensive national awareness-raising and educational strategies, which are to be inclusive of organisation of and for people with disabilities and is to be far-reaching and inclusive of rural communities.

#### **5. Article 9: Accessibility<sup>266</sup>**

##### **(a) Absence of legislation**

4.32 Concerns are raised in the Observations about the non-existence of accessibility laws and plans and the exclusion of persons with disabilities in the development of a plan to create accessibility. The solutions that have been suggested are the:

1. creation of legislative measures;<sup>267</sup>

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<sup>263</sup> Mr Dube indicated that all SDG’s are relevant to the needs of persons with disabilities.

<sup>264</sup> Ms Fransolet again questions what further actions to advance this SDG can be taken.

<sup>265</sup> Concluding observations 4 Par III B sub par 14

<sup>266</sup> Concluding observations 5 Par III B sub par 16

<sup>267</sup> Ms Fransolet indicated that we have the legislative requirement for “Plans” in PEPUDA and in the National Strategic Framework on UA and UD which references Universal Design Access Plans, yet these plans are not being written. We don’t need more legislation we need compliance, monitoring, evaluation, and consequences for non-compliance.

2. create a legislative framework on access and services for persons with disabilities especially for “persons with sensory impairments and persons with psychosocial or intellectual disabilities;”
3. provision of adequate resources and sanctions;
4. creation of adequate penalties for diversions; and
5. ensure accessibility requirements in procurement matters.<sup>268</sup>

**(b) Strategy**

4.33 The fact that there is not a national accessibility strategy for persons with disabilities, especially when dealing physically and virtually with banking institutions and especially “... for those with sensory impairments and psychosocial or intellectual disabilities, as well as rural public transport are of concern. The solutions that have been suggested are to ensure the involvement of persons with disabilities and their organisations in developing accessibility plans,<sup>269</sup> and the creation of measures to ensure compliance with and monitoring of SANS.<sup>270</sup>

**6. Article 10: Right to life<sup>271</sup>**

4.34 There is concern in the Observations about the “extreme forms of violence against persons with disabilities, especially persons with albinism and children with psychosocial or intellectual disabilities, including kidnappings, killings and attacks for witchcraft practices, and the absence of measures to prevent these crimes, protect victims and prosecute and convict the perpetrators.” Solutions suggested are the use of measures to prevent such violence, the prosecution of and adequate sentencing of the offenders.<sup>272</sup>

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<sup>268</sup> Ms Fransolet asked how will this be done? We already have the BBBEE % points contributions.

<sup>269</sup> Ms Fransolet indicated that the solution is then the development of accessibility plans (UDAPs) for each department and across the public and private sector. This should be part of the “Universal Design Implementation” strategy for SA, of which the WPRPD with its implementation matrix can form a good base doc as reaches across all departments and all sectors.

<sup>270</sup> The requirements can be translated into a separate act or be included in a general act with an accessibility clause.

<sup>271</sup> Concluding observations 5 Par III B sub par 18.

<sup>272</sup> The Witchcraft Act 3 of 1957 is in existence and is the subject of an investigation by the SALRC. Ms Fransolet indicated that education and awareness are key as well as strict law enforcing on offenders.

4.35 With regard to albinism, it is suggested that the Ekurhuleni Declaration on the Rights of Persons with Albinism adopted in 2013 be implemented and these actions investigated effectively.

## **7. Article 11: Situations of risk and humanitarian emergencies<sup>273</sup>**

### **(a) Information and advance planning**

4.36 Concerns about the non-existence of a national disaster risk reduction plan<sup>274</sup> for the support of persons with disabilities, “especially persons with psychosocial or intellectual disabilities and persons who are blind or visually impaired”, are raised. Similarly, there is concern about the non-existence of accessible information relating to emergencies. Solutions suggested are the creation of a risk and humanitarian emergencies national plan, so that people with disabilities are included at all levels of risk reduction and the execution thereof. Relevant in this regard is adherence to “the Committee’s General Comment No. 2 and the *Sendai Framework for Disaster Risk Reduction 2015–2030*.”

## **8. Article 12: Equal recognition before the law<sup>275</sup>**

4.37 Article 12, equal recognition before the law, creates the right of recognition as a person before the law. This means that the legal capacity of persons with disabilities should be recognised as equal to others in all aspect of life. Appropriate measures must be created by States to provide support for the effective exercising of this right.<sup>276</sup> Grobbelaar-du Plessis<sup>277</sup> indicated that there is an interrelatedness between article 12 and other rights of persons with disabilities that will have an effect on “legal competence,” “legal capacity” and “informed consent.” The implementation of the obligations in article 12 requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.

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<sup>273</sup> Concluding observations 5 Par III B sub par 29.

<sup>274</sup> Mr Dube emphasizes the importance of this in the light of the exclusion of persons with disabilities in the Covid 19 responses.

<sup>275</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law

<sup>276</sup> The SALRC conducted an investigation into assisted decision making. Its report is available on <https://www.justice.gov.za/salrc/index.htm>

<sup>277</sup> Input provided

4.38 Apart from the SA Law Reform Commission's proposed Bill on Supported Decision-making, additional areas will be considered in a review of civil and criminal legislation. Such as:

1. the common law test for legal capacity;
2. the common law mechanism for appointment of a *curator bonis* or a *curator personae* by the High Court;
3. the appointment of an administrator as provided for in Chapter VIII in the Mental Health Care Act, 2002; and
4. an inquiry into an accused person's criminal capacity in criminal proceedings.

4.39 The notion of "informed consent", will also have to be reviewed which features in a number of laws:

1. Choice on Termination of Pregnancy Act, 1996;
2. Sterilisation Act, 1998;and
3. National Health Act, 2003; and Children's Act, 2005.

4.40 She indicated that the same need for review of enabling legislation apply to legislation that exclude certain persons with disabilities from voting.

**(a) *Legal personality and legal capacity*<sup>278</sup>**

4.41 The Observations indicate concerns about the existence of a substitute-decision making regime dealing with "guardianship and mental health laws" and the non-existence of measures for supported decision-making. Solutions suggested are to withdraw the substituted decision-making regime in favour of a supported decision-making (assisted decision-making) regime. The data collection system on this matter is inadequate as well as the implementation of the evaluation of the data regarding these matters. Further solutions are the provisions of training, in consultation with DPO's, on the "legal capacity" of persons with disabilities and on the new decision-making measures for all stakeholders.

4.42 Grobbelaar-Du Plessis<sup>279</sup> also indicated that the lack of data collection on persons with disabilities under guardianship in South Africa,<sup>280</sup> makes it difficult to estimate how many persons with psychosocial and/or intellectual disabilities the current guardianship and mental

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<sup>278</sup> Concluding observations 6 Par III B sub par 22

<sup>279</sup> Input provided.

<sup>280</sup> Concluding observations para 22 (b)

health laws affect. The lack of data collection also makes it difficult to estimate the number of persons with psychosocial and/or intellectual disabilities that are potentially disenfranchised in mental health institutions.

4.43 The importance of statistics and data collection (article 31 of the CRPD) in South Africa is highlighted by the CRPD Committee in their concluding observations to the Initial State Party Report.<sup>281</sup> In this regard, the CRPD Committee recommends that the data on these persons should be disaggregated by age, gender and type of impairment.<sup>282</sup>

## **9. Article 13: Access to justice<sup>283</sup>**

### **(a) Barriers to access**

4.44 The Observations notes that “target 16.3 of the Sustainable Development Goals” should be taken into account when dealing with this article. Other concerns are the statutory and corporeal barriers (such as the lack of accessibility measures in the justice system) that prevent access to justice for persons with disabilities, inclusive of “... persons with psychosocial or intellectual disabilities, and deaf blind persons.” The solution to this concern of non-participation is the establishment of reasonable accommodations in the entire justice chain.<sup>284</sup>

### **(b) Informational accessibility**

4.45 A concern linking to accessibility is the fact that there is no accessible information on the justice system “to blind and visually impaired persons (braille and audio), deaf persons (sign language interpretation) and persons with psychosocial or intellectual disabilities (Easy Read).” The solution suggested is to create such means of information and enable access to it.

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<sup>281</sup> Concluding observations para 22 (b) and Initial State Party Report para 335)

<sup>282</sup> Concluding observations para 22 (b)

<sup>283</sup> Concluding observations 6 Par III B sub par 24

<sup>284</sup> Ms Fransolet indicated that we cannot plan for RA, we must establish universal access to and throughout the entire justice system. It seems that there are two meanings to reasonable accommodation, the legal definition and the design definition.

**(c) Disability training**

4.46 Another concern is the absence of knowledge about disability related discrimination in the “judicial system” as well as the low numbers of “trained professional and certified sign language interpreters, Braille transcribers and Easy Read producers” to convey such information. The solution suggested is training of officials in the justice chain on the right of persons with disability to have access to justice. It is then suggested the inclusion of persons with disabilities as judicial officers. In terms of the related SDG, target 16.3 indicates that its aim is to: “promote the rule of law at the national and international levels and ensure equal access to justice for all.” It is also recommended that the judicial system have, on immediate call, trained and professional service providers who are able to offer alternative means of accessible communication to people as needed.

**10. Article 14: Liberty and security of the person<sup>285</sup>**

4.47 Concerns with regard to liberty and security of the person is reflected in the mention of the slow pace of amendment of the Older Persons Act 2006 after the amendment of the Mental Health Care Act 2002. The solution according to the Observations is to have the Older Persons Act and the Mental Health Care Act conform to the Convention, under strict timelines for such conversion.<sup>286</sup>

**(a) Deprivation of liberty**

4.48 A solution mentioned concerning institutionalisation is the repeal of all acts authorising institutionalisation. It is stated that the general comment of the Committee on this matter should be taken into account.<sup>287</sup>

**(b) Institutionalisation**

4.49 The Observations also states a concern with the increased number of institutionalisation<sup>288</sup> of persons with disabilities in mental health institutions. The solution

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<sup>285</sup> Concluding observations 7 Par III B sub par 26

<sup>286</sup> The SALRC has published a report on assisted decision making in its website.

<sup>287</sup> Committee on the Rights of Persons with Disabilities Guidelines on Article 14 of the CRPD the Right to Liberty and Security of Persons with Disabilities.

<sup>288</sup> Mr Dube indicated that this is a complex area. Despite persons with disabilities being the first group to be put in institutions, the recent COVID 19 responses concentrated on elderly homes. Despite the proponents of some form of institutionalisation were necessary, this is not sustainable in the long term. Portions of disability grants are often used/deducted to support costs in institutions thus depriving the recipients of the full value of the grant.

according to it is deinstitutionalisation and the creation of measures to protect the liberty of persons with disabilities in institutions.

4.50 A further concern in this regard is the fact that the situation of persons with disabilities in institutions and detention places are not monitored. There is also another concern, namely the lack of training of staff regarding the rights of persons with disabilities to reasonable accommodation. The involvement of persons with disabilities and their representative organisation in the monitoring described above in all places where persons are deprived of their liberty is suggested as a possible solution. The other part of this solution is to provide training for “mental health professionals and law enforcement and prison officials” for them to respect the rights of persons with disabilities where they are detained or institutionalised.

## **11. Article 15: Freedom from torture and cruel, inhuman or degrading treatment or punishment <sup>289</sup>**

4.51 Concerns in this regard is the existence of unauthorised institutions like those that lead to the Life Esidimeni tragedy. The solution according to the Observations is the creation of legal and administrative measures to protect persons with disabilities, especially females with disabilities and “persons with psychosocial or intellectual disabilities” in such cases and to provide support through the provision of “legal advice, information in accessible formats, counselling services and redress, including compensation and rehabilitation.”

4.52 Further to the above concerns, it mentions the absence of measures to report and avoid such treatment in all environments. There is also no access to accessible community-based services for persons with disabilities, especially women with disabilities who are victims of gender-based violence. The solution the Observations suggest is the prosecution and punishment of such perpetrators and the collection of applicable data.

### **(a) Corporal punishment**

4.53 The continued incidents of corporal punishment of children with disabilities in South Africa and the non-awareness of recourse mechanisms when this occurs is a concern. Again, the collection of disaggregated data on these issues is needed. The solution is to have the

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<sup>289</sup> Concluding observations 8 Par III B sub par 28

SAHRC<sup>290</sup> (the national independent monitoring mechanism) monitor institutions where persons with disabilities are housed. This should be in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; which it suggests South Africa ratifies.<sup>291</sup> It is suggested that a protective monitoring mechanism be created to monitor places of institutionalisation and detention.<sup>292</sup>

## 12. Article 16: Freedom from exploitation, violence and abuse<sup>293</sup>

4.54 The concern of the Observations in this article is the absence of effective protection of persons with disabilities “in particular women and girls with psychosocial or intellectual disabilities” and children with disabilities, from violence and abuse and corporeal punishment. A further concern is the absence of information that is accessible and appropriate on support, remedies and restoration. The solution, according to the Observations, is to adopt and implement legislation, policies and programmes to protect persons with disabilities against all forms of violence and abuse, including corporal punishment. The “implementation of article 16(3) of the Convention and the Prevention and Combating of Trafficking in Persons Act (2013)” should be expedited.

4.55 An additional concern is the absence of systems to identify, investigate and prosecute instances of exploitation, violence and abuse against persons with disabilities, and the non-existence of applicable data thereon. The solution according to the Observations is to investigate, prosecute and punish promptly. Victim support<sup>294</sup> is important and should consist

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<sup>290</sup> Mr Dube indicated that for the SAHRC to be effective in executing its role, it will require a great deal of capacity (human/financial resources/skills).

<sup>291</sup> South Africa has signed the *Optional Protocol on the Convention against Torture* in 1993 and ratified/acceded in 2019. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>  
<https://indicators.ohchr.org/>

<sup>292</sup> South Africa has enacted the Prevention of Torture Act 13 of 2013.

<sup>293</sup> Concluding observations 8 Par III B sub par 30

<sup>294</sup> South Africa created the *Service Charter for Victims of Crime in South Africa*. It relates to the rights and obligations of crime survivors. It aims to: “...eliminate secondary victimization in the criminal justice process; ensure that victims remain central to the criminal justice process; clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system; and make provision for victims’ recourse when standards are not met.” The following rights are enumerated: “The right to be treated with fairness and with respect for dignity and privacy; the right to offer information; the right to receive information; the right to compensation; the right to restitution; the right to protection and the right to assistance.”

[https://www.gov.za/sites/default/files/gcis\\_document/201409/servchartcrimemvictimssa-071.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/servchartcrimemvictimssa-071.pdf)  
accessed on 10 September 2020. The Victim Support Services Bill, 2019 is out for comment until  
5 September 2020.

of “effective redress, including compensation and rehabilitation” providing child victims with child-friendly reporting channels, and physical and psychological rehabilitation and health services, including mental health services.”

4.56 A further possible solution is the promotion of the “24-hour Gender-based Violence Command Call Centre” of the DSD, and to make it available countrywide.

### **13. Article 17: Protecting the integrity of the person<sup>295</sup>**

#### **(a) Reproductive health**

4.57 Concern in this regard is the occurrence of non-consensual abortions and sterilization of females with disabilities. The solution suggested is the revision of the Sterilization Act (1998) and Choice on Termination of Pregnancy Act (1996), which, according to the Observations, allow such actions because of assisted decision-making. Such new solutions should be in line with the first general comment of the Committee.<sup>296</sup>

4.58 It is stated that there concerns about the absence of protection for persons with disabilities, “especially those with psychosocial or intellectual disabilities” on the absence of protection “against the forced use of anti-fertility drugs and the use of experimental medicine without the consent of the person with a disability, which states sometimes use as a condition for entry into “... some special education schools.” The solution according to the Observations is the creation of protective measures to ensure “free and fair consent.”

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<https://www.dsd.gov.za/index.php/documents?task=download.send&id=165&catid=13&m=0>  
[https://static.pmg.org.za/Victim\\_Support\\_Services\\_Bill.pdf](https://static.pmg.org.za/Victim_Support_Services_Bill.pdf)

The explanatory memorandum indicate the purpose of the Bill as follows:

“The purpose of the Bill is therefore to bring the victim to the centre of the justice system in order to ensure that the rights applicable to a perpetrator are also extended to a victim to the extent that is applicable.”

<https://www.dsd.gov.za/index.php/documents?task=download.send&id=164&catid=13&m=0>

<sup>295</sup> Concluding observations 9 Par III B sub par 32

<sup>296</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law

## **14. Article 19: Living independently and being included in the community<sup>297</sup>**

4.59 The concern here is about the absence of a programme or legislation to institute deinstitutionalisation and “independent living community support services.” There is also concern that the Life Esidimeni experience can restrict deinstitutionalisation efforts. The Observations indicate a possible solution, which includes “General Comment No. 5 (2017) on living independently and being included in the community.” It suggests the creation of the measures in that Comment. During deinstitutionalisation, persons with disabilities and their representative organisations must be involved in the process. Such plans should be expedited and developed nationally, regionally and locally and also deal with the provision of “...personal assistance, grants and support to families of children with disabilities and parents with disabilities, covering support for assistive devices, guides and sign language interpreters.”

4.60 Grobbelaar-Du Plessis indicates that the Mental Health Care Act, 2002 provides for community-based care, treatment and rehabilitation services, and the regulations to the Act prescribe standards for residential and/or day care community-based mental health services. The Act needs to be reviewed to ensure compliance with the CRPD.

## **15. Article 20: Personal mobility<sup>298</sup>**

4.61 Accessibility for persons with disabilities, particularly those with mobility impairments and blind and visually impaired persons, to mobilisation devices and assistance, and in particular in remote areas is a concern. The solution according to the Observations is the creation of measures to make such accessibility devices possible.

4.62 Another concern is the shortage of personnel capable of providing training for the use of these devices. The suggested solution is the creation of a nation-wide policy<sup>299</sup> for the training of such personnel.<sup>300</sup>

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<sup>297</sup> Concluding observations 9 Par III B sub par 34

<sup>298</sup> Concluding observations 10 Par III B sub par 36

<sup>299</sup> Ms Fransolet questioned the effectiveness of such policies

<sup>300</sup> This could lead to amendment acts relating to the physiotherapy and occupational therapy laws, or could it be part of an accessibility Act?

## 16. Article 21: Freedom of expression and opinion, and access to information<sup>301</sup>

### (a) Sign Language

4.63 The concern here is the delay in the amendment of the Constitution to make sign language the 12<sup>th</sup> national language. The suggested solution is expediting the constitutional amendment and creating training for such interpreters.<sup>302</sup>

4.64 A further concern is the absence "... of sufficient teachers trained in sign language, tactile interpreters, Easy Read translators and Braille transcribers,...", inaccessible websites and the non-provision by television stations of accessible information for persons with a hearing disability. The suggested solution by the Observations is the development of legislative provisions to ensure that all publicly provided information should be made accessible in and through all necessary formats. Websites should comply with the standards developed by the Web Accessibility Initiative of the World Wide Web Consortium.<sup>303</sup> The solution also suggests that the rights of persons with disabilities should be an integral part of teacher training courses.

4.65 There is a concern about the absence of consultation with the relevant organisations for persons with hearing disabilities when procuring sign language interpreters for important public events.

4.66 The solution is the inclusion of disability rights in teacher training programmes and the creation of measures that ensure that televised information caters for accessibility to such information for persons with disabilities.<sup>304</sup>

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<sup>301</sup> Concluding observations 10 Par III B sub par 38

<sup>302</sup> See chapter 3 supra par 71 for an indication of progress

<sup>303</sup> Could this form part of an accessibility Act? What are the existing structures in this regard?

<sup>304</sup> This could relate to acts and policies in the broadcasting area? Or could it be included in an accessibility Act?

## 17. Article 24: Education<sup>305</sup>

### (a) Attendance, safety and deinstitutionalisation

4.67 The Observations state that General Comment No. 4 should be included in the education issue and have concerns about the numbers of out of school persons with disabilities, the ongoing existence of special schools and the poor safety record of these establishments. The solution suggested is to make inclusive education the norm in the country and ensure children are not separated from their families to go to special schools through a national plan.<sup>306</sup>

### (b) Accessibility of mainstream schools

4.68 A related concern is the systems that prevent persons with disabilities access to mainstream schools. The solution seems to be the development of sufficient and efficient reasonable accommodation measures that are adequately financed, and the collection of relevant data.<sup>307</sup>

### (c) Absence of data

4.69 Another concern is the non-existence of information on education budgets and the absence of applicable data. Further concerns are the non-existence of:

1. reasonable accommodation measures;
2. enough education resources in hard to reach areas and
3. ways to report discrimination suffered in accessing education or reasonable accommodations.

4.70 Solutions suggested are to create teacher-training programmes dealing with “inclusive education” and communication methods for persons with disabilities. A plan, addressing the security situation, should be developed and such a plan should have a monitoring framework and review the provisions of the Children’s Act on child and youth centres regarding security. A further suggested solution is the continued allocation of financial and human resources to

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<sup>305</sup> Concluding observations 11 Par III B sub par 40; Mr Dube indicated this sector needs a lot of work as the school system is not addressing the needs of all children.

<sup>306</sup> *The Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System July 2001* but remember the critique hereon.

<sup>307</sup> What about the suitability of mainstream schools for certain learners that are disabled, and what about curriculum progress for all learners, irrespective of disability?

enable reasonable accommodation for the provision of inclusive education and the collection of applicable data.<sup>308</sup>

## **18. Article 25: Health<sup>309</sup>**

4.71 Regarding this article, the Observations indicate that Sustainable Development Goal 3, especially target 3.7, should be used. Goal 3 states that it aims to create health and well-being. Target 3.7 wants to, “By 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes.”

4.72 The Observations are concerned about the challenges faced by persons with disabilities to obtain health services because of distance, accessibility (financial, physical and informational) and attitudinal barriers. A suggested solution is the creation of complete health care for persons with disabilities that is “accessible, affordable and culturally sensitive”. The denial of health care should be prohibited.

4.73 Similarly, concerns exist about the non-existence of the recognition of sexual and reproductive rights of persons with disabilities and the inadequate education and inaccessible information thereon for persons with disabilities. The suggested solution is the provision of accessible information on these rights and the training of medical professionals thereon to enable them to assist appropriately.<sup>310</sup>

## **19. Article 27: Work and employment<sup>311</sup>**

4.74 With regard to work, concerns are about the low employment rate of persons with disabilities and discrimination based on gender. The suggested solution is to ensure the employment of persons with disabilities through affirmative action and the collection of relevant data.<sup>312</sup>

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<sup>308</sup> Mr Dube indicated that other issues include the need for accessible and reliable transport, assistive devices and parental participation.

<sup>309</sup> Concluding observations 11 Par III B sub par 42

<sup>310</sup> Additional barriers are inaccessibility of transport, education, and cultural issues. Mr Dube indicated that there should be equitable access to health care.

<sup>311</sup> Concluding observations 12 Par III B sub par 44

<sup>312</sup> Ms Fransolet indicated that we have the Laws, we need training, awareness, technical notes and guidance to assist employers as well as applicable consequences for non-compliance.

4.75 Additional concern relates to the non-existence of reasonable accommodation and accessible and adaptable workspaces, especially with reference to motor impairment disabilities. The suggested solution is increased employment of persons with disabilities by creating reasonable accommodation measures and the prevention of disability discrimination. This should be done in accordance with article 27 of the Convention and target 8.5 of the Sustainable Development Goals. South Africa is also to ensure that the principle of equal pay for equal work is applicable to persons with disabilities.

4.76 With regard to migrant workers, the concern is that there is no protection for them once they become disabled in a work related incident. The solution suggested is similar to the above, with inclusion of training to respect reasonable accommodation. Another part of the solution is to include migrant workers in the labour law to make them eligible for reparation measures if a disability has occurred at the workplace.<sup>313</sup>

## **20. Article 28: Adequate standard of living and social protection<sup>314</sup>**

4.77 The Observations include the connection between article 28 and “target 10.2 of the Sustainable Development Goals, to empower and promote economic inclusion of all persons, irrespective of disability status” in this article. There is a concern about the inability to access social relief and the discriminatory provisions relating to pensions in relation to women with disabilities. The solution suggested is the elimination of such non-accessibility issues and the establishment of an inclusive social relief system where such system should provide a sufficient living, inclusive of “compensation schemes”<sup>315</sup> that will deal with the costs of disability.

## **21. Article 29: participation in political and public life**

4.78 Dr. Grobbelaar-Du Plessis indicated that even though the Committee on the Rights of persons with Disabilities have not commented on article 29, South Africa in their initial report reported that both the Constitution and section 8(c) and (d) of the Electoral Act, 1998, exclude

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<sup>313</sup> What is the current position regarding the status of migrant workers as employees?

<sup>314</sup> Concluding observations 12 Par III B sub par 46

<sup>315</sup> Mr Dube indicated that further research is needed on these schemes.

certain categories of persons with psycho-social disabilities from inclusion on the voters roll, and need to be reviewed to comply with the CRPD.

4.79 In 2014, the South African government indicated to the CRPD Committee in the Initial State Party Report that sections 47(1)(c); 106(1)(c) and 158(1)(c) of the Constitution and subsections 8(c) and (d) of the Electoral Act 73 of 1998, which exclude certain categories of persons with psychosocial disabilities from inclusion on the voters' roll, need to be reviewed to comply with articles 12 and 29 of the CRPD.<sup>316</sup> South Africa reported, in its initial state party report, that the right to vote of citizens with disabilities is guaranteed in section 19 of the Constitution which concerns the right to make political choices, to form political parties, participate in the activities of political parties, to vote in elections for any legislative body established in terms of the Constitution, to do so in secret, and to stand for public office and, if elected, to hold office.<sup>317</sup> The Electoral Act 73 of 1998 and the Local Government Municipal Electoral Act 27 of 2000 respectively regulate elections at national, provincial and local spheres of government.<sup>318</sup> In terms of section 1 of the Electoral Act, a "voter" is a South African citizen who is 18 years or older and whose name appears on the national common voters' roll.

4.80 To enter their names on this voters' roll, citizens are required to register as voters. Of importance is that the chief electoral officer, who is responsible for registering voters may, in terms of subsections 8(c) and (d) of the Electoral Act, not register persons who have been declared by the High Court to be "of unsound mind or mentally disordered" or have been detained under the Mental Health Act 18 of 1973.<sup>319</sup> Furthermore, section 47(1)(d) of the Constitution provides that "[e]very citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except ... (d) anyone declared to be of unsound mind by a court of the Republic ... ." The disqualification of membership to the National Assembly in this provision corresponds with section 106(1)(d) of the Constitution relating to disqualification of membership to the provincial legislatures,<sup>320</sup> and section 158(1)(c) of the Constitution that provides for disqualification as a member of a Municipal Council.

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<sup>316</sup> Initial Report par 340.

<sup>317</sup> Initial Report par 332.

<sup>318</sup> Initial Report par 333.

<sup>319</sup> As repealed and replaced by the Mental Health Care Act 17 of 2002; Initial Report par 333.

<sup>320</sup> Initial Report, par 332.

4.81 The Office of the UN High Commissioner for Human Rights' (OHCHR) 2011 thematic study<sup>321</sup> observed that the “legal landscape changed dramatically since the adoption of the General Comment” by the OHCHR relating to article 25 of the International Covenant on Civil and Political Rights (“ICCPR”).<sup>322</sup> The OHCHR's thematic study argued that the majority of voting restrictions no longer are compatible with the prohibition of discrimination, in particular with regard to limitations concerning the right to vote and stand for election based on psychosocial and/or intellectual disabilities. The OHCHR contended that restrictions on political rights, including the right to vote, are not based on disability itself, but rather on a lack of legal capacity. Restrictions and/or exclusions with regard to political rights, including the right to vote in the absence of a lack of legal capacity, would be inconsistent with the provisions of the CRPD.<sup>323</sup> Similarly, the report of the Special Rapporteur on the rights of persons with disabilities states that persons with disabilities must enjoy the right to vote and to be elected on an equal basis with others. The report notes that no one should be restricted, either in law or in practice, in the enjoyment of political rights on grounds of disability.<sup>324</sup>

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<sup>320</sup> United Nations A/HRC/19/36 Human Rights Council Nineteenth session Agenda items 2 and 3 Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities.(hereinafter Thematic study)

<sup>322</sup> “General comment 25: The rights to participate in public affairs, voting rights and the right of equal access to public service” UN Doc CCPR/C/21/Rev1/Add7 (12 July 1996) <https://www.refworld.org/docid/453883fc22.html> par 33.

<sup>323</sup> Thematic study par 28; Valentina Della Rina, Rachele Cera, Guisepe Palmisano (eds) *The United Nations convention on the rights of persons with disabilities: A commentary* (2017) 531 Article 29 participation in political and public life” Cera 531 ISBN13: 9783319437880 February 2017 Springer-Verlag Switzerland (hereinafter Cera); Combrinck, H “Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa” 2014 *ADRY* 84 (hereafter Combrinck); Grobbelaar, I and Njau JJ “Article 29 CRPD participation in political and public life” 2018 *The UN convention on the rights of persons with disabilities, a commentary* 859–860 (hereafter Grobbelaar-du Plessis and Njau);Mgijima-Konopi I “Regional developments: The jurisprudence of the committee on the rights of persons with disabilities and its implication for Africa” 2016 *ADRY* 275 (hereinafter Mgijima-Konopi) and Thuo, L “Implementation of political participation standards for persons with intellectual disabilities in Kenya” Volume 2, Number 1, August 2016 *Strathmore Law Journal* 115–116. (hereinafter Thuo)

<sup>324</sup> “Report of the Special Rapporteur on the rights of persons with disabilities” UN Doc A/HRC/31/62 (12 January 2016) par 19.

4.82 The “opportunity to enjoy” political rights on “an equal basis with others” in article 29 of the CRPD is inextricably linked to the recognition of legal capacity (article 12 of the CRPD) of persons with disabilities.<sup>325</sup> Without recognising a person with a disability as a person before the law, the ability to assert, exercise and enforce rights is significantly compromised.<sup>326</sup> The CRPD Committee explains in the first General Comment that legal capacity includes the capacity to be both a holder of rights and an actor under the law and affirms that all persons with disabilities have full legal capacity, which is indispensable for the exercise of civil, political, economic, social and cultural rights.

4.83 Article 12 of the CRPD does not provide for any exception or restrictions to legal capacity. However, the provision does require state parties to take appropriate measures to provide access to any support a person with a disability might need to exercise his or her right to engage in and with the law.<sup>327</sup> These measures include mechanisms and legislation that provide support in decision-making (supported or assisted decision-making) when a person with psychosocial and/or intellectual disability exercises their legal capacity.<sup>328</sup> This means that practices of which the purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.<sup>329</sup> The first general interpretative comment confirms that a person’s decision-making ability cannot constitute justification for their exclusion from exercising their political rights.<sup>330</sup> The same was confirmed in *Zsolt Bujdosó v Hungary* Communication,<sup>331</sup> where the CRPD Committee recalled that under article 12, paragraph 2 of the CRPD state parties must recognise and uphold the legal capacity of persons with disabilities “on an equal basis with

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<sup>325</sup> “General Comment 1 Article 12 Equal recognition before the law” par 31; Combrinck 2014 (2) *ADRY* 87; and Series and Nilsson 340 347; Series and Nilsson “Article 12 CRPD Equal recognition before the law” in Bantekas, Stein and Demetres (eds) 2018 *The UN convention on the rights of persons with disabilities, a commentary* 341, 348, 353, 363, 366. (hereafter Series and Nilsson)

<sup>326</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law par 31.

<sup>327</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law par 8; Broderick A and Ferri D *International and European disability law and policy: Text, cases, and materials* 2019 165 167–168 (hereafter Broderick and Ferri); Grobbelaar-du Plessis and Njau 857–858; Series and Nilsson 366–368.

<sup>328</sup> Concluding observations par 22 (a).

<sup>329</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law par 9.

<sup>330</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law par 48; and Series and Nilsson 341 348 353 363 366.

<sup>331</sup> *Zsolt Bujdosó v Hungary* Communication No 4/2011 (Committee on the Rights of Persons with Disabilities) (UN Doc CRPD/C/D/4/2011) (hereafter Zsolt)

others in all aspects of life”, including political life.<sup>332</sup>

4.84 Article 29 of the CRPD requires state parties to guarantee to persons with disabilities the equal and effective enjoyment of political rights, including the right to vote and be elected to office. The provision does not foresee any reasonable restriction, nor does it allow for any exceptions for any group of persons with disabilities.<sup>333</sup> The provision establishes the right to vote and be elected without any exception and aims to address obstacles and/or barriers encountered by persons with disabilities in the enjoyment of such rights.<sup>334</sup> The obstacles and/or barriers that persons with disabilities may encounter in exercising their right to vote fall into three categories. These are, firstly, inaccessible polling places; secondly, inaccessible vote recording technologies; and, lastly, disability-based voting restrictions,<sup>335</sup> which affect mostly persons with psychosocial and/or intellectual disabilities.<sup>336</sup>

4.85 The CRPD guarantees that persons with disabilities should be provided with assistance to vote when they “request” assistance.<sup>337</sup> This means that not all persons with disabilities require assistance to vote, and more importantly, state parties should not compel persons with disabilities to be assisted during voting.<sup>338</sup> Such assistance therefore is not mandatory, but at the discretion of the individual desiring support during the exercising of the right to vote. The person providing assistance and/or support is only an enabling measure in order to exercise and enjoy the right to vote. The assistance provided by “a person of their own choice” needs to be tailored to the will, preference and needs of the person with the disability, thereby respecting the individual autonomy and legal capacity of persons with disabilities.<sup>339</sup>

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<sup>332</sup> *Zsolt* par 9.4 and 9.5 and Series and Nilsson 354.

<sup>333</sup> Thematic study par 29; Grobbelaar-du Plessis and Njau 846 859; Series and Nilsson 366 and Thuo 107.

<sup>334</sup> Grobbelaar-du Plessis and Njau 843 850–851 859.

<sup>335</sup> Cera 530; Broderick and Ferri 171; and Grobbelaar-du Plessis and Njau 843–844 850–853 859

<sup>336</sup> *Zsolt* par 5.2.

<sup>337</sup> Art 29(a)(iii) of the CRPD.

<sup>338</sup> Grobbelaar-du Plessis and Njau 851 854–858.

<sup>339</sup> *Zsolt* par 10(ii); Broderick and Ferri 172–173; Grobbelaar-du Plessis and Njau 851 854 857–858; Series and Nilsson 366–368 369; and Thuo 109.

4.86 The South African government reported in their Initial State Party Report that anecdotal evidence showed that persons in mental health care facilities are often excluded from participating in special voting procedures.<sup>340</sup> In this regard, the CRPD Committee noted in their concluding observations to the Initial State Party Report their concern about the current guardianship and mental health laws, which maintain substituted decision-making regimes making decisions on behalf of persons with disabilities.<sup>341</sup> This will inevitably affect the right to political participation of persons with psychosocial and/or intellectual disabilities.

## **22. Article 30: Participation in cultural life, recreation, leisure and sport<sup>342</sup>**

4.87 Concerns in this regard is the delay regarding the amendment of the Copyright Act (1978)<sup>343</sup> and ratifying the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*. The solution suggested is to ratify the Marrakesh Treaty and putting the Copyright Bill into law.

4.88 In a matter unrelated to the Observations, The World Intellectual Property Organization (WIPO) in its summary of The *Marrakesh Treaty*<sup>344</sup> indicates that it is the first copyright treaty to have a human rights dimension. It talks of definitions like “beneficiary,” “works” and “accessible format copy” and “authorized entities”. The summary states that two obligations need to be fulfilled by countries.

4.89 The first obligation is to make it legally possible to make changes to printed works in order to make it accessible for persons “with a print disability.” The second obligation is to allow these accessible copies to cross borders.

4.90 The summary indicates the following benefits:

Improved awareness of the challenges faced by the print-disabled community and persons with disabilities, greater access to education, enhanced social

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<sup>340</sup> Initial Report par 339.

<sup>341</sup> Concluding observations par 22 (a).

<sup>342</sup> Concluding observations 13 Par III B sub par 48

<sup>343</sup> There is controversy surrounding the constitutionality of provision of this Bill and it has not been signed yet.

<sup>344</sup> Main provisions and benefits of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013) <http://www.Wipo.int>

integration and cultural participation, poverty alleviation and increased contributions to the national economy.

## **23. Article 31: Statistics and data collection<sup>345</sup>**

4.91 The concern of the Observations is the lack of data on persons with disabilities and the inaccessibility of such data to persons with disabilities. The exclusion of disability aspects in the implementation of the Sustainable Development Goals is also of concern.

4.92 Suggested solutions are to conduct consultations with persons with disabilities and their organisations in order to create an acceptable data collection system in adherence to target 17.18 of the Sustainable Development Goals. The final part of this solution is analysing the collected data to create strategies to implement the Convention and make such data available in accessible formats for persons with disabilities.<sup>346</sup>

## **24. Article 32: International cooperation<sup>347</sup>**

4.93 Concerns are focussed on the fact that disability organisations are not involved in the creation of international documents.<sup>348</sup> There is also an insufficient level of mainstreaming of disability rights in the national implementation and monitoring of the *2030 Agenda for Sustainable Development*. The solution is the creation of measures that create inclusion of persons with disabilities in the international arena.

## **25. Article 33: National implementation and monitoring**

4.94 The Observations mention concerns about the absence of regional and local focus points and mechanisms to implement the CRPD. The suggested solution is the creation of such points and mechanisms, including measures to enhance their capabilities at all levels. A

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<sup>345</sup> Concluding observations 13 Par III B sub par 50

<sup>346</sup> From meetings attended on the disability issue, it seems that Stats SA are aware of this need. Mr Dube indicated that there is a need for harmonisation of data across space and time and departments.

<sup>347</sup> Concluding observations 13 Par III B sub par 52

<sup>348</sup> This could be part of a general prescriptive act relating to the goals to be achieved in mainstreaming disability nationally. Mr Dube indicated that disability is excluded in international development cooperation agreements.

further solution suggested is to designate the SAHRC as a national independent mechanism and the allocation of funds for it to operate.<sup>349</sup>

4.95 There are also concerns about the non-adherence to the obligation to consult with the representative organisations of persons with disabilities when dealing with matters affecting them, the ineffective “accreditation procedures,” and insufficient provision of funds by the DSD for the organisations to participate effectively. The suggested solution is the creation of effective consultation and participation mechanisms that enable all organisations to participate. It is also suggested that accreditation procedures are streamlined and made accessible. In this regard, the National Disability Rights Machinery (NDRM) should be involved.

## **26. Article 37: Cooperation and technical assistance**

4.96 The Committee on the Rights of Persons with Disabilities can provide technical assistance<sup>350</sup> to State parties.

## **E. Twenty year review**

4.97 This paper indicates that barriers exist, which can be defined as:

1. discriminatory attitudes and stereotypes;
2. inaccessible public transport systems and information;
3. non-enforcement of the Employment Equity Act;
4. the definition of disability;
5. equity in access;
6. non-prioritising of children and youth with special needs;
7. inadequate responses in care, treatment and rehabilitation in assisted and independent living programs;
8. non-homogenous character of people with disabilities as a group and the relationship between poverty, disability and development;

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<sup>349</sup> The SALRC had been informed by the DOJCD that the SAHRC is the national independent monitoring mechanism by virtue of the powers assigned to it in its establishing act: South African Human Rights Commission Act 40 of 2013; Mr Dube again emphasised the need for harmonised data and statistics.

<sup>350</sup> Mr Dube asked whether this can be dealt with by legislating some of the key structures. The Presidential Working Group and structure similar to Disability Machinery?

9. lack in comprehensive social security;
10. a need for a more comprehensive involvement by civil society; and
11. a need for an effective disability coordinating system.<sup>351</sup>

4.98 The Twenty year review further indicates<sup>352</sup> that South Africa's first county report indicated weakness in government machinery, capacity constraints<sup>353</sup> and a lack of disability sector coordination. It also indicated that<sup>354</sup> the CRPD requires equal access of persons with disabilities to the physical environment, public transport,<sup>355</sup> information and communication, and public facilities and services.

4.99 The mainstreaming of disability rights, universal access, accountability and enforcement, and partnerships with civil society are needed.<sup>356</sup>

## **F. The Gap analysis**

4.100 The Centre for Human Rights indicates that the issue of the lack of inclusion can be solved through legislation that "advance disability rights"; and changing laws that discriminate against persons with disabilities.

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<sup>351</sup> Twenty Year Review 26 – 33

<sup>352</sup> Twenty Year Review 33

<sup>353</sup> Mr Dube indicates that this occurs at key senior level of decision making

<sup>354</sup> Twenty Year Review 33 - 34

<sup>355</sup> Mr Dube indicates that this is a major area of concern. Transport legislations defines disability and universal design. However, implementation is poor.

<sup>356</sup> Twenty Year Review 34; According to the review universal access means "the design of products environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or special design, including assistive devices and technologies for particular groups of persons with disabilities where these are needed."

## THE CURRENT SOUTH AFRICAN POSITION

### CHAPTER 5: INSTITUTIONAL INVOLVEMENT, LEGISLATION, COMMON LAW AND POLICIES

5.1 The purpose of this chapter is to identify who is involved in eliminating the environment discrimination against persons with disabilities. It also aims to identify the role-players of the slogan “nothing for us without us” and how the disability sector should be involved in the relevant accommodating institutions. It is trying to encapsulate the legal environment that is discriminating against persons with disabilities

#### A. Institutional involvement

5.2 By virtue of the human rights involved in the area of disability as mentioned in the CRPD, the NDRM, the history of the movement and the White Paper, all government departments, provincial legislatures and local authorities are involved.

5.3 By virtue of article 33 of the CRPD a focal point and monitoring mechanisms are required. Structures develop should fit into this mould.

5.4 The nature of the involvement of departments in the domestication of the CRPD is crosscutting. There is also no specific structure promoting the rights of persons with disabilities, such as those dealing with women and children. A previous department dealing with disability rights was the, now defunct, Department of Women, Children and Persons with Disabilities (The demise of the Department came in 2014.)<sup>357</sup> The Parliamentary Portfolio Committee on Women, Children and Persons with Disabilities was also involved.

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<sup>357</sup> Isaac Mangena “Still not the Promised land” Opinion 20 March 2015 <https://www.iol.co.za/dailynews/opinion/still-not-the-promised-land-1834971> Accessed on 8 February 2019

5.5 In a parliamentary committee meeting, that Department was described as follows: <sup>358</sup>

...The Department for Women, Children and Persons with Disabilities ... was established to emphasize the need for equity and access to development opportunities for vulnerable groups in South African society. This Department was created ... to replace the former national multi-agency structures in the Presidency, which lacked sufficient financial and human resources and the necessary authority to co-ordinate and oversee their mandates. The purpose of the Department was to drive the Government's equity, equality and empowerment agenda with regard to marginalized groups and historically disadvantaged communities in each of the three sectors.

5.6 A new Department of Women, Youth and Persons with Disabilities is now a fully-fledged government department.<sup>359</sup> The Department has five programmes whereof Programme 5 deals with persons with disabilities.

The purpose of Programme 5 is to promote, protect and empower persons with disabilities through the development and implementation of legislation, policies and programmes.

It consists of two sub-programmes:

Advocacy and Mainstreaming: The purpose of the sub-programme is three-fold, i.e. to oversee the development of policies, strategies, legislation, guidelines and programmes to promote the rights of persons with disabilities; to ensure effective awareness raising and advocacy programmes on the rights of persons with disabilities; and to manage the provision of institutional support and capacity building on the rights of persons with disabilities.

Governance and Compliance (Monitoring and Evaluation): The purpose of the sub-programme is three-fold, i.e. to coordinate the compilation of national and international compliance reports; to ensure the development of a knowledge system for reporting purposes; and to provide technical support for participation on international platforms."<sup>360</sup>

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<sup>358</sup> Department of Women, Children and People with Disabilities Budgetary Review and Recommendations Report Women in The Presidency 15 October 2013 Chairperson: Ms. D Ramodibe (ANC) <https://pmg.org.za/committee-meeting/16573/>. Accessed on 8 February 2019

<sup>359</sup> <http://www.women.gov.za>

<sup>360</sup> [http://www.women.gov.za/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=107](http://www.women.gov.za/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=107)[http://www.women.gov.za/index.php?option=com\\_content&view=category&layout=blog&id=12&Itemid=105](http://www.women.gov.za/index.php?option=com_content&view=category&layout=blog&id=12&Itemid=105)

5.7 Departments are not alone in domesticating the CRPD. Constitutional bodies that can deal with the issue of accountability for the violation of disability rights in South Africa are the following:<sup>361</sup>

- The Public Protector; and
- The South African Human Rights Commission.<sup>362</sup>

5.8 The Committee on the right of persons with disabilities has commented on the need for involvement of disability organisations in the implementation of the CRPD and subsequent structures. This is contained in General comment no 7.

5.9 General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention is summarised as follows in terms of the involvement of persons with disabilities and their organisations:

5.10 To implement article 4(3) and 33 (4) the following is suggested:

1. Repeal legislation, including legal capacity laws that prohibit the participation of persons with disabilities through their representative organisations.<sup>363</sup>
2. Create policy frameworks that enable the creation of and continuous operation of representative organisations and encourage the creation of umbrella organisations.
3. The following should be guaranteed:
  - a. independence from the State;
  - b. access to and implementation of adequate funding mechanisms;
  - c. providing support emancipation and the creation of abilities;
  - d. protecting representative organisations against:
    - i intimidation
    - ii harassment
    - iii reprisal
4. Create legislation and policies that ensure the right to participation and regulations that create procedures for consultation “at all levels of authority and decision-making.”
5. As discussed in chapter 9 hereunder, a focal point should be established that, amongst others, acts as an entry point for the disability sector for consultation and coordination

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<sup>361</sup> Chapter 9 Constitution

<sup>362</sup> According to the Gap analysis Chapter 1 and Reyneke and Oosthuizen below. It is also understood that the SAHRC is the monitoring mechanism in terms of article 33. See chapter 10 hereunder. The SAHRC has a disability focus area.

<sup>363</sup> V Implementation at the National Level, Par 94 (a) – (u) p 17 - 19

with government on all levels. This is currently found in South Africa in the National Disability Right Machinery (NDRM).

## **B. The National Disability Rights Machinery (NDRM) and related matters**

5.11 A meeting arranged by the National Disability Rights Machinery Disability Inclusion Cluster Work Groups on 10 and 11 October 2018<sup>364</sup> dealt with apparently existing structures.

5.12 It was stated that the goal of the NDRM is to coordinate the implementation of the White Paper. It aims to do the following:

1. Provision for a strategic platform for decision-makers in government and civil society for collective and coordinated action aimed at implementing the WPRPD at national level;
2. Strengthening inter-governmental collaboration across the three spheres of government towards accelerated implementation of the WPRPD; (White Paper)
3. Providing a strategic platform for peer-learning through participatory monitoring of the WPRPD and the UNRPD.

5.13 The National Disability Rights Coordination Mechanism was driven by the DSD and the Department of Planning, Monitoring and Evaluation (DPME). It now falls under the Department of Women, Youth and Persons with Disabilities (DWYPD).

5.14 It was also indicated that disability related information should be included in the new MTSF, as the old one did not provide enough coverage for disability rights. Source documents here will be the:

1. 2014- 2019 MTSF Outcomes 14;
2. National Development Plan (Disability disaggregation);
3. WPRPD Implementation Matrix;
4. UN Committee on RPD (Committee on the Rights of Persons with Disabilities) concluding observations; and
5. SDG indicators. (Indicators of sustainable development).

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<sup>364</sup> Meeting on the *National Disability Rights Machinery Disability Inclusion Cluster Work Group Meetings (JCPS Cluster)* held on 10 and 11 October 2018 Harlequins Office Park Groenkloof.

5.15 It was indicated that as such there is no opposition to the structure. Opposition is in terms of the fact that the civil sector does not have one body to represent them.

## **C. Issues noted for possible reform**

5.16 How should the disability sector be involved together with the State in the development of disability rights?

## **D. Institutional cooperation required**

5.17 The White Paper describes the institutional cooperation that will be needed.

### **1. Who is responsible for implementation?<sup>365</sup>**

5.18 The White Paper can only be implemented if there are actors responsible for such implementation. These actors are:

... Executive Authorities, accounting Officers, disability rights coordinating mechanisms, intergovernmental and cooperative governance mechanisms, legislatures, institutions promoting democracy and organisations of and for persons with disabilities.

5.19 The White Paper in Part 7 describes what the result of such interactions should be.

### **2. How do government act as a whole?<sup>366</sup>**

5.20 In accordance with article 33 of the CRPD, a focal point (one or more) should be established to implement the White Paper. This part of the White Paper further states that a government should also create a body to coordinate cross cutting actions. In order to achieve this coordination must take place at:

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<sup>365</sup> White Paper part 7 125; United Nations CRPD/C/GC/7 Committee on the Rights of Persons with Disabilities; General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention.

<sup>366</sup> White Paper Part 7 126

- *Institutional level*, responsible for providing strategic direction and technical support in the delivery of equality and elimination of discrimination against persons with disabilities;
- *Inter-departmental level (national and provincial)*, providing strategic direction and technical support in the delivery of equality and elimination of discrimination against persons with disabilities;
- *Inter-provincial level*, responsible for the oversight, management, co-ordination of the implementation of programmes for persons with disabilities in all provinces in order to ensure standards are maintained across provinces;
- *District level*, responsible for coordination of action and sharing of experiences between local municipalities in a district;
- *Local level*, providing support to ward committees to drive local action aimed at promoting and protecting the rights of persons with disabilities; and
- *Government-Civil Society Interface* - Provision should be made for full participation of civil society structures at national, provincial and local level, particularly in issue-based working groups.

### 3. Oversight institutions

5.21 “The National Assembly, the National Council of Provinces, provincial legislatures, Municipal councils as well as the national and provincial Houses of Traditional Leaders, through committee systems, constituency programmes and by involving rights-holders, ...” play an important oversight role in making sure the WPRPD is incorporated into all public entities. These institutions are:

1. The National Assembly
2. The National Council of Provinces
3. Provincial legislatures
4. Municipal councils and The National and Provincial Houses of Traditional Leaders
5. The hosting of annual sectoral legislatures (Disability Rights Parliaments or Councils)<sup>367</sup>

### 4. Chapter 9 Institutions

5.22 These institutions are important when it comes to protecting the rights of persons with disabilities:

1. The SAHRC;
2. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (which enhances the cultural rights of persons with disabilities, especially deaf persons)

3. The Commission for Gender Equality;
4. The Auditor-General; and
5. The Electoral Commission<sup>368</sup>

5.23 Another institution is the autonomous national monitoring mechanism that monitors the rights of women, men and children with disabilities as required by article 33 of the Convention. This is assumed is the SAHRC.<sup>369</sup>

## **5. “Disability Organizations”**

5.24 Such organisations are crucial with regard to the White Paper. Their role is to enable their communities through education on human rights matters and to monitor and support the execution of the WPRPD.<sup>370</sup>

## **6. “Research and Academic Institutions”**

5.25 Such institutions should enhance the rights of persons with disabilities through implementing the WPRPD.<sup>371</sup>

## **7. “Media and Advertising Industry”**

5.25 Media and advertising agencies have a vast influence on society. If they portray persons with disabilities in a negative way, this could lead to negative perceptions of persons with disabilities. Discrimination, exploitation and exclusion will continue. Transformation of the industry is needed.<sup>372</sup>

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<sup>368</sup> White Paper 129; The SAHRC has a dedicated disability unit.

<sup>369</sup> White Paper 129

<sup>370</sup> White Paper 130

<sup>371</sup> White Paper 130

<sup>372</sup> White Paper 130

## **8. “Religious Sector”**

5.27 Some exclusion exists in religious places. Therefore, persons with disabilities must be seen as inclusive of the religious community and reasonable accommodation must be made to ensure participation in religious activities.<sup>373</sup>

5.28 Another very important structure is the Presidential Working Groups on Disabilities chaired by the President. The aim of this group is to provide a mouthpiece for the disability sector to indicate the urgency of the situation in attending to the rights of persons with disabilities.

### **E. Issues noted for possible reform:**

5.29 How can this excerpt from the White Paper be translated into meaningful coordination between all the role-players?

# THE CURRENT SOUTH AFRICAN POSITION

## CHAPTER 6: LEGISLATION AND COMMON LAW

6.1 The purpose of this chapter is to indicate what norms are currently in existence in South Africa in terms of the law that might be discriminatory to or advance the rights of persons with disabilities. Such information will help to define the reformation of the elements of discrimination therein to include persons with disabilities.

### A. The Gap analysis

6.2 A cursory glance at the Gaps Analysis indicates the applicable legislation in South Africa and the relationship with the rights in the Convention.

6.3 The Gap analysis dealt with issues surrounding PEPUDA, employment matters, accessibility and transport for persons with disabilities. The analysis also dealt with the plight of disabled children as well as inclusive education and the provision of higher education for disabled students. Additionally, it also dealt with the participation of persons with disabilities in political and public life, disability discrimination in insurance, to be protected against exploitation, violence and abuse, protecting disabled children from violence and abuse and ensuring their access to the justice system, the impact of the CRPD on health law and the rights to social protection of persons with disabilities.

6.4 It concludes that there is a need for “laws” to advance disability rights. Laws that discriminate against persons with disabilities need to be changed, discrimination against persons with disabilities need to be criminalised and activities that advance disability rights need to be undertaken.<sup>374</sup>

### 1. PEPUDA

6.5 It also looked at PEPUDA and stated that this Act is an example of anti-discrimination law.<sup>375</sup> It aims to stop discrimination in:

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<sup>374</sup> Gap analysis 9

<sup>375</sup> Gap analysis 37

... labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pension, partnerships, professions and professional bodies, provision of goods, services and facilities and clubs, associations and sports.<sup>376</sup>

6.6 It further discussed the general duty to prohibit discrimination under Chapter 5 of the Act. As an aside, the Victims Support Services Bill 2019 has been made available for public consultation.<sup>377</sup>

6.7 Relevant to the area of substantive equality is the United Nations CRPD/C/GC Committee on the Rights of Persons with Disabilities; General comment No. 6 (2018) on equality and non-discrimination.

## 2. Accessibility

6.8 Article 9 (Accessibility) of the Convention relates to accessibility for disabled people in South Africa. It relates to the removal of environmental barriers that impede movement and access to information.<sup>378</sup> Relevant is the concept of accessibility and of an “inclusive environment.”<sup>379</sup> a built environment that caters for the use thereof by all people. An inclusive environment is defined as:

... an expansive state which will go beyond physical and structural features of the building to include accessible services, management and an understanding of lifestyles.<sup>380</sup>

6.9 The “Implementation of accessibility norms and standards in South Africa”<sup>381</sup> relates to the equality provision of the Constitution as well as the right to human dignity, the right to an acceptable environment (sections 9, 10 and 24) and the relevance of socio-economic rights.<sup>382</sup>

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<sup>376</sup> Gap analysis 37

<sup>377</sup> No provision for disability is made in this Bill even though it deals with victim’s rights.

<sup>378</sup> Gap analysis 129 – 130

<sup>379</sup> Gap analysis 136

<sup>380</sup> Gap analysis 136

<sup>381</sup> Gap analysis 137

<sup>382</sup> Gap analysis 138 – 139

6.10 National legislation in terms of access to buildings, access to housing, a safe working environment, and accessibility and equality, land transportation, and access to information and information systems are identified:<sup>383</sup>

1. the National Building Regulations and Building Standard Act 103 of 1977
2. the Standards (SANS) PART S – Facilities for Persons with Disabilities
3. the Housing Amendment Act 4 of 2001
4. the Occupational Health and Safety Act 85 of 1993
5. the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000
6. the National Land Transport Transitional Act 5 of 2009
7. the National Library of South Africa Act 2 of 1998, and
8. the South African Library for the Blind Act 91 of 1998.

6.11 The General Comment by the Committee on the Rights of Persons with Disabilities General comment No. 2 (2014) Article 9: Accessibility is relevant here.

### **3. Protection against Exploitation, Violence and Abuse and Children's Access to Justice and Protecting Children with Disabilities from Violence and Abuse and ensuring their access to the Justice System**

6.12 The rights of persons and children with disabilities are to be protected against exploitation, violence and abuse and children's access to justice are discussed in Article 16 (Freedom from exploitation, violence and abuse) of the Convention. Sections 7, 9, 10, 12 and 28 of the Constitution are relevant.<sup>384</sup> The following acts are mentioned which are indicated as complying with the Convention but implementation of some of them might be lacking:<sup>385</sup>

1. the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA);<sup>386</sup>
2. the Older Persons Act 13 of 2006;<sup>387</sup>
3. the Domestic Violence Act 116 of 1998;<sup>388</sup>

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<sup>383</sup> Gap analysis 141 – 166

<sup>384</sup> Section 7: Rights, Section 9: equality, Section 10: human dignity and Section 27: health care, food, water and social security

<sup>385</sup> Gap analysis 285

<sup>386</sup> Gap analysis 266

<sup>387</sup> Gap analysis 278

<sup>388</sup> Gap analysis 281

4. the Children's Act 38 of 2008; and
5. the Criminal Procedure Act 51 of 1977.<sup>389</sup>

6.13 Children are protected from "violence and abuse" by SORMA<sup>390</sup> while the Criminal Procedure Act 51 of 1977 provides for the safeguarding children as victims as well as witnesses to ensure that no further trauma is endured. It also provides for proceedings to be held in camera.<sup>391</sup>

6.14 Relevant are the General Comment Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law and United Nations CRPD/C/GC/3 Committee on the Rights of Persons with Disabilities General comment No. 3 (2016) on women and girls with disabilities.

#### **4. Education**

6.15 Article 24 (Education) of the Convention<sup>392</sup> equated education matters to the right to education in the Bill of Rights and mentions various policies and acts namely:<sup>393</sup>

1. the Integrated National Disability Strategy (INDS);
2. the Education White Paper 3: Transformation of the Higher Education System;
3. the National Plan for Higher Education;
4. the Education White Paper 6: Special Needs Education;
5. the 2012 Green Paper for Post School Education; and
6. the South African White Paper on Post-school Education and Training
7. the Schools Act 84 of 1996.<sup>394</sup>

6.16 It was felt that general and specific legislation in the education sector will be needed to create effective legislation and policy in this area.<sup>395</sup>

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<sup>389</sup> Gap analysis 308 – 315

<sup>390</sup> In chapter 3 while chapter 4 deals with sexual offences against persons with mental disabilities. A concern is whether SORMA protects the rights of all persons with disabilities, and not just persons with mental disabilities as defined therein, sufficiently.

<sup>391</sup> Gap analysis 309; Section 170A of Act 51 of 1977

<sup>392</sup> Gap analysis 181

<sup>393</sup> Gap analysis 182 – 183

<sup>394</sup> Gap analysis 182 – 183

<sup>395</sup> Gap analysis 202

6.17 The relevant General Comments are United Nations CRPD/C/GC/3 Committee on the Rights of Persons with Disabilities General comment No. 3 (2016) on women and girls with disabilities and United Nations CRPD/C/GC/4 Committee on the Rights of Persons with Disabilities General comment No. 4 (2016) on the right to inclusive education.

## 5. Health

6.18 In the area of health law, Article 25 (Health) of the Convention is coupled with sections 9 and 12 (the right to freedom and security of the person) of the Constitution.<sup>396</sup> Issues surrounding mental health law and health law relating to autonomy, competency and consent in relation to the Sterilization Act 44 of 1998, the Mental Health Care Act 17 of 2002, the National Health Act 61 of 2003 and the Choice on Termination of Pregnancy Act are discussed.<sup>397</sup> Institutionalisation, the use of constraints and unequal treatment of mentally ill persons are mentioned. Issues relating to health rights of children with disabilities are touched upon in terms of section 28 of the Constitution and the National Health Act 61 of 2003.<sup>398</sup> The following is quoted from Chapter 13 of the Gap analysis:<sup>399</sup>

A view is held that legislation on the current policy of non-consensual sterilization of children and disabled children is needed. It is opined that the Convention has an influence on the non-consensual treatment of people. The Convention outlaws the involuntary treatment of people and this is a potential area of concern.<sup>400</sup> It is concluded that the CRPD poses major challenges for a justification of, for example, treatment of disabled people without their informed consent, or involuntary treatment for mentally-ill patients. Some have stated that the CRPD may effectively rule out involuntary treatment in any circumstance. It is, however suggested that very few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves. There is still clearly much conceptual and practical work to be done in developing measures to solve these problems. It remains to be seen whether and how the CRPD will work to inspire reforms in global health governance.

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<sup>396</sup> Gap analysis 320 - 321

<sup>397</sup> Gap analysis 327 – 325

<sup>398</sup> Gap analysis 322 - 368

<sup>399</sup> Gap analysis 378 - 379

<sup>400</sup> Gap analysis 369

6.19 Relevant to the situation is the statement made by the Committee on the Rights of Persons with Disabilities: Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities; Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women 29 August 2018; Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law the General Comment United Nations CRPD/C/GC/3 and the Committee on the Rights of Persons with Disabilities General comment No. 3 (2016) on women and girls with disabilities.

## 6. Labour practices

6.20 The right to fair labour practices (section 23 of the Constitution)<sup>401</sup> is compared with Article 27 (Work and employment) of the Convention. Reasonable accommodation and the interrelatedness of Article 27 with the rest of the rights in the Convention are identified.<sup>402</sup>

South African legislation identified are:

1. the Employment Equity Act 55 of 1998 and its Code of Good Practice: Key Aspects on the Employment of People with Disabilities;
2. the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG);
3. the Labour Relations Act 66 of 1995, its Code of Good Practice on Dismissal;
4. the Basic Conditions of Employment Act 75 of 1997;
5. the Skills Development Act 97 of 1998;
6. the Skills Development Levies Act 9 of 1999; and
7. the Compensation for Occupational Injuries and Diseases Act 130 of 1993.<sup>403</sup>

## 7. Adequate standard of living and social protection

6.21 Article 28 (Adequate standard of living and social protection) of the Convention deals with the “legal and policy framework relating to the right of access to social protection of persons with disabilities.”<sup>404</sup> Sections 9 and 27 of the Constitution are indicated as appropriate.<sup>405</sup> There is an intersection between disability and poverty, which has an impact

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<sup>401</sup> Gap analysis 91

<sup>402</sup> Gap analysis 79

<sup>403</sup> Gap analysis 91 – 126

<sup>404</sup> Gap analysis 376

<sup>405</sup> Gap analysis 376 – 377

on the lives of disabled people.<sup>406</sup> The relevance of the NDP is mentioned which requires that social protection measures must create social cohesion and an adequate standard of living.<sup>407</sup> The progressive realisation of rights to access to social security and social assistance are mentioned.<sup>408</sup> The relevant Act is the Social Assistance Act 13 of 2004.<sup>409</sup>

6.22 Relevant is the General Comment United Nations CRPD/C/GC/5 Committee on the Rights of Persons with Disabilities; General comment No. 5 (2017) on living independently and being included in the community

## 8. Insurance

6.23 Kuschke indicates that insurance providers must, due to the type of business, discriminate between persons.<sup>410</sup> They need to classify in order to create risk profiles. Discrimination is possible.<sup>411</sup> Such discrimination is based on the grounds of non-discrimination in the Constitution and on the traits displayed by a specific group.<sup>412</sup> Risks should be compiled with reference to transparency, anti-discrimination, proportionality and good customer policy.<sup>413</sup>

## 9. Political life

6.24 Section 19 of the Constitution, political rights, relates to Article 29 (Participation in political and public life) of the Convention. Relevant legislation is:

1. the Constitution of South Africa, 1996;
2. the Electoral Act 73 of 1998;
3. the Voter Registration Regulations 1998;
4. the Regulations on the Accreditation of Voter Education Providers, 1998;
5. the Regulations on the Accreditation of Observers, 1999;
6. the Regulations Concerning the Submission of Lists of Candidates, 2004;

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<sup>406</sup> Gap analysis 378

<sup>407</sup> Gap analysis 379

<sup>408</sup> Gap analysis 379

<sup>409</sup> Gap analysis 379

<sup>410</sup> Gap analysis 242

<sup>411</sup> Gap analysis 242

<sup>412</sup> Gap analysis 243

<sup>413</sup> Gap analysis 249

7. the Election Regulations, 2004;
8. the Electoral Commission Act 51 of 1996; and
9. the Local Government: Municipal Electoral Act 27 of 2000.

6.25 Grobbelaar-du Plessis draws the attention to the intersectionality of article 12 of the CRPD to the issue of legal capacity in terms of the exercise of free will and the legal competency to act in terms of common law and legislation.<sup>414</sup> These issues are relevant in terms of the capacity of a person to bring out a vote and stand for political office.

6.26 The Gap analysis concluded that political rights of persons with disabilities are adequately protected in South Africa.<sup>415</sup>

## 10. National implementation and monitoring

6.27 It identified the need for an implementation and monitoring framework as Article 33 (national implementation and monitoring) of the Convention requires an independent focal point, an independent institution and allow participation by persons with disabilities and their organisations.<sup>416</sup> It opines that the lack of disability legislation creates difficulty in establishing a focal point. The analysis mentions the need for government wide focal points, which is to culminate in the National Disability Rights Machinery (NDRM). The NDRM is the Inter-departmental coordinating unit to align “mainstreaming of disability rights.”<sup>417</sup>

## B. Other observations in relation to applicable legislation

6.28 In their articles: *Are the rights of the disabled a reality in South Africa? Part One and Two*<sup>418</sup> Reyneke and Oosthuizen survey the legal landscape regarding disability law in South Africa. They also state that there is no definition of disability as it depends on the context.<sup>419</sup>

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<sup>414</sup> See chapter 4 par 21

<sup>415</sup> Gap analysis 240; See however Grobbelaar – Du Plessis at par 21 in Chapter 4.

<sup>416</sup> Gap analysis 11 – 14

<sup>417</sup> Gap analysis 15 - 16

<sup>418</sup> JM Reyneke & H Oosthuizen “Are the rights of the disabled reality in South Africa? Part One” (2003) 28(2): *Journal for Juridical Science* 91 – 108; JM Reyneke & H Oosthuizen “Are the rights of the disabled a reality in South Africa? Part Two” (2004) 29(1): *Journal for Juridical Science* 88 – 115

<sup>419</sup> Part One 93

6.29 They identify section 9 of the Constitution and the applicable rights in the Bill of Rights relating to disability, namely: the right to dignity, life, the right to freedom and security of the person, and the right to health care and social security.<sup>420</sup>

6.30 They further identify the White Paper for Social Welfare of August 1997 published by the (then) Ministry for Welfare and Population Development. This paper, according to them, wanted to restructure services and social welfare programmes in the private and public sector. They refer to the CASE report, which was, according to them, a study to implement the White Paper on an Integrated National Disability Strategy of November 1997.<sup>421</sup> They also identify the Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System July 2001 (the Education White Paper).<sup>422</sup> They mention the concepts of unfair discrimination and affirmative action.

6.31 New or applicable legislation according to them is:

1. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;<sup>423</sup>
2. The Labour Relations Act 66 of 1995,<sup>424</sup> and its Code of Good Practice: Dismissal;
3. The Employment Equity Act 55 of 1998 and the Code of Good Practice on Key Aspects of Disability in the Workplace;
4. The Skills Development Act 97 of 1998;
5. The Compensation for Injuries and Diseases Act 130 of 1993 (COIDA);
6. The Road Accident Fund Act 56 of 1996;
7. The Occupational Health and Safety Act 85 of 1993, and
8. The Mine Health and Safety Act 29 of 1996.<sup>425</sup>

6.32 They feel that the Human Rights Commission plays an important role in terms of monitoring unfair discrimination.<sup>426</sup>

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<sup>420</sup> Part One 93 – 96

<sup>421</sup> Part One 99

<sup>422</sup> Part One 99

<sup>423</sup> Part One 103

<sup>424</sup> Part Two 89

<sup>425</sup> Part Two 89 – 114

<sup>426</sup> Part Two 113

## **C. Further Acts that have an influence on the rights of persons with disabilities**

### **1. Preferential Procurement Policy Framework Act 5 of 2000**

6.33 This Act indicates in article 2: “Framework for Implementation of Preferential Procurement Policy” that an organ of state must select a preferred procurement policy. This policy should be implemented in accordance with the following:

2(1)(d) The specific goals may include-

- (i) Contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination the basis of race, gender or disability;

6.34 This act seems to create reasonable accommodation in procurement in the form of affirmative action for persons with disabilities.

### **2. The Promotion of Access to information Act 2 of 2000**

6.35 This Act defined “personal information” as follows:

Information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

### **3. The National Education Policy Act 27 of 1996**

6.36 This Act states in section 4 “Directive principals of national education policy” in subsection (d):

Endeavouring to ensure that no person is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability

6.37 This act seems to ensure that disability is not a hurdle in attending school and receiving an education.

#### **4. The Broad-based Black Economic Empowerment Act 53 of 2003**

6.38 This act aims to “establish a legislative framework for the promotion of black economic empowerment.”

6.39 The definition section defines broad-based black economic empowerment as “the economic empowerment of all black people in particular, women, workers, youth, and people with disabilities.”

6.40 Again, reasonable accommodation for persons with disabilities in the form of affirmative action is created to counter act the social consequences of the disadvantage suffered by persons with disabilities.

#### **5. National Sport and Recreation Act 110 of 1998**

6.41 The Act indicates in Section 8 “Resources for Sport and Recreation” and in 8(1) that

Sports and recreation South Africa must, in accordance with its funding and section 10, provide physical facilities for sport and recreation nationally, as prescribed, depending on the availability of funds.

6.42 Section 8(3) indicates that:

Sport and Recreation South Africa must, when planning such facilities, ensure that special consideration is given to the accessibility of such facilities to sports people and spectators with disabilities.

6.43 It further indicates in section 9 “Programmes to promote equity in sport and recreation” and in section 9(2)(e) that “Sport and Recreation South Africa must-

...

Ensure that-

...

(iii) The disabled

...

receive priority regarding programmes for development and the delivery of sport and recreation;”

## 6. The National Sport and Recreation Amendment Draft Bill 2020(X-2019)

6.44 This Bill indicates the following changes to section 9:

Section 9 of the principal Act is hereby amended by the addition of the following subsections:

(3) The Minister may make regulations for vulnerable communities to participate in sport and to be protected from any sexual abuse and exploitation.

(4) For purposes of subsection (3) 'vulnerable community' means children under the age of 18, women or people living with disabilities.<sup>427</sup>

## 7. The Government Employment Pension Fund (GEPF)

6.45 The GEPF states that there are "ordinary pensioners", "medical pensions" and "Military pensions". A military pensioner obtains a military pension if such a person is injured or disabled in the line of duty. A medical pension is when a person retires on "...medical grounds or because of an injury on duty."<sup>428</sup>

## 8. The Military Pension Act 84 of 1976

6.46 This Act deals with payment of pensions and gratuities to persons which have been disabled or where the disability has been made worse by military duty, amongst others.<sup>429</sup>

6.47 It defines "pensionable disability" as

in relation to a member means a disability which was caused or aggravated by military service within the meaning of section 2, provided it was injury or aggravation of an injury to a member due to military service in accordance with section 2 which in the Secretary's opinion was not caused or aggravated by the member." The injury should have been determined or predetermined in terms of section 7.

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<sup>427</sup> <http://www.pmg.org.za> Accessed on 2 October 2020

<sup>428</sup> <Http://www.Gepf.gov.za> Pensioners Who is a GEPF pensioner? accessed on 6 May 2020

<sup>429</sup> Long Title of the Act <http://www.gov.za> accessed on 6 May 2020.

6.48 Section 2 defines how the disabilities occurred, while section 3 authorises the payment of the pensions or gratuities. Section 7 indicates how the disability amount is determined.

## 9. The Military Veterans Act 18 of 2011

6.49 This Act states in section 3 “Fundamental principles recognized by State, that:

1. For the purposes of this Act, the following fundamental principles are recognized by the State as governing affairs relating to military veterans:

...

- (a) Compensation to which military veterans may be entitled for disablement constitutes reparation and is, despite any provision to the contrary contained in any law, not a welfare benefit;

...

- (d) Special consideration must be given to benefit and relieve military who suffer from physical or mental disability arising from military service rendered by them;”

6.50 Section 5 “Benefit relating to military veterans” states:

- (1) The benefits relating to a military veteran are the following:
  - (a) Compensation to military veterans who sustained disabling injuries or severe psychological and neuro-psychiatric trauma or who suffer from a terminal disease resulting from their participation in military services;
  - (b) Dedicated counselling and treatment to military veterans who suffer from serious mental illness, post-traumatic stress disorder or related conditions;

...

## 10. The Correctional Services Act 111 of 1998

6.51 This Act defines disability as:

...a physical, mental, intellectual or sensory impairment which prevents a person having such an impairment from operating in an environment developed for persons without such an impairment.

6.52 It states in section 49B “disabled remand detainees” that a disabled person can be housed in a single or communal cell if such is available and has been designed for persons with disabilities.

6.53 It further states in section 49C “Aged remand detainees” that remand detainees older than 65 can be housed in single or communal cells depending on availability.

6.54 Section 49D “Mentally ill remand detainees” indicates that a mentally ill person in terms of section 77(1) of the Criminal Procedure Act “or a person showing signs of mental health care problems” can be held in a single cell or prison hospital for observation by a medical practitioner.

6.55 This Act seems to indicate the rights of persons with disabilities in the remand prison system.

6.56 The Department of Correctional Services has a policy on disability.

## **11. The Copyright Amendment Bill [B- 13 – 2017]<sup>430</sup>**

6.57 This Bill states in its long title that it aims to amend the Copyright Act of 1978 to make copyright works available for persons with disabilities amongst others. It defines “Accessible format copy” as “a copy of a work in an alternative manner or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability.”

6.58 It also defines “person with a disability” as “... a person who has a physical, intellectual, neurological, or sensory impairment and requires the work to be in a format that enables that person to access and use the work in the same manner as a person without disability.”

6.59 Clause 19D “General exceptions regarding protection of copyright for persons with disability” indicates that:

Any person may be prescribed and that serves persons with disabilities may, without the authorization of the copyright owner, make an assessable format copy for the benefit of a person with a disability, supply that accessible format copy to a person with disability by any means, including non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives,...

6.60 This can be done if the following conditions are met:

1. The person making the accessible copy must have legal access to the work.

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<sup>430</sup> <http://www.parliament.gov.za>

2. He or she can use any possible way to convert the work into an accessible format, but only the changes necessary to convert the work to accessible format may be made;
3. The action must be for non-profit purposes;
4. The disabled person or organization that receive the work by wire or wireless means can reproduce the work for private use, without the authorization of the owner of the copyright; and
5. The actions are “without prejudice” to any limitation or exception that the disabled person or organization have.

## 12. The Consumer Protection Act 68 of 2008

6.61 The Act states in section 3 “Purpose and Policy of Act” that it aims

“... to promote and advance the social and economic welfare of consumers in South Africa by-

- (a) establishing a legal frame work for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-

...

(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the presentation is packaged, published or presented;”

6.62 Unconscionable conduct is conduct “that is unconscionable for a supplier to knowingly take advantage of the fact that a customer was substantially unable to protect the customer’s own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.”<sup>431</sup>

6.63 Section 39 deals with “agreements with persons lacking legal capacity.” This section states that a transaction with a person that has been found to be legally incapable by a court, amongst other situations, is cancelled if the supplier have known or could “reasonably” have known that the consumer has been found “mentally unfit” by a court,<sup>432</sup> unless another person has led the supplier to believe that the consumer is legally capable.<sup>433</sup>

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<sup>431</sup> Section 40(2)

<sup>432</sup> Section 39 (1)(a)

<sup>433</sup> Section 39 (2)

### 13. South African Revenue Service (SARS)

6.64 SARS<sup>434</sup> has tax exemption benefits where a spouse or parent of a disabled person can claim an additional medical expenses tax credit. Certain criteria have to be met. Another benefit is a medical scheme fees tax credit where contributions to a registered medical aid can be deducted.

### 14. The Divorce Act 70 of 1979

6.65 Section 5 of the Divorce Act states that a divorce may be granted by the Court in the following circumstances:

Mental illness or continuous unconsciousness as grounds of divorce

- (1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied -
  - (a) that the defendant in terms of the Mental Health Act, 1973 (Act No. 18 of 1973) -
    - (i) has been admitted as a patient to an institution in terms of a reception order;
    - (ii) is being detained as a State patient at an institution or other place specified by the Minister of Correctional Services; or
    - (iii) is being detained as a mentally ill convicted prisoner at an institution,
 and that he has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such a patient, State patient or mentally ill prisoner; and
    - (b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.
- (2) A court may grant a decree of divorce on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness, if it is satisfied -
  - (a) that the defendant's unconsciousness has lasted for a continuous period of at least six months immediately prior to the institution of the divorce action; and
  - (b) after having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.

...

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<sup>434</sup> SARS Tax and Disability <http://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Tax-and-Disability.aspx>.

## **15. Prevention of and Treatment for Substance Abuse Act 70 of 2008**

6.66 Section 4 of the Act “Guiding principles for provision of services” states that services provided must:

...

- “(g) recognises the special needs of people with disabilities;
- (h) ensures that services are available and accessible to all service users, including women, children, older persons and persons with disabilities without any preference or discrimination;
- ...”

6.67 It would seem that this act provides for reasonable accommodation when persons with disabilities access these institutions.

## **16. The Mental Health Act 17 of 2002**

6.68 This Act deals with the lawful detention of mentally ill persons.

## **D. Equal recognition before the law in South Africa: Legal personality, capacity and culpability**

### **1. General Comment No 1 (2014) Article 12: Equal recognition before the law**

6.69 The Comment gives guidance in the implementation of article 12.<sup>435</sup> States should identify persons with disabilities as equal subjects of and persons under the law who have equal rights to all other persons. States should abolish substituted decision-making regimes.<sup>436</sup> States should also create access for persons with disabilities to a range of support services in order to express their equality.<sup>437</sup>

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<sup>435</sup> Par 50 – 52 p 12 - 13

<sup>436</sup> Par 50(a) p 12

<sup>437</sup> Par 50(b) p 13

6.70 Safeguards are needed to protect “the rights, will and preferences of persons with disabilities.” These safeguards should meet the criteria for such a system described above.<sup>438</sup>

6.71 States should also consult with and involve persons with disabilities and disabled children through their representative organisations in the development of measures relating to article 12.<sup>439</sup>

6.72 States should not engage in any actions that can derogate the right to equal protection before the law.<sup>440</sup> States should take action to prevent third party interference with this right and should provide training for persons with disabilities receiving support, for them to decide on the level of support needed. Universal legal capacity should be recognised and states should get rid of discriminatory practices in relation to disability.<sup>441</sup>

6.73 States should also review its legislative framework relating to “guardianship and trusteeship” (Substituted decision-making) to replace it with a system of supported decision-making.<sup>442</sup> Supported decision-making means that all forms of support are to be based on the will and preference of the person. Such systems should be freely available. The amount of support that is needed should not block a person from harnessing such assistance.<sup>443</sup>

6.74 The need for support in decision-making should not hinder other rights:

like the right to vote, marry or establish a civil partnership and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty...<sup>444</sup>

6.75 The person with disabilities should have the right to change and refuse or terminate the support. “[M]ental capacity assessments” should not guide the provision of support.<sup>445</sup>

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<sup>438</sup> Par 50(b) p 13

<sup>439</sup> Par 50 (c) p 13

<sup>440</sup> Par 24 p 6

<sup>441</sup> Par 25 p 6

<sup>442</sup> Par 26 p 6

<sup>443</sup> Par 29(a) – (b) p 7

<sup>444</sup> Par 29(f) and (g) p 17

<sup>445</sup> Par 29(i) p 6

6.76 The manner of communication of the persons with disabilities should not be a barrier to obtain support. Financial barriers should not prevent the provision of support. Support should be available to persons with disabilities at a minimal cost or be free.<sup>446</sup>

6.77 The support person chosen by the disabled person should be legally recognised. States are obliged to create support, which must include measures for the identification and removal of a support person by third parties. Safeguards protecting the expression of the "... will and preference ..." of the disabled person should exist.<sup>447</sup>

6.78 The right to equal recognition before the law is immediately realisable. This obligation is stated in article 12(3):

... to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of civil and political rights to equal recognition before the law.<sup>448</sup>

6.79 Legal personality is the attribute of a person to have "rights and duties." Due to the content of these rights and duties, it can only be exercised by capable persons that understand their actions. Such fair differentiation is constitutional.<sup>449</sup> The idea is that a person that does not comprehend the consequences of their actions cannot be held liable for their actions. The capacity of some persons to regulate their own affairs is a case in point.

6.80 The SALRC flags the following further areas for attention:

## 2. Assisted decision-making

6.81 Another relevant issue is the assisted decision-making skills of adults as it relates to the legal capacity of the disabled person. The SALRC has finalised and submitted to the Minister a Report on Assisted Decision Making.<sup>450</sup> The recommendations in the Report do

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<sup>446</sup> Par 29(c) and (e)

<sup>447</sup> Par 29 (d), (i) and (h)

<sup>448</sup> Par 30 p 7

<sup>449</sup> A Cockrell "Legal Personality" Bill of Rights Compendium The Law of Persons and the Bill of Rights by Updated by W Domingo Last updated September 2015 – SI 35 Lexis Nexis

<sup>450</sup> SALRC Project 122 Assisted Decision-Making Report December 2015

ISBN: 978-0-621-47481-7 © Copyright South African Law Reform Commission  
<https://www.justice.gov.za/salrc/index.htm> (hereinafter Report on Assisted decision making)

not change the law regarding the legal capacity to marry or to make a will or testamentary provisions, but it does change the law relating to curatorship.<sup>451</sup>

6.82 In the country response to a list of issues from the UN Committee on Rights of Persons with Disabilities, the following is indicated regarding decision-making legislation:

- 1 The legalisation of “informal support measures” to allow people to assist the disabled person to enter into a contract with the required safeguards.
- 2 The creation of “formal support measures” that deals with property and personal welfare. This includes a mechanism whereby the Master of the High Court can appoint a “financial supporter and/or a personal welfare supporter for a person with disability.” It seems as if this will replace the current *curator bonis* and *curator personae*. It is indicated that such arrangements will not be in breach of a person’s legal capacity. It is further indicated that safeguards will be provided.

6.83 The Report of the SALRC on Assisted decision-making states the following with regards the place of that investigation in the domestication of the CRPD:

We believe that the question whether the curatorship system should be retained, might be one of the matters that have to be considered under the comprehensive review of all law and legislation which needs to be undertaken by the government in terms of its obligations under the CRPD.<sup>452</sup>

### 3. Delict and damages

6.84 Neethling, Potgieter and Visser describe a delict as<sup>453</sup> “the act of a person which in a wrongful and culpable way causes harm to another.” Elements necessary for a delict to exist are action, wrongfulness, fault, harm and causation.

6.85 The action, if it fulfils the definitions of the constituent parts, will result in either a pecuniary loss or personal damage. There are remedies available in the common law to claim for both types of damages.

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<sup>451</sup> Response by researcher responsible for the project on the List of Questions from the Committee on the Rights of Persons with Disabilities.

<sup>452</sup> Project 122 Assisted Decision-Making Report December 2015 Isbn: 978-0-621-47481-7.

© Copyright South African Law Reform Commission. Also note the relationship between this section and article 12 as dissected in chapter 4 Concluding observations in light of legal competency and free consent.

<sup>453</sup> L Neethling et al *Law of Delict 4<sup>th</sup> edition* (1996) Butterworths Durban chapters 1, 10

6.86 The following is relevant in illustrating the application of a delictual action:

Legalbrief feb19 2020 Delict: Blind man seeks damages after falling into hole  
Reported on 18 February 2020

A 77-year-old blind man – ... – has told the Pietermaritzburg Magistrate’s Court how he fell into a huge hole in the city in April 2006 and sustained injuries. The Witness reports the civil trial is to determine if Msunduzi Municipality is liable to pay the man damages because workers from its electricity department had dug the hole. ... is claiming R6 136 for medical expenses already incurred and future expenses, and another R100 000 for ‘general damages’ for pain, shock and disfigurement. ... has retinitis pigmentosa – a disease that impairs sight – and uses a cane. In court papers, the municipality claims... was the ‘master of his own demise/injury/damage’ because he failed to take the necessary precautions to avoid falling into the hole. The city has also questioned whether the hole was indeed dug by its employees, but nevertheless said it could not be found in breach of its duty for failing to take extra precautions to prevent such an incident happening to a handicapped person, saying that such action would place ‘too harsh a burden’ on the city. The municipality said foreseeing that a blind person would be in such a danger cannot be part of its responsibilities. This case is the first instance where a South African Court has recognised disability discrimination as a subject on its own under the equality provision in the Constitution.

#### **4. Taking mental illness in civil, employment, and criminal law seriously<sup>454</sup>**

6.87 *Road Accident Fund v Russell*<sup>455</sup> is an important mental health law SCA decision that has changed the common law rights of people living with mental illness in civil law, employment law and criminal law.

##### **(a) The Background**

6.88 The Russell case arose from severe mental illness and a sufferer’s decision to end their own life. The deceased had sustained multiple injuries in a road accident in August 1989, which resulted in “brain damage,” multiple “fractures” and “lung contusion.”<sup>456</sup> The injuries had

<sup>454</sup> Excerpts of response provided by Mr. P Strassheim.

<sup>455</sup> *Road Accident Fund v Russell* (656/98) [2000] ZASCA 66; 2001 (2) SA 34 (SCA); [2001] 1 All SA 160 (A) (24 November 2000) The judgment of Chetty AJA with Howie, JA and Schutz JA concurring.

<sup>456</sup> [1] On 16 August 1989 ... (the deceased), a roofing contractor of Durban, sustained severe multiple injuries as a result of a motor collision, inter alia concussion with brain damage, scalp lacerations, multiple rib fractures, a contusion of the left lung, a fracture of the right humerus, a

led to profound physically and mentally disabling effects, which resulted in personality transformation.<sup>457</sup> He was initially hospitalised, then lived at home and then at a care facility.<sup>458</sup> Some one and a half years after the motor vehicle accident he chose to end his own life tragically<sup>459</sup> in a specific manner.<sup>460</sup>

## (b) The Central Issue

6.89 The central issue for decision was “whether the death of the deceased arose as a result of the injuries sustained in the collision and in circumstances not involving any *novus actus interveniens*.”<sup>461</sup>

## (c) The Legal Questions

6.90 The legal question was whether the death of the deceased was due to the earlier collision injuries and not due to a *novus actus interveniens* (a “new intervening act” which breaks the causal chain) in the form of the decision to intentionally end his life (which had

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fracture of the right femur, a fracture of the right lower tibia, and a fracture dislocation of the left metatarsals.

<sup>457</sup> [3] It is clear from the evidence of the respondent that the collision completely transformed the deceased, not only disabling him physically but moreover seriously affecting his interpersonal relationships. She described him prior to the collision as being a wonderful husband and father to his children, a fit and healthy individual, a man who loved life. The collision, however, had rendered him intolerant, impatient, irritable, subject to angry outbursts and lacking libido. In short, the man whom she had described as a fighter and full of spirit, was completely transformed.

<sup>458</sup> [2] The deceased was hospitalised initially at the King Edward Hospital where he lay in a comatose state for approximately one month, whereafter he was transferred to the Addington Hospital where he remained until his discharge on 22 January 1990. Save for two short periods of further hospitalisation in July and October 1990, the deceased lived with his wife, the respondent, and their children in the family home until November 1990.

[2] ... In that month she had him admitted to Morningside Nursing Home where, in January 1991, he committed suicide. The SCA decision uses the phrase “committed suicide”. The term has received adverse comment: see Rabe, L (10 May 2017 at 16:19) Mail and Guardian Suicide and the violence of our words <https://bhekisisa.org/article/2017-05-10-the-violence-of-words-does-those-who-die-of-suicidean-injustice>

<sup>460</sup> [6] The respondent visited the deceased regularly and on occasion took him on excursions. On the morning of his suicide she took him for a medical assessment to determine his prospects of recovery and future working capabilities. The deceased was informed that his prospects were nil.

[7] It is common cause that during the course of that morning the deceased jumped to his death from a second storey parapet of the nursing home.

<sup>461</sup> [9] The central issue which the trial court was required to decide was whether the death of the deceased arose as a result of the injuries sustained in the collision and in circumstances not involving any *novus actus interveniens*. The trial court found in favour of the respondent but granted the appellant leave to appeal to this court.

taken place thereafter). The answer to the legal question depended on making findings on the evidence as to whether, when the deceased brought his life to its end, he:

- (a) had “impaired judgment”;
- (b) was or was not at the time “of sound mind;
- (c) had or did not have “impaired volition.”

6.91 If the SCA found (a) and (b) and (c) existed, the deceased’s decision to end his life would not be a *novus actus interveniens* (not a “new intervening act” which broke the causal chain), and the Road Accident Fund would be liable for the loss of support.

**(b) *The Medical Evidence***

6.92 The evidence of a Professor and “prominent Neuropsychologist” was that before the incident, he had suffered from “severe depression”, that “depression is a brain dysfunction” and that “the most significant contributing factor to the depression was the deceased’s brain injury.”<sup>462</sup>

**(c) *Causation Issues***

6.93 The court concluded on the medical evidence that the brain injury sustained in the motor vehicle accident probably caused by, or was the major contributor to, the depression.<sup>463</sup>

**(d) *Recognition of effects of mental illness on cognition***

6.94 For the first time, the SCA decision focused attention on mental illness – and the psychiatric and cognitive distress harm by others causes to others. The acts and omissions of others as proximate non-remote causes of psychiatric illness will need to be recognised. The duty of dignity and care toward mentally ill people will need to be appreciated and the effects of harmful conduct that causes mental illness will need to be understood – and prevented.

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<sup>462</sup> [11] Although Prof Schlebusch conceded that the deceased suffered from severe depression, albeit not major depression, he was constrained to admit that depression is a brain dysfunction. He furthermore reluctantly conceded but only as a possibility that the most significant contributing factor to the depression was the deceased’s brain injury. Such injury was consistent with his irritability, inappropriate behaviour, inability to control outbursts, lack of short term memory, reduced concentration and loss of fine motor control functions. In her testimony the respondent had described all these manifestations of the deceased’s altered personality and conduct. Finally, Prof Schlebusch conceded that there was a clear relationship between the deceased’s depression and the suicide.

<sup>463</sup> [13] Upon careful evaluation therefore, the evidence establishes that the brain injury probably caused, or was the major factor, inducing the depression.

6.95 The SCA's signalled new approach to a major and increasing social concern needs to be understood and adopted: to mental illness in society, to treatment of mentally ill people by others, and to sufferers' decisions to bring their own lives to their end. In Russell, the mental illness was *depression*. One in every four people will reportedly during their lives be diagnosed with depression. The probability is then that everyone will at some point either become mentally ill themselves, or will interact with someone who is or has been.

**(e) *Mental health: always-present uncertainties***

6.96 In civil, discrimination, labour and criminal law, a person, employee or accused may disclose a mental illness or be known to live with one. Then some difficult, crucial and sensitive questions arise – usually difficult to raise, always not easy to answer.

6.97 These may include whether – at the time of the events, based on the sufferer's acts and omissions, or at the time they reached consensus, or when they signed the contract – the mental illness they lived with was of a nature, had causes, had effects that impacted their *judgment* or whether they were *of sound mind*, and thus whether the volition of the person at the time had been impaired.

**(f) *Legal form and constitutional substance***

6.98 The Russell decision's *form* positions it within the common law of delict. The ruling is authority on factual causation in the event that acts or omissions by another lead to severe mental illness, which causes the sufferer to experience such psychiatric anguish and distress that they bring their life to its end. The negligent party will be liable in damages for the support the deceased's dependents lost as a result of the breadwinner's tragic demise.

6.99 The Russell decision's *substance* positions it within many other contexts: in workplace "whistleblowing" and delictual damages claims; in workplace bullying and delictual compensation claims; in acts and omissions by perpetrators that result in direct or foreseeable serious mental illness and psychiatric harm for others; in criminal law and diminished responsibility; and in impairment of cognition, affect, insight and judgment caused by or arising from severe mental illness.

6.100 The SCA's ruling resonates with the position of disabled people in what the Constitutional Court has called "*disability law*"<sup>464</sup> - that people living with a mental health diagnosis like depression are disabled<sup>465</sup> and are entitled to reasonable accommodation of their different ability. This in turn accords with the ever-increasing Labour Appeal Court, Labour Court <sup>466</sup> and SCA <sup>467</sup> decisions on mental health rights in the workplace and the need for fair treatment by employers of mentally ill employees.

## **E. Criminal law and Protection provided by the criminal procedural law**

### **1. Criminal Law**

#### ***(a) Culpability***

6.101 Snyman<sup>468</sup> in his book on the criminal law, deals with fault and culpability for actions as well as the type of crimes that can be committed against a person. He deals with legal capacity regarding crimes committed when a person is not culpable. He describes the requirement for a crime as follows:

1. legality
2. conduct
3. fulfilment of requirements of a specific crime
4. unlawfulness

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<sup>464</sup> *MEC For Education: KwaZulu-Natal v Pillay* Case No: CCT 51/06 and [2007] ZACC 21

<sup>465</sup> The Equality Act places a duty on the state to "develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation" and permits courts to order that a group or class of persons be reasonably accommodated.

<sup>466</sup> *Marsland v New Way Motor & Diesel Engineering* (J4175\_02) [2008] ZALC 157; (2009) 30 ILJ 169 (LC); [2008] 11 BLLR 1078 (LC) (28 June 2008); *Pharmaco Distribution (Pty) Ltd v Weideman* (JA104\_2015) [2017] ZALCJHB 258 (4 July 2017) ; *Smith v Kit Kat Group (Pty) Ltd* (JS787/14) [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC) (23 September 2016); *Media 24 Ltd and Another v Grobler* (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005); *LS v CCMA and Others* 2014 35 ILJ 2205 (LC); *Media 24 Ltd and Another v Grobler* (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005) <sup>24</sup> *LS v CCMA and Others* 2014 35 ILJ 2205 (LC)

<sup>467</sup> *Murray v Minister of Defence* (383\_2006) [2008] ZASCA 44; [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA) ; 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) (31 March 2008)

<sup>468</sup> CR Snyman "Criminal Law Chapter 1 E Criminal Liability a Summary" Last Updated: 2014 - Sixth Edition. Jutastat (hereinafter Criminal law) accessed 10 September 2020

5. capacity
6. culpability (fault).

6.102 He then describes culpability as the manner in which someone acts that fulfil the specific requirements of a specific crime, which act is unlawful, but when doing the act, that person does not have the ability to appreciate the unlawful nature of the act, and is unable to act according to such appreciation. Such a person is not criminally culpable, irrespective of the reason for him being unable to appreciate the wrongfulness of his actions.<sup>469</sup>

***(b) Criminal capacity***

6.103 This term is defined as the existence of the mental ability that the law needs to blame a person for illegal actions. Therefore, the “mentally ill” and “very young children” cannot have criminal capacity.<sup>470</sup> If the mental ability is absent, the law cannot hold the person responsible for his or her unlawful conduct.

***(c) Mental illness and the Criminal Procedure Act 51 of 1977***

6.104 This matter is the practical implementation of the discussion above on capacity and culpability. It is found in the Criminal Procedure Act 51 of 1977 in sections 77 to 79. According to Hiemstra,<sup>471</sup> the Criminal Matters Amendment Act 68 of 1998, the Judicial Matters Amendment 55 of 2002, the Criminal Procedure Amendment 4 of 2017, the Mental Health Care Act 17 of 2002 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are applicable as these Acts had made changes to sections 77 – 79.<sup>472</sup>

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<sup>469</sup> Criminal law “Criminal capacity the concept of criminal capacity” Accessed on 10 September 2020 “Before a person can be said to have acted with culpability, he must have had criminal capacity – an expression often abbreviated simply to “capacity”. A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct.” Such requisites are:

- “(1) the ability to appreciate the wrongfulness of his conduct; and
- (2) the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct.”

<sup>470</sup> The issue of the age when criminal capacity of children can be established is also relevant here.

<sup>471</sup> Hiemstra's Criminal Procedure Albert Kruger Last Updated: May 2020 - SI 13. Lexis Nexis

<sup>472</sup> Criminal Procedure Act 51 of 1977

## 2. The Criminal Procedure Act 51 of 1977<sup>473</sup>

6.105 Section 77 of the Criminal Procedure Act, 51 of 1977 (CPA), provides that an accused who, due to mental illness or intellectual disability, is not capable to understand the court proceedings so as to make a proper defence, shall not be held liable and may be detained in a psychiatric hospital or designated health establishment or be conditionally or unconditionally released and also, in the event of a child, be referred to a children`s court.

6.106 The CPA is silent on steps that may be taken in the event of an accused who, for any other reason, is not capable to communicate or to understand the proceedings such as an accused with a hearing disability (deaf and mute) who is unable to communicate. These accused, some of whom commit serious offences such as murder and rape, are left with impunity and have to simply be released back into the community.

6.107 In terms of the CPA prior to amendments, accused unable to communicate due to hearing disability were to be referred to a psychiatric institution. Following the Rumpff commission's *Report of the inquiry into the responsibility of mentally deranged persons and related matters RP 69/1967* these provisions were repealed but nothing was put in its place despite the Rumpff Commissions recommendation that provision be made for an administrative enquiry where, after an accused with hearing disability unable to communicate may be imprisoned since it would no longer be possible to have accused, suffering from a hearing disability with inadequate communication skills, referred to a psychiatric institution if they do not also suffer from a mental disability/disorder.<sup>474</sup>

## 3. Criminal Capacity: adults and children

### (a) Adults

6.108 Section 78 of the CPA provides that an accused is not criminally responsible if, at the time of the commission of the offence, such person was incapable of appreciating the wrongfulness of the deed (the ability to distinguish between right and wrong) or to act in accordance with such appreciation, due to mental illness or intellectual disability.

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<sup>473</sup> Excerpts provided by Adv Meintjes, SC

<sup>474</sup> It is clear that there is a lacuna in the law that needs to be corrected.

6.109 The burden of proof lies on the accused on a preponderance of probability unless the prosecution raises the issue. This clause also provides for lack of criminal capacity due to causes other than mental illness or intellectual disability since it includes “*or for any other reason.*”

6.110 Orders similar to those provided for in section 77, referred to above, may be made. In addition, should an accused be found to have criminal capacity but that such capacity was diminished; this may be taken into account at the sentencing stage (section 78(7)). All of the orders provided for are, however, again limited to only those instances where the cause of criminal incapacity or diminished capacity is due to mental illness or mental defect.

**(b) Children**

6.111 The criminal capacity of children (their ability to distinguish between right and wrong and to act accordingly that might be absent due to immaturity) is dealt with in the Child Justice Act, 75 of 2008 (CJA) as amended.

6.112 Children do not have criminal capacity if under the age of 12. Under the common law, the age was 7; this was raised to 10 years by the CJA and was raised to 12 years by the Child Justice Amendment Act of 2019 (assented to on 26 May 2020).

6.113 There is a rebuttable presumption that children between the ages of criminal responsibility (whether the law prescribes this to be 7, 10 or 12) and 14 lacks criminal capacity and thus the onus is on the prosecution to prove that the child did have criminal capacity at the time of the commission of the offence. The CJA provides for various remedies (and, should sections 77 or 78 of the CPA find application, the orders provided for as referred to above may also be made).

6.114 The wide range of orders possible, is as a result of the decision of the Constitutional Court in *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* 2015(2) SACR 217 (CC), 2015(9) BCLR1026 (CC), the Court having held that the compulsory imprisonment of adults and compulsory hospitalisation or imprisonment of children to be unconstitutional. The detention of persons with disabilities on their supposed dangerousness to themselves or others are not allowed.

## **F. Person with disabilities as witnesses**

### **1. Competence to testify, modes of testifying and aids to testify**

6.115 Whether a witness is competent to testify depends on the ability of the witness to communicate, the mental capacity of the witness and an understanding of the difference between the truth and a lie. If the witness is competent to testify, the CPA allows for some assistance in certain circumstances.

### **2. Modes of assistance**

#### ***(a) Competency of witness to testify***

6.116 Section 192 provides that EVERY person not expressly excluded by the CPA, but subject to s206 (i.e. the law as to competence, compellability or privilege in force regards criminal proceedings as at 30 May 1960 to apply where this Act/other law does not expressly provide), shall be competent and compellable to give evidence.

6.117 Section 194 deals with incompetency due to state of mind and provides that no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like and is thereby deprived of the proper use of his reason shall be competent to give evidence while so afflicted or disabled.<sup>475</sup>

#### ***(b) Evidence from outside the courtroom or court may adjourn to a different place (these provisions may speak to mobility challenges and reasonable accommodation)***

6.118 Section 158 provides that the proceedings must take place in the presence of the accused except where a court orders that a witness (or, an accused) who consents thereto, may give evidence by means of closed circuit television or similar medium and the facilities are readily available. Such an order may only be made where it will prevent undue delay; save costs; be convenient; be in the interest of state security or public safety or justice or the public; or prevent the likelihood of resulting prejudice or harm to the witness if such witness testifies or is present at the proceedings. It must be possible to question and observe the witness. If the witness is a child under 14, reasons must be provided for refusal of an order.

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<sup>475</sup> The terminology in this section needs to be updated to more acceptable language.

6.119 Section 169 provides that if deemed necessary or expedient the court may adjourn the proceedings to continue at a place other than where the court is sitting.

***(c) Evidence to be oral with limited exceptions***

6.120 Section 161 provides that, unless expressly otherwise provided, evidence shall be viva voce/oral which, in the case of a “deaf and dumb” witness is deemed to include gesture-language and, in the case of a witness under 18 (thus, a child), deemed to include demonstrations, gestures or any other form of non-verbal expression.

***(d) Evidence to be under oath or affirmation except, where the oath or affirmation is not understood, the witness may be admonished to speak the truth***

6.121 Section 162 provides that no person shall be examined as a witness unless he has taken the oath or sections 163 or 164 apply (the witness swears that the evidence will be the truth, the whole truth and nothing but the truth) and Section 163 allows for an affirmation/solemn declaration to give evidence that is the truth, the whole truth and nothing but the truth inter alia where the witness objects, does not consider the oath binding or holds no religious belief.

6.122 Section 164 provides that where a witness is found not to understand the import of the oath or affirmation, the witness may be admonished to speak the truth. This section previously required non-understanding due to youthfulness, defective education or other cause. This causative requirement was abolished by Act 32 of 2007, as was the requirement that the admonishment is not only to speak the truth but also to speak the whole truth and nothing but the truth. The interpretation by the Courts is that such admonishment may only be given after the court has established that the witness understands the difference between the truth and a lie.

6.123 In an article by Anthony Pillay<sup>476</sup> titled *The rape survivor with an intellectual disability vs the court* the writer points out that in the absence of research into the position of the mentally disabled witness and the truth-lie requirement, extrapolation of research findings into the position of the child witness may validly be made. He points out that the truth-lie

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<sup>476</sup> Pillay A L “The rape survivor with an intellectual disability vs. the court” South African Journal of Psychology Vol. 42, No. 3 Sept 2012 <https://hdl.handle.net/10520/EJC125221>

requirement has been abolished in many jurisdictions also for the intellectually disabled witness and concludes by stating that society and the courts ought to be making legal and other procedures easier, rather than more difficult, for complainants with mental disabilities.

6.124 The Supreme Court of Appeal in Canada in *R v D.A.I.* 2012 SCC 5, a matter that involved a 23 year old woman with the mental age of a 3-6 year old having been repeatedly sexually assaulted over a period of 4 years, dealt pertinently with the truth-lie requirement in the event of adult witnesses with mental disabilities and held that it is unnecessary and indeed undesirable to conduct abstract enquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court and what makes a promise binding. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced. Section 16.1(7) of the Canada Evidence Act forbids such inquiries of children and section 16(3) dealing with witnesses 14 years or older with mental disabilities, i.e. found not to understand the nature of the oath or affirmation, does not require it, only the acts of communicating and promising, the requirement to understand the duty to speak the truth having been abolished. The court held furthermore that the underlying policy concerns-bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions- support allowing adults with mental disabilities to testify.

6.125 Rejecting evidence on the ground that the witness cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunise an entire category of offenders from criminal responsibility for their acts and further marginalise the already vulnerable victims of sexual predators. Also, that there is no guarantee that any witness will tell the truth - the trial process seeks a basic indication of reliability (by securing an oath, affirmation or promise, and that, along with the rules governing admissibility and weight of evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

***(e) Witness assistants/assistance in some limited circumstances***

6.126 Section 170A provides that where a witness under the **biological or mental age of 18** will be exposed to undue stress and suffering, an intermediary may be appointed through whom all questions are to be directed and who may convey the general purport of the questions unless otherwise directed by the court. Such questioning can happen within an informal setting or a setting where anyone that may upset the witness is out of sight and

hearing of the witness and where the witness can still be seen either directly or through electronic devices.

6.127 Section 191A provides for the Minister to make regulations relating to assistance and support to witnesses, counselling and other services to witnesses (*no such regulation has as yet been made*).

### 3. Current issue

6.128 Though the CPA seems to sufficiently provide for persons with language/communication disabilities to testify, albeit through intermediaries, alternative interpreters or conduit pipes, there seems to be a need for clarity on the application of the presumption of competence as it relates to persons with intellectual disabilities including children, their exclusion amounting to a denial to equal access to justice. The right to equal access to justice and to reasonable accommodation might call for abolishment of the truth-lie requirement which, according to research, seems to be a requirement without justification.

## G. Specific Crimes

6.129 The crimes discussed hereunder are crimes that can have an influence on the violations that persons with disabilities experience due to societal stereotyping. It is discussed in order to indicate the relevant protection provisions available for, amongst others, persons with disabilities.

### 1. Hate crimes

6.130 PEPUDA Section 10 on hate speech states:

#### 10. Prohibition of hate speech

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds,<sup>477</sup> against any person, that could reasonably be construed to demonstrate a clear intention to-

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<sup>477</sup> “prohibited grounds” are-

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

6.131 Section 12 states:

**12. Prohibition of dissemination and publication of information that unfairly discriminates**

No person may-

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

6.132 PEPUDA does not criminalise hate speech (but see below the discussion of the Prevention and Combatting of Hate Crimes and Hate speech Bill, B9 – 2018) but does provide for a variety of remedies other than criminal sanction. A prosecution under the common law, referred to in section 10(2) of PEPUDA, might be possible for the crimes of *crimen injuria* or perhaps defamation where the offending conduct amounts to an intentional and unlawful infringement of another person's dignity or reputation.

6.133 To be noted is that the Supreme Court of Appeal in *Qwelane v SAHRC and Others* (686/2018) [2019] ZASCA (29 Nov 2019) held that the provisions of section 10(1) and (2) of PEPUDA were overbroad, vague and unconstitutional when regard is had to section 16 of the

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- (b) any other ground where discrimination based on that other ground-
    - (i) causes or perpetuates systemic disadvantage;
    - (ii) undermines human dignity; or
    - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

Constitution, providing for the right to freedom of expressions and the limitation thereof.<sup>478</sup> The court consequently narrowed down the ambit of section 10 both with reference to the conduct it provided for and the prohibited grounds that may be the subject of hate speech. Section 10 was there for formulated to read as follows, pending confirmation by the Constitutional Court and legislative amendment, which has to occur within a prescribed period failing which the re-formulation will stand. Section 10 is thus to read as follows:

10 (1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with s 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in ss (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

6.134 The court thus restricted, for purposes of section 10, the prohibited grounds to those mentioned in section 16 of the Constitution, being *race, ethnicity, gender and religion* but included the further ground of *sexual orientation* as provided for in section 1 of PEPUDA. This was because such further ground, having been the subject matter of the appeal which dealt with an article that offended on the prohibited ground of sexual orientation, had been fully justified in terms of section 36 of the Constitution, given the evidence provided for purposes of justification. Disability remains a defined prohibited ground in section 1 of PEPUDA but, in terms of the *Qwelane* decision, is no longer a ground to be considered for purposes of the prohibited conduct in section 10 (as reframed) and the remedies for such conduct as provided for in PEPUDA. The Constitutional Court is yet to confirm the decision and the fact that Disability (and also other grounds such as age and HIV status) was excluded from the ambit

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<sup>478</sup> “**prohibited grounds**” are-

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground-
  - (i) causes or perpetuates systemic disadvantage;
  - (ii) undermines human dignity; or
  - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

of this section whilst not the subject matter of the appeal and in the absence of evidence to justify its inclusion (or even exclusion) might dictate a different outcome.

## **2. The Prevention and Combatting of Hate Crimes and Hate Speech Bill B 9 - 2018**

### **(a) Offence of hate crime**

6.135 The memorandum states that<sup>479</sup>

A hate crime is committed if a person commits any recognized offence under any law, commonly referred to as the ‘base crime or offence’ and the commission of that offence is motivated by prejudice or intolerance on the basis of one or more characteristics or perceived characteristics of the victim, as listed in the Bill, a family member of the victim or the victim’s association with or support for a group of persons who share the said characteristics.

6.136 The Bill thus has the following provision:

3. (1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person’s prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim’s association with, or support for, a group of persons who share the said characteristics:

- ...
- (b) albinism;
- ...
- (f) disability;
- ...

### **(b) Offence of hate speech**

6.137 The memorandum defines hate speech as follows:

Clause 4(1)(a) provides that any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm or to promote or propagate hatred based on age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity,

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<sup>479</sup> The “memorandum on the objects of the prevention and combating of hate crimes and hate speech bill, 2018” indicates the operation of hate crimes and hate speech as well as the penalties prescribed.

HIV status, language, nationality or migrant or refugee status, race, religion, sex, which includes intersex or sexual orientation, is guilty of the offence of hate speech.<sup>480</sup>

6.138 The Bill then creates penalties for these actions. Clause 4(2) provides an exemption for the offences.

### **3. National Action Plan (NAP) To Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances**

#### **(a) Background**

6.139 This plan is the result of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerances.<sup>481</sup> This Conference had as one of its outcomes the following:

States to establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerances, including their gender-based manifestations.

6.140 The Plan indicates that the recipients thereof are all persons in South Africa<sup>482</sup> that have the right to equality and non-discrimination. In terms of disability, it states that discrimination against persons with disabilities are an ongoing concern.<sup>483</sup> Albinism is also touched upon.<sup>484</sup>

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<sup>480</sup> The “memorandum on the objects of the prevention and combating of hate crimes and hate speech bill, 2018” indicates the operation of hate crimes and hate speech as well as the penalties prescribed.

<sup>481</sup> National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances 12 Department of Justice and Constitutional Development <http://www.justice.gov.za/docs/other-docs/nap.html>. Accessed on 6 November 2018.

<sup>482</sup> *ibid* 13

<sup>483</sup> *ibid* 34

<sup>484</sup> *ibid* 34

## 4. Witchcraft

6.141 The SALRC has an investigation into witchcraft on its research programme to review the Witchcraft Act 3 of 1957. The relevance hereof for the domestication of the CRPD can be referred from the following statement:

Disabled people all over the world are confronted with a range of explanations for disability. These can have an impact on many aspects of their lives. In many African countries a range of beliefs and attitudes underpin these alternative explanations. They include assumptions, misconceptions, traditional or religious beliefs and beliefs about the natural and supernatural worlds.

The beliefs associated with the visible difference of people with albinism often result in prejudice. They have also led to bodily and psychological harm and ritual attacks.<sup>485</sup>

## 5. The Prevention of Torture Act 13 of 2013 and the Prevention and Combating of Trafficking in Persons Act (2013)

6.142 South Africa has enacted the above acts, which could have an influence in the protection of persons with disabilities.

## 6. Crimen Iniuria and criminal defamation.<sup>486</sup>

### (a) *Crimen iniuria*

6.142 Crimen iniuria is the:

“unlawful, intentional and serious violation of the dignity or privacy of another.”

6.143 It overlaps with the crimes of criminal defamation and assault. The crime committed is the:

“unlawful and intentional violation of the dignitas, fama (reputation) or corpus (physical security)” of another person.

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<sup>485</sup> Charlotte Baker, Lancaster University, Elvis Imafidon, Ambrose Alli University “Traditional beliefs inform attitudes to disability in Africa. Why it matters” June 15, 2020 5.08pm SAST [Theconversation.com](http://Theconversation.com)

<sup>486</sup> Criminal law “*Crimen iniuria*” accessed on 5 March 2020

6.144 These are the three elements necessary for the crime of *crimen iniuria*. If both a violation of the reputation and physical security are present, the crime committed is criminal defamation. For the crime to spill over into assault, reputation and bodily integrity need to be violated. The crime protects the dignity and privacy of a person. It relates to sections 10 and 14 of the Constitution, namely dignity and privacy. Words and actions can indicate the presence of the crime. However, an unlawful deed or word directed towards a particular segment of society is not *crimen iniuria*.<sup>487</sup>

**(b) Criminal Defamation**<sup>488</sup>

6.145 This crime is the:

unlawful an intentional publication of matter concerning another which tends to injure his reputation.”

## 7. Assault

6.146 Snyman defines assault as conduct that impairs, or creates the belief of impairment, of another person’s bodily integrity in an unlawful and intentional manner.<sup>489</sup>

## 8. Murder

6.147 Snyman describes murder as intentionally and unlawfully causing the death of another person.<sup>490</sup>

## 9. Violating a grave

6.148 Snyman in *Criminal law* states that this is the unlawful and intentional damage to a human grave.<sup>491</sup>

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<sup>487</sup> See the discussion of the *Qwalane* case supra.

<sup>488</sup> Criminal law “*Criminal defamation*” accessed on 5 March 2020

<sup>489</sup> Criminal law “*Assault*” accessed on 6 September 2020

<sup>490</sup> Criminal law “*Murder*” accessed on 6 September 2020

<sup>491</sup> Relevance here is to the action of grave robbing for purposes of obtaining body parts for muti.

## 10. Sexual offences

6.148 Snyman in *Criminal law* indicate that the Criminal Law (Sexual Offences and Related Matters Act 32 of 2007 (SORMA) deals with sexual crimes against persons, including persons with mental disabilities in chapter 4.

### **(a) Relevant Bail and Sentencing provisions**

6.150 The provisions of sections 60(11) and 60(11A) of the CPA make it particularly difficult for an accused to be released on bail in the event of a schedule 6 offence, which includes the offences of rape or compelled rape where the victim is under 16, rendered particularly vulnerable because of a physical disability or is a person who is mentally disabled as defined in SORMA.

6.151 A minimum sentence of life imprisonment for such crimes,<sup>492</sup> including the rape or compelled rape of an older person as defined in the Older Persons Act, 13 of 2006, is provided for in the Criminal Law Amendment Act 105 of 1997, as per schedule 2 part I. This latter Act also provides for a minimum sentence of 10 years imprisonment for the crimes of inter alia sexual exploitation or of using a person for pornographic purposes, where the victim is a child or mentally disabled in schedule 2 part III.

6.152 The section 1 definition in SORMA: “person who is mentally disabled” “means a person affected by any mental disability, including disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was-

- (a) unable to appreciate the nature and reasonable foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonable foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act”

6.153 The question can be asked as to what protection persons with mild disabilities that do not fall into the above categories have?

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<sup>492</sup> Excerpt provided by Adv. Meintjes, SC

**(b) Gender-based violence and intersectionality**

6.154 In 2018, a Presidential Summit Against Gender-Based Violence and Femicide was held in Pretoria.<sup>493</sup> This was in response to the high level of violence against women.

6.155 In response to this, various bills are in the process of being considered by Parliament. These are the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill B16 – 2020, Domestic Violence Amendment Bill B 20 – 2020 and the Criminal and Related Matters Amendment Bill 17 - 2020.

**(c) The National Strategic Plan on Gender-based Violence & Femicide**

6.156 This plan aims to:

... provide a multi-sectoral, coherent strategic policy and programming framework to strengthen a coordinated national response to the crisis of gender-based violence and femicide by the government of South Africa and the country as a whole. The strategy seeks to address the needs and challenges faced by all, especially women across age, sexual orientation, sexual and gender identities; and specific groups such as elderly women, women who live with disability, migrant women and trans women, affected and impacted by the gender-based violence scourge in South Africa.<sup>494</sup>

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<sup>493</sup> <https://www.gov.za/speeches/declaration-presidential-summit-against-gender-based-violence-and-femicide-2-nov-2018-0000>

<sup>494</sup> Copyright © NATIONAL STRATEGIC PLAN ON GENDER-BASED VIOLENCE & FEMICIDE All rights reserved. First published in 2020. <http://www.women.gov.za>

# INTERNATIONAL AND FOREIGN LAW

## CHAPTER 7: INTERNATIONAL LAW

### A. Relevant international law

7.1 All nine international human rights treaties<sup>495</sup> can be relevant in terms of disability as they include provisions against discrimination.<sup>496</sup>

7.2 The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (together known as the International Bill of Human Rights) ensure the civil, cultural, economic, political and social rights of all people.<sup>497</sup> These treaties create the rights of persons, including persons with disabilities to non-discrimination by the inclusion of the term “other status.”<sup>498</sup> Other relevant treaties are the *International Labour Organisation Convention No 159 (1983) Concerning Vocational Rehabilitation and Employment (Disabled Persons)*, *The United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination*

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<sup>495</sup> *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, *International Covenant on Civil and Political Rights (ICCPR)*, *Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1)*, *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty (ICCPR-OP2), *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, *Optional Protocol to the Covenant on Economic, Social and Cultural Rights (ICESCR – OP)*, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, *Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW)*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)*, *Convention on the Rights of the Child (CRC)*, *Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC)*, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC)*, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP-CRC-IC)*, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*, *International Convention for the Protection of All Persons from Enforced Disappearance (CPED)*, *Convention on the Rights of Persons with Disabilities (CRPD)*, *Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD)* <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>496</sup> Handbook 11

<sup>497</sup> Handbook 11

<sup>498</sup> Training guide 21

*in Education and the Convention against Discrimination in Education in the United Nations Educational, Scientific and Cultural Organization.*<sup>499</sup>

7.3 The United Nations *Convention on the Rights of the Child*, however, recognises specifically the protection of disabled children against discrimination on the grounds of disability.<sup>500</sup> The eradication of disability discrimination is not adequately included in the UN treaty scheme. A new convention was needed.<sup>501</sup>

7.4 The African Union (AU) adopted the *Protocol to the African Charter on Human and People's Right on the Rights of Persons with Disability in Africa* in January 2018.<sup>502</sup> *Blind South Africa* state that this protocol builds on the CRPD, but has a distinctive African outlook. This development will influence the way South Africa implements the CRPD.<sup>503</sup> The Pan African Parliament adopted *the Pan African Model Law on Disability* in 2019.

## 1. Other International obligations<sup>504</sup> and/or regional instruments and their obligations<sup>505</sup>

7.5 These instruments are:

1. African Charter on Human and Peoples' Rights ("Banjul Charter");<sup>506</sup>
2. African Charter on the Rights and Welfare of the Child;<sup>507</sup>
3. Protocol to the African Charter on the Rights of Women;<sup>508</sup>
4. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;<sup>509</sup>

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<sup>499</sup> As indicated in the relevant General Comment and the Twenty Year Review

<sup>500</sup> Training guide 21

<sup>501</sup> Training guide 22

<sup>502</sup> Blind SA "*Rights of Persons with Disabilities in Africa*" 13 February 2018 [Http://blindsa.org.za/2018/02/13/protocol-african-charter-human-peoples-rights-rights-persons](http://blindsa.org.za/2018/02/13/protocol-african-charter-human-peoples-rights-rights-persons). Accessed on 1 June 2018.

<sup>503</sup> As confirmed in the speech by the Deputy Minister for Social Development the African angle will play a decisive role in South Africa's view on disability.

<sup>504</sup> Treaty System Fact Sheet Treaty 2; Twenty year review

<sup>505</sup> Treaty System Fact Sheet Treaty 2; Twenty year review

<sup>506</sup> <https://achpr.org/resources>

<sup>507</sup> <https://achpr.org/resources>

<sup>508</sup> <https://achpr.org/resources>

<sup>509</sup> African Human Rights System International Justice Resource Centre <http://www.ijrcenter.org/regional/african/>.

5. *UNESCO SALAMANCA Statement on Special Needs Education 2001*,<sup>510</sup>
6. The UN Convention of the Rights of the Child;<sup>511</sup> and
7. The World Health Organization Community Based Rehabilitation Guidelines 2010.<sup>512</sup>

7.6 The *Protocol to the African Charter on Human and People's Right on the Rights of Persons with Disability in Africa*<sup>513</sup> and *The African Model Law on Disability by the Pan African Parliament* is seen to be of relevance.

7.7 Any other treaties of the AU relating to civil, political and socio-economic rights also be applicable, as South Africa's commitment under SADC and other African alliances.

7.8 The documents of the World Health Organization (WHO) and International Labour Organization (ILO) be relevant as they also deal with disability.

7.9 Relevant in terms of the WHO is the International Classification of Functioning, Disability and Health (ICF). The guide<sup>514</sup> by the WHO entitled *Towards a Common language for Functioning, Disability and Health (ICF)* indicates that the document is a tool for collecting data on "health and health-related states." It functions with domains that deals with "levels of capacity" and "levels of performance." It subscribed to both the medical and social model by recognising:

a list of body functions and structure, and a list of domains of activity and participation.

7.10 It states that it functions by way of:

mainstreams[ing]' the experience of disability and recognises it as a universal human experience.

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<sup>510</sup> [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Salamanca\\_Statement\\_1994.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Salamanca_Statement_1994.pdf)

<sup>511</sup> <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>512</sup> Twenty year review; World Health Organization, UNESCO, International Labour Organization & International Disability Development Consortium. (2010). Community-based rehabilitation: CBR guidelines. World Health Organization. <https://apps.who.int/iris/handle/10665/44405>

<sup>513</sup> <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>

<sup>514</sup> World Health Organization Geneva 2002 "Towards a Common Language for Functioning, Disability and Health: ICF The International Classification of Functioning, Disability and Health" <https://www.who.int/classifications/icf/icfbeginnersguide.pdf> accessed on 18 November 2020

7.11 It was preceded by the International Classification of Impairments, Disabilities and Handicaps (ICIDH). This document was not well received, as it was felt that it focused too<sup>515</sup> much on the medical model of disability.

7.12 Of further relevance are the:<sup>516</sup>

1. The Sustainable Development Goals;
2. *The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*;<sup>517</sup>
3. *The Pan African Model Law on Disability*;
4. *Sendai Framework for Disaster Risk Reduction 2015–2030*;<sup>518</sup>
5. “International Telecommunications Regulations;”<sup>519</sup>
6. The International Telecommunication Union (ITU);
7. High Level Forum on Disability Inclusion and Accessible Urban Development (Habitat III) held in Quito, Ecuador, in October 2016;<sup>520</sup>
8. Web Accessibility Initiative of the World Wide Web Consortium;<sup>521</sup>
9. Treaties related to migrant workers (It is assumed that this will include the UN treaty as well as regional treaties by SADC and the AU);
10. Continental Plan of Action for the African Decade of Persons with Disabilities;<sup>522</sup> and
11. “Guideline 20 of the United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceeding before a court.”<sup>523</sup>

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<sup>515</sup> Ngwena 1

<sup>516</sup> These documents are sourced from the relevant General Comment.

<sup>517</sup> Specifically, here the Copyright Amendment Bill [B- 13 – 2017] is of relevance

<sup>518</sup> [https://www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf)

<sup>519</sup> <https://www.itu.int/en/wcit-12/Pages/itrs.aspx>

<sup>520</sup> <https://www.un.org/development/desa/dspd/2016/10/habitat-iii-high-level-forum-on-disability-inclusion-and-accessible-urban-development/>

<sup>521</sup> <https://www.w3.org/WAI/>

<sup>522</sup> [https://au.int/sites/default/files/pages/32900-file-cpoa\\_handbook.\\_audp.english\\_-\\_copy.pdf](https://au.int/sites/default/files/pages/32900-file-cpoa_handbook._audp.english_-_copy.pdf)

<sup>523</sup> Genser J “UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court” in “The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice” September 2019 [https://www.researchgate.net/publication/335983976\\_UN\\_Basic\\_Principles\\_and\\_Guidelines\\_o](https://www.researchgate.net/publication/335983976_UN_Basic_Principles_and_Guidelines_o)

## FOREIGN LAW

# CHAPTER 8: INCORPORATION OF AN INTERNATIONAL TREATY INTO RSA NATIONAL LAW

### A. Constitutional imperative

8.1 In *Constitutional Law of South Africa Second Edition*<sup>524</sup> Hennie Strydom and Kevin Hopkins deals with international law and amongst other topics, with the definition and the incorporation or domestication of international law into substantive domestic law in South Africa.

8.2 They define treaties as legally binding documents to which States have consented to be bound. Treaties can be bilateral (between two States) or multi-lateral, in which case a number of States are involved.<sup>525</sup>

8.3 They quote section 231 of the Constitution<sup>526</sup> which, according to them, defines the process of incorporation/domestication as signature and signing of treaties by the executive

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*n\_Remedies\_and\_Procedures\_on\_the\_Right\_of\_Anyone\_Deprived\_of\_Their\_Liberty\_to\_Bring\_Proceedings\_Before\_a\_Court*

<sup>524</sup> Hennie Strydom, Kevin Hopkins "International Law" in Stuart Woolman et al *Constitutional Law of South Africa Second Edition* (original service) Juta.

<sup>525</sup> Strydom and Hopkins 30-3 unilateral treaties (treaties between two states) can also become part of domestic laws.

<sup>526</sup> 231. International agreements

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

where after the treaty becomes binding on the international level if it has been approved by both houses of parliament. The next step is further action by the legislature to make the treaty applicable to domestic law,<sup>527</sup> through either automatic incorporation or a specific act of adoption.<sup>528</sup>

8.4 They consider the legal consequences once a treaty has been ratified but not incorporated. States become bound on the international level. Lacking incorporation into national law, individuals cannot approach a court and ask for a remedy based on the treaty.<sup>529</sup> According to them States are then prohibited from doing anything domestically that is in conflict with the treaty during the period of non-domestication.<sup>530</sup>

8.5 Ferreira and Ferreira-Snyman support this view of incorporation. With reference to the *Glenister* judgment,<sup>531</sup> they opine that, according to the minority judgment, if South Africa has ratified a treaty and not incorporated it, South Africa is still bound on the international level. It only becomes law in terms of section 231(4) through an Act of Parliament. Ratification does not create rights domestically.<sup>532</sup> If South Africa does not honour its obligations, it is responsible to the other involved State Parties. Ratification does not mean domestication, incorporation with legislation means domestication.<sup>533</sup>

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(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

<sup>527</sup> Strydom and Hopkins 30-4

<sup>528</sup> Strydom and Hopkins 30-6 - 30-7

<sup>529</sup> This however is tempered by section 39 and 233 of the Constitution which talks about the indirect influence of international law on domestic laws by having the courts consider it in their judgments. This is evident from the arguments by Meyersfeld and Ferreira and Ferreira-Snyman

<sup>530</sup> Strydom and Hopkins 30-10

<sup>531</sup> *Glenister v President of The Republic of South Africa and Others* 2011 (3) SA 347 (CC)

<sup>532</sup> G Ferriera and A Ferreira-Snyman "*The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism.*" PER vol 17 n. 4 Potchefstroom 2015 <http://www.scielo.org.za/SciELO.php?> (hereinafter Ferriera and Ferrira-Snyman) 4

<sup>533</sup> Ferreira and Ferreira-Snyman 4

8.6 Meyersfeld also supports this opinion of incorporation. She reaffirms the situation: a state is bound internationally to a treaty if it has ratified it. It is not law until incorporation takes place. She quotes section 231(2) of the Constitution by stating that incorporation is necessary for a treaty to become law unless it is a self-executing treaty. She described the parliamentary process for approving the treaty in both houses of parliament.<sup>534</sup>

8.7 Dugard adds to this by saying the term “national legislation” includes subordinate legislation and legislation already in force when the Constitution took effect.<sup>535</sup> He indicates that treaties can become part of South African law via the text of an act of parliament or it can be included in a schedule to an Act<sup>536</sup> or the enabling act may give the executive the power to bring the treaty into effect by means of a proclamation in the Government Gazette. (If this is publication for general information, it is not an act of incorporation.)

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<sup>534</sup> B Meyersfeld “Domesticating International Standards: the direction of international human rights law in South Africa.”(2014) 5 *Const.Ct.Rev.* 399. 406 – 407 (hereinafter Meyersfeld)

<sup>535</sup> J Dugard *et al* “*Dugard’s International Law A South African Perspective*” Fifth Edition Juta 2018 (hereinafter Dugard) 79 - 80

<sup>536</sup> The potential problem herewith is practical implementation. Who will be the subjects of the Treaty? Can citizens then claim these rights? Is its provisions implementable?

## **CHAPTER 9: SITUATIONAL ANALYSIS IN OTHER COUNTRIES: SURVEYING FOREIGN LAW**

### **A. Foreign domestic law**

9.1 South Africa has a common legal ancestry with countries both in Africa and in the western world.

9.2 As such, a comparative legal study could be done on Kenya, Malawi and Uganda while in the western countries, Australia, Canada, the United States of America and the United Kingdom were studied.

9.3 Each of these countries have a distinct manner in which the CRPD was implemented or in the case of the United States of America, not implemented but similar provisions are addressed in separate legislation.

9.4 A brief survey of the constitutional systems of the mentioned countries was done with reference to the incorporation of the CRPD and how their systems cope with disability. The content hereunder is purely for identification purposes. It is not intended to be comprehensive.

### **B. African countries**

9.5 The following countries seem to have an equity-based system that stretched through from their constitutions to relevant acts dealing with disability. These acts create focal points and monitoring bodies specifically relating to disability. It will seem that the sequence of the Convention is not followed in the country's Act resulting from the Convention, but rather the definition of equality, equality of treatment, accessibility, education, health, goods and services and in some instances, criminalisation measures, are provided for.

## 1. Kenya

9.6 According to the Common Core Document of Kenya,<sup>537</sup> its Constitution is supreme and cannot be challenged before any court.<sup>538</sup>

### (a) *Human rights protection*

9.7 Kenya has a Bill of Rights situated in article 19 of its Constitution. This is the source of all initiatives.<sup>539</sup> This Bill of Rights has vertical and horizontal application. The State and its organs have to ensure the rights of vulnerable people, including persons with disabilities. The State has the responsibility to create legislation in terms of international instruments protecting human rights. Remedies are available from courts in terms of section 23 of the Constitution.<sup>540</sup> Every person has the right to approach a court.<sup>541</sup> The limitation of rights seems to be similar in South Africa.<sup>542</sup> Kamundia states that disability is regulated by article 54.<sup>543</sup>

### (b) *Human rights institutions*

9.8 Kenya has a National Human Rights Institution created under the Kenya National Commission on Human Rights Act 2002. It has both protection and promotion competence.<sup>544</sup> Disability protection falls under the National Council for Persons with Disabilities. It deals with accessibility and reasonable accommodation issues and has promotion, educational and policy responsibilities.<sup>545</sup> The National Council for Persons with Disabilities (NCPWD) is a government body under a Ministry and is semi-autonomous of government. It has to promote the rights of persons with disabilities and include it in the development of the country.<sup>546</sup>

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<sup>537</sup> *International Human Rights Instruments HRI/CORE/KEN/2011* (Hereinafter Common Core document Kenya) 11

<sup>538</sup> Common core document Kenya 11

<sup>539</sup> Common core document Kenya 17

<sup>540</sup> Common core document Kenya 17

<sup>541</sup> Common core document Kenya 18

<sup>542</sup> Common core document Kenya 18

<sup>543</sup> Kamundia E "Kenya" (2014) 2 *ADRY* 185 – 205 3 Constitution (hereinafter Kamundia)

<sup>544</sup> Common core document Kenya 21

<sup>545</sup> Common core document Kenya 21

<sup>546</sup> *Convention on the Rights of Persons with Disabilities CRPD/C/KEN/1 Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of State parties due in 2010 Kenya* (hereinafter Report Kenya) 18

9.9 Older persons are dealt with under the Department of Gender and Social Services, under the Ministry and Gender, Children and Social Development. A “draft National Social Protection Policy” is under consideration. Its aim will be the improvement of the lives of “the poor and the vulnerable.”<sup>547</sup>

**(c) *Human rights implementation***

9.10 In its human rights dispensation, the Constitution in article 20 creates “equality before the law” and “the equal protection and benefit of the law.” No discrimination shall take place, directly or indirectly by the State or a third party, against any person, including persons with disabilities. Women and men are equal, and direct and indirect discrimination is prohibited on, amongst other grounds, disability. Effect is given to this right through legislation, affirmative action programmes and policies. This legislation prohibits direct and indirect discrimination, victimisation and harassment.<sup>548</sup> Discrimination is prohibited in:

employment (and employment related areas), education in schools, the provision of goods, facilities and services, political parties and the exercise of public functions.

9.11 Acts relating to this are the:<sup>549</sup>

1. National Cohesion and Integration Act 12 of 2008
2. Persons with Disabilities Act
3. National Commission on Gender and Development Act 2003
4. Children's Act
5. Political Parties Act
6. Employment Act
7. Refugees of Kenya Act 2006
8. HIV and AIDS Prevention and Control Act, 2006

9.12 Disability is defined in both the Constitution and the Disability Act.<sup>550</sup> The Constitutional definition is the same as that of the CRPD. The Disability Act's definition is the following:

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<sup>547</sup> Common core document Kenya 23

<sup>548</sup> Common core document Kenya 37 - 38

<sup>549</sup> Common core document Kenya 39- 40

<sup>550</sup> Report Kenya 13

Disability” means “physical, sensory, mental or other impairments, including any visual, hearing, learning or physical incapacity, which impacts adversely on social, economic or environmental participation.

9.13 The National Disability Policy is aware of the need of different information and communication requirements of persons with disabilities. It aims to improve the plight of persons with disabilities in this regard. The Act promotes the inclusion of these policies in

... the use of communication and language for persons with disabilities in education institutions, television programmes, traffic facilities, newspaper and print media, telephone services and facilities in public buildings.<sup>551</sup>

9.14 The Kenya Report states that Kenya deals with disability in its Constitution (section 27(4)) and Article 54<sup>552</sup> and the Persons with Disabilities Act 2003. Disability discrimination is prohibited in the Constitution in article 27(4).<sup>553</sup> Reasonable accommodation is found in the Kenyan Constitution. It provides access to all areas for persons with disabilities within the undue burden doctrine. The Persons with Disabilities Act provides for reasonable accommodation in section 15(5) only in terms of employment it seems. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations 2009 provided incentives like tax relief.<sup>554</sup>

9.15 Laws relevant to disability rights are indicated as follows:

1. The Persons with Disabilities Act 2003 – This act creates disability rights and the NCPWD, and aims to create equality of opportunity.
2. The Children’s Act 8 of 2001– prohibit discrimination against disabled children.
3. The Employment Act 11 of 2007 (Chapter 22 of the Laws of Kenya) - prohibits discrimination in employment.
4. The Sexual Offences Act 3 of 2006 – in cases where a victim of sexual crimes is a person that has a mental disability or is unable due to the disability to institute a charge, another person can do this.

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<sup>551</sup> Report Kenya 13

<sup>552</sup> Report 13 - 14 The Report also states that the Constitutional texts have language similar to the CRPD to eradicate barriers.

<sup>553</sup> Report Kenya 13

<sup>554</sup> Report Kenya 13 - 14

5. The Penal Code (chapter 63 of the Laws of Kenya) – provided protection to mentally persons with disabilities, also providing protection in cases where a person with a mental disability is abused.
  6. The Witness Protection Act (Chapter 79 of the Laws of Kenya) – this Act creates the Witness Protection Unit which should be aware of the needs of persons with disabilities.<sup>555</sup>
  7. Social Assistance Act 24 of 2013 - social assistance is provided if there is severe mental or physical disability, the person is incapable to fend for themselves and there is no income source.
  8. The Mental Health Act 10 of 1989 - this Act relates to the care of individuals with a mental disability, management of themselves and their estates and the management of mental health facilities.
  9. Matrimonial Causes Act 34 of 1941 –This Act indicates when a marriage can be dissolved on the basis of mental disability.
  10. Criminal Procedure Code – This Act creates the procedure to determine the legal capacity of a person.
  11. The Basic Education Act 14 of 2013 – This Act deals with special needs education.
  12. The Elections Act 24 of 2011 –This Act regulates the political actions of mentally persons with disabilities.<sup>556</sup>
- 9.16. The Report further mentions subsidiary legislation and policies. Subsidiary legislation are:
1. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations 2009;
  2. The Persons with Disabilities (Cost care, Support and Maintenance) Regulations 2009;
  3. The Persons with Disabilities (Registration) Regulations, 2009;
  4. The Persons with disabilities (Income Tax Deductions and Exemptions) Order, 2010; and
  5. The Persons with Disabilities (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board and Trustees) Regulations, 2009.<sup>557</sup>

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<sup>555</sup> Report Kenya 16

<sup>556</sup> Kamundia Question 4.1 under subheading 4. Legislation

<sup>557</sup> Report Kenya 16

9.17 Policies are:<sup>558</sup>

1. The National Disability Policy – this create a framework wherein government provides protection and an acceptable environment for persons with disabilities.
2. The Draft Special Needs Education Policy – aims to open the employment market for persons with disabilities.
3. The draft National Social Protection Policy - provision of sustainable mechanisms for poor and vulnerable people, including persons with disabilities.
4. The Draft Human Rights Policy – the aim is to provide a framework for the integration of human rights in Kenya.
5. The National Land Policy – provision of land rights for persons with disabilities.

9.18 The 2003 Act deals with relevant definitions and creates the National Council for Persons with Disabilities. It deals with the establishment thereof, and

membership, tenure of office, Director, functions of the council, funds of the council, deal with the rights and privileges of persons with disabilities, civic rights, the National Development Fund for persons with disabilities, relief and incentives and offences and penalties. Miscellaneous matters deal with the “... legal system, television programmes, telephone services, postal charge exemptions, exemptions, deductions and general requirements, inspectorate units and Council inspectors and regulations.

9.19 The rights and privileges of persons with disabilities extent to the realisation of the rights of persons with disabilities, employment, reservation of employment, apprenticeship, discrimination by employers prohibited, incentives to employers, records for job placement, education, special and non-formal education, health, accessibility and mobility and public buildings.<sup>559</sup>

9.20 The Persons with Disabilities Bill 2015 also creates the National Council for Persons with Disabilities, the rights of persons with disabilities, the National Council for Persons with Disabilities Development Fund, relief and incentives and offences and penalties and miscellaneous matters. It again defines relevant definitions. It deals more comprehensively and in a manner related to flow of the Convention, with the rights of persons with disabilities.<sup>560</sup>

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<sup>558</sup> Report Kenya 15 - 17

<sup>559</sup> Arrangement of Section of the Persons with Disability Act, 2003. A full discussion of the Act is not necessary at the moment.

<sup>560</sup> Kenya Gazette Supplement No.111 (Acts No. 14) Republic of Kenya Act, 2003

9.21 Directly applicable policies are:<sup>561</sup>

1. The National Disability Policy 2006;
2. The National Guidelines for HIV Testing and Counselling;
3. The Cash Transfer Programme;
4. The National Land Policy; and
5. Kenya Vision 2030

## 2. Malawi

9.22 According to the Common Core Document of Malawi,<sup>562</sup> Article 4 of its Constitution binds

... all executive, legislative and judicial organs of the State at all levels of Government and that all the people of Malawi are entitled to the equal protection of the Constitution and the laws made under it.

9.23 It states that article 20 deals with equality and discrimination. This includes protection against discrimination on the grounds of disability. It also states section 20, which makes it clear that

... legislating may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.<sup>563</sup>

9.24 Recognition before the law is provided for in article 41(1) of the Constitution of Malawi. This right cannot be curtailed.<sup>564</sup>

9.25 Their constitution also deals with gender equality. The Principles of National Policy under section 13 of the Constitution, makes it possible

to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality for women and men.

9.26 In terms of disability, it states that section 20 of their Constitution provides for equal protection, while section 13 places an obligation on the State to institute policies ensuring physical access to the public environment, equal employment opportunities and inclusion in

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<sup>561</sup> Kamundia Question 6.1 under subheading 6. Policies and Programmes.

<sup>562</sup> *International Human Rights HRI/CORE/MWI/2014 Common Core Document forming part of the report of States parties Malawi* (hereinafter Common core document Malawi) 19

<sup>563</sup> Common core document Malawi 29

<sup>564</sup> Common core document Malawi 29

the life of the nation.<sup>565</sup> Constitutional amendments to deal with access to public spaces and identify disabled children as children that can access state assistance.<sup>566</sup> Effective remedies are created in section 15 of their Constitution

...through the courts, the Human Rights Commission, the Ombudsman and other organs...

9.27 Section 20 of the Constitution makes it possible for the imposition of criminal sanctions for the violation of some rights.<sup>567</sup>

9.28 According to the Report<sup>568</sup> Malawi has the following disability specific legislation:

1. The 1971 Handicapped Persons Act.

This Act established the Agency responsible for persons with disabilities. This Act provided for “rehabilitation and welfare services” and for “administering vocational and special training centres” for persons with disabilities.<sup>569</sup>

2. The Disability Act of 2012. This Act does not repeal the Handicapped Act and provides the following:
  1. It is centred around human rights;
  2. Discrimination based on disability is prohibited;
  3. Provides access to education and social services for persons with disabilities;
  4. Persons with disabilities have equal access for skill development;
  5. Some practices are criminalised.<sup>570</sup>

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<sup>565</sup> Common core document Malawi 29

<sup>566</sup> Common core document Malawi 29 - 30

<sup>567</sup> Common core document Malawi 31

<sup>568</sup> *Committee on the Rights of Persons with Disabilities Combined initial and second periodic reports submitted by Malawi under article 35 of the Convention CRPD/C/MWI/1, due in 2016 1903904* (Hereafter Report Malawi)

<sup>569</sup> Report Malawi 8

<sup>570</sup> Report Malawi 8

9.29 The Act defines disability as:

...a long term physical, mental, intellectual or sensory impairment, which in interaction with various barriers may hinder the full and effective participation in society of a person on equal basis with others.<sup>571</sup>

9.30. The Act deals with anti-discrimination in:

healthcare services, social services, work and employment, political and public life, cultural and sporting activities and recreational services, housing, association and representation.<sup>572</sup>

9.31 From a cursory glance at the actual Act, it seems that in addition to the above, the Act defines relevant terms and sets out the measures for the adoption of policies and legislation on equalisation of opportunities. It also sets out the minister's responsibility regarding the administration of the Act and enables him to create the focal point and monitoring mechanism called the National Advisory and Coordinating Committee on Disability issues. It further deals with the rights of persons with disabilities and provide for a disability trust fund.<sup>573</sup>

9.32 Other acts are identified as:<sup>574</sup>

1. Constitution of Malawi 1995, articles 13(g), 20(1) and (2), 23(4) and 30(1);<sup>575</sup>
2. The Mental Treatment Act, updated by the Mental Health Bill 2005 – deals with mental health care services; and property rights;<sup>576</sup>
3. Child Care, Protection and Justice Act 22 - This act makes provision for the keeping of a register of disabled children in a local authority to provide assistance, as well as the provision that children's courts proceedings should be informal and that disabled children should be afforded assistance;<sup>577</sup>
4. Education Act 21 of 2013 – This Act makes provision for the promotion of non-discriminatory education;

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<sup>571</sup> Report Malawi 9

<sup>572</sup> Report Malawi 10

<sup>573</sup> Malawi Government Act No 8 of 2010 (Disability Act 2012)

<sup>574</sup> Chilemba, E.M. "Malawi" (2014) 2 *ADRY* 207 – 226 (hereinafter Chilemba)

<sup>575</sup> Chilemba 212

<sup>576</sup> Chilemba 213- 215

<sup>577</sup> Chilemba 216

5. Employment Act 6 of 2000 – This Act protects employees from discrimination on amongst other grounds, disability in terms of employment matters, provides for affirmative actions and equal work for equal pay; and
6. Technical, Entrepreneurial and Vocational Education and Training Authority Act 6 of 1999 – one person on the board must be a disabled person.

9.33 Policies relevant are:<sup>578</sup>

1. National Policy on the Equalization of Opportunities for Persons with Disabilities;
2. Special Needs Education Policy 2007; and
3. National Youth Policy.

9.34 The Human Rights Commission established under the Constitution deals with violations of human rights. The Commission is regulated by the Human Rights Commission Act 27 of 1998. The functions of the Commission are amongst others, to give specific attention to vulnerable persons, including persons with disabilities.<sup>579</sup>

9.35 A National Advisory and Coordinating Committee on Disability Issues (as required by the Disability Act) will deal with disability issues.<sup>580</sup>

9.36 The National Policy on Equalization of Opportunity for Persons with Disabilities promotes disability rights as well as mainstreaming and inclusion.<sup>581</sup> It ensures that persons with disabilities are treated equally to other persons and ensures the inclusion of persons with disabilities in “all political, social, cultural and economic development initiatives in Malawi.”

9.37 The policy is based on:

1. The Constitution of Malawi;
2. National policies like Vision 2030;
3. Malawi Poverty Reduction Strategy Paper; and
4. Malawi Growth and Development Strategy.

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<sup>578</sup> Chilemba 217 - 219

<sup>579</sup> Chilemba 219 - 220

<sup>580</sup> Chilemba 219

<sup>581</sup> Report Malawi 6

9.38 The policy is situated in the Ministry of Gender, Children, Disability and Social Welfare where it is the responsibility of a “Department dealing with Disability and Elderly Affairs.”<sup>582</sup>

9.39 A special needs education department also exists in the Ministry of Education, Science and Technology and deals with mainstreaming of disability rights in the education sector.

### 3. Uganda

9.40 Uganda has a supreme constitution.<sup>583</sup> A bill of rights is contained in Chapter 4 thereof and protects the rights for all persons in Uganda, namely:<sup>584</sup>

1. Article 21: equality and freedom from discrimination
2. Article 22: protection of the right to life
3. Article 23: protection of personal liberty
4. Article 24: respect for human dignity and protection from inhuman treatment
5. Article 25: protection from slavery, servitude and forced labour
6. Article 26: protection from deprivation of property
7. Article 27: right to privacy of person, home and other property
8. Article 28: right to a fair hearing
9. Article 29: freedom of conscience, expression, movement, religion, assembly and association
10. Article 30: right to education
11. Article 39: right to a clean and healthy environment
12. Article 40: protection of economic rights
13. Article 41: right to access of information
14. Article 42: right to just a fair treatment in administrative decisions
15. Article 59: right to vote and contest for any elective office in line with the set requirements
16. Article 45: rights not expressly mentioned are acknowledged.

9.41 According to the Common core document, Uganda has an Independent Human Rights Commission dealing with human rights.<sup>585</sup>

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<sup>582</sup> Report Malawi 10

<sup>583</sup> *United Nations International Human Rights Instruments Common Core Document forming part of the Report of States parties Uganda HRI/CORE/UGA/2015;16* (Hereinafter Common core document Uganda) Common core document Uganda Par 43

<sup>584</sup> Common core document Uganda 18 - 19

<sup>585</sup> Common core document Uganda 19

9.42 The Constitution, besides providing for affirmative action, also provide protection for persons with disabilities. The Constitution rights are taken up by other legislation and developed further.<sup>586</sup>

9.43 Article 21 of the Constitution protects against discrimination and ensures the right to equality.<sup>587</sup> Adjudication for infringements are situated in the courts, the Uganda Human Rights Commission and other tribunals.<sup>588</sup>

9.44 There is also the Equal Opportunities Commission established after the implementation of the Equal Opportunities Commission Act 2007. This Commission has to eliminate discrimination and inequalities on the grounds of amongst others, disability. It can also institute affirmative action in favour of amongst others, persons with disabilities.<sup>589</sup>

9.45 The Report of Uganda to the Committee on the Rights of Persons with Disabilities states that affirmative action is permitted. In 2006, the Uganda National Policy on Disability was created and its provisions were translated into the 2006 Disability Act. The Act provides legal protection and equal opportunities.<sup>590</sup>

9.46 There is also the National Programme and Plan of Action on Disability, which deals with the following aspects:<sup>591</sup>

1. Accessibility to Basic Services;
2. Physical Environment and Information;
3. Capacity building;
4. Conflict and Humanitarian emergencies;
5. Livelihoods and Employment;
6. Research and Documentation;
7. Monitoring and Evaluation.

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<sup>586</sup> Common core document Uganda19

<sup>587</sup> Common core document Uganda 20

<sup>588</sup> Common core document Uganda 21

<sup>589</sup> Common core document Uganda 21

<sup>590</sup> *Convention on the Rights of Persons with disabilities CRPD/C/UGA/1 Committee on the Rights of Persons with Disabilities Consideration of report submitted by States parties under article 35 of the Convention Initial report of State party due in 2010 Uganda 9 (hereinafter Report Uganda)*

<sup>591</sup> Report Uganda 10

9.47 Disability issues are located in the Department of Disability and Older Persons, which falls under the Ministry of Gender, Labour and Social Development. The Uganda Human Rights Commission also plays a role.<sup>592</sup> It created a “Vulnerable Persons’ Unit” to address such issues, including those of persons with disabilities. All ministries have to mainstream disability rights in their departments. The Ministry of Education and Sports created a Special Needs Education and Career Guidance. The Ministry of Health has a disability prevention and rehabilitation division. In district and sub county levels, disability is handled through the Local Government Act 1997 and falls under the Department of Community Development.<sup>593</sup>

9.48 Civil society organisations are registered under a Non-governmental Organizations Act. No provision for reasonable accommodation is made in Ugandan legislation but this is overcome by changing the design of new public buildings to make them accessible for persons with disabilities.<sup>594</sup>

9.49 The Persons with Disabilities Act 2006 establishes the National Council for Disability<sup>595</sup> and deals with definitions, objects of the Act and disability codings, (the calibration of the effect the disability has on the functionality of a person). It also deals with the right to education and health, employment of persons with disabilities, accessibility, discrimination in relation to goods, services and facilities, other social rights, exceptions and miscellaneous provisions (general provisions and offences and penalties).<sup>596</sup> It, however, does not make provision for article 12 rights (“equal legal capacity”) and does not include the social protection rights.<sup>597</sup>

9.50 The African Disability Yearbook<sup>598</sup> 2014 in its country report on Uganda, states that the Constitution in National Objective XVI and National Objective XXIV(C) and article 21 deals with the rights of persons with disabilities directly while other articles deals indirectly with disability.<sup>599</sup>

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<sup>592</sup> Report Uganda 10

<sup>593</sup> Report Uganda 11

<sup>594</sup> Report Uganda 11

<sup>595</sup> Report Uganda 10

<sup>596</sup> Titles of articles of the Act

<sup>597</sup> Chilemba, E.M *“Disability rights and emerging disability legislation in selected African jurisdictions: a diagnostic commentary”*(2015) 3 *ADRY* 291 – 308 <http://dx.doi.org/10.17159/2413-7138/2015/v3n1a13>

<sup>598</sup> Oyaro, L. “Uganda” (2014) 2 *ADRY* 247 – 266 (hereinafter Uganda) Heading 3 Constitution question 3.1

<sup>599</sup> Article 20: “... fundamental rights of all individuals and groups (including persons with disabilities) to be respected and protected by the state”; Article 22: The “... right to life of all persons”; Article

9.51 Primary legislation dealing with disability are:

1. The Persons with Disabilities Act 2006 – this is the preferred legislation dealing with disabilities in Uganda. It aims to eradicate all discrimination against disabled person and to equalise opportunities.
2. “The Mental Treatment Act 1938 (updated in 1964)” –This Act deals with mental disabilities and subscribes to the medial model. A person can be declared of unsound mind and makes provision for involuntary detention, treatment and rehabilitation.<sup>600</sup>
3. The National Council for Disability Act 2003 - this Act creates the National Council for Disability, which is the national body coordinating communication between the government and persons with disabilities, monitoring and evaluation of actions of role-players on mainstreaming of disability rights.

9.52 Indirectly relevant legislation is:<sup>601</sup>

1. The Employment Act 2006;
2. The Equal Opportunities Commission Act;
3. The Business, Technical, Vocational Education and Training Act 12 of 2008;
4. The Local Government Act 1997;
5. The Parliamentary Elections Statute 1996;
6. The Traffic and Road Safety Act 1998;
7. The Uganda Communications Act 1998;
8. The Uganda National institute of Special Education Act 1998;
9. The Workers’ Compensation Act 2000;
10. The Equal Opportunity Act 2006; and
11. The Universities and Other Tertiary Institutions Act.

9.53 National policies and programs include:<sup>602</sup>

1. The Uganda National Policy on Disability 2006;
2. The National Community Rehabilitation Programme; and

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24: Protection form “...torture or cruel, inhuman or degrading treatment and punishment for all groups and persons; Article 26: the “...right to property for all persons”; Article 28: “...right to a fair hearing for all persons in the formal justice system including disabled persons”; Article 30: “...right to education for all”; Article 31: “...the right to found a family for all persons”; Article 36: “...the rights of minorities to participate in the judicial making process” and Article 38: provision of “...civic rights for all people.” Uganda Question 3.2 under Subheading 3. Constitution

<sup>600</sup> Uganda Question 4.1 under subheading 4. Legislation

<sup>601</sup> Uganda Question 4.2 under the subheading 4. Legislation

<sup>602</sup> Uganda Question 6.1 under subheading 6. Policies and programmes.

3. The National Mine Action Programme.

9.54 Indirectly relevant policies are:

1. The National Gender Policy (2007);
2. The National Education Policy; and
3. The National Health Policy.

9.55 Remedies can be obtained in ordinary courts. The Equal Opportunities Commission is relevant as well as the Human Rights Commission.<sup>603</sup> The Human Rights Commission is a constitutional body that deals with all human rights issues. Its investigative powers is original.<sup>604</sup>

## C. Conclusion on African countries

9.56 It is clear that all countries mentioned here have the right to equality, freedom from discrimination and other civil and political rights included in the Constitution and in their disability acts.

9.57 All countries have a human rights commission and a body established by the disability act.

9.58 Of importance is that all countries have a disability act and it is clear that there is a move away from the medical model to the social model as the human rights of persons with disabilities are recognised in the disability acts. All countries have established article 33 structures in these acts as well as covering some or all of the rights in the CRPD. All the disability acts have some definition of disability. All countries also have a disability policy. Some countries have criminal sanctions for infringements

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<sup>603</sup> Uganda Question 5.1 under subheading 5. Decision of courts and tribunals; Question 8.1 under subheading 8.1

<sup>604</sup> Uganda Question 8.1 under subheading 8. National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

9.59 The areas protected from discrimination are:

1. Employment, access to health care, access to basic services and access to the physical environment and information, the provision of goods, services and facilities, political and public life, cultural and sporting activities and associations. These areas are further elaborated on in specialised legislation.
2. Provision is made for reasonable accommodations and affirmative action.

9.60 The fact that the model law by the pan African parliament exist, is a clue as to what any vehicle outlawing disability discrimination should look like. It would seem that this model law is similar to the disability acts in the African countries studied. It has a coordination body, sets out the rights of persons with disabilities and the obligations of the State, even though some African acts only deals with goods and services and make provisions for a monitoring body. It is wider than those African acts.

9.61 The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa seems to be similar to the Model Law. Both these documents deals with all aspects of the CRPD and it seems that it can be used as an example for a South African disability anti-discrimination in disability or all areas of discrimination construction. Here the approach of the UK with their Equality Act is relevant. This, however, depends on whether the naming of specific areas of discrimination is constitutional in the South Africa context where the discrimination grounds are not limited and described.

9.62 What has to be kept in mind still is the fact that extra specialised legislation will be needed to deal with the finer details or regulating the protection of persons with disabilities against discrimination.

9.63 If this were linked with the experiences of the western countries hereunder, it would seem that a personalisation of the provisions to the South African experience is to be conducted, as domestication does not necessarily mean verbatim incorporation of the CRPD and the African models. The South African equality and anti-discrimination dispensation should be kept in mind.

## **D. The African Model Law on Disability by the Pan African Parliament**

### **1. Definition of a model law**

9.64 This Model Act has several categories: Part 1: Preliminary provisions, Part 2: Rights and Welfare of Persons with Disability, Part 3: State obligations, Part 4: Gender, Age and Disability (Special Treatment), Part 5: Implementation, Coordination and Monitoring and Part 6: General provisions.

9.65 It includes in its terms used, terms such as “Persons with Disabilities,” and it defines terms like “Communication,” “Deaf Culture,” “Discrimination on the basis of disability,” “Reasonable accommodation,” “habilitation,” “Persons with disabilities,” “Rehabilitation,” “Ritual killings,” “situations of risks,” “The State,” and “universal design.”

9.66 It deals with “Principles for the Protection of Persons with Disabilities” which states that the protection and promotion of rights are regulated. These measures are re-stating the basic issues in the CRPD like equality, accessibility, respect for the basic human rights, and the prohibition of discrimination, amongst others.

9.67 The second part then sets out the following rights, explaining what the entitlement of persons with disabilities are and what are the obligations of government:

1. Article 7: Right to Human Dignity;
2. Article 8: Right to life;
3. Article 9: Right to Equality and Non-discrimination;
4. Article 10: Right to Legal Capacity;
5. Article 11: Right to a nationality;
6. Article 12: Freedom of Expression and opinion;
7. Article 13: Association and Assembly;
8. Article 14: Access to Information;
9. Article 15: Right to Liberty and Security of Person;
10. Article 16: Freedom from torture or Cruel, Inhuman or Degrading Treatment or Punishment;
11. Article 17: The Right to Privacy;
12. Article 18: Right to Vote, stand for elections and make political choices;

13. Article 19: Right to Work;
14. Article 20: Right to Education;
15. Article 21: Living independently and being included in the community;
16. Article 22: Right to Adequate Standard of Living;
17. Article 23: Right to Health;
18. Article 24: Personal Mobility;
19. Article 25: Sport, Recreation, Social and Cultural Activities;
20. Article 26: Duties of Persons with Disabilities; and
21. Article 27: Right to Family, Article 28: Access to Justice.

9.68 The part on State Obligations deals with: Article 29: Respect and ensure Respect, Article 30: Promotion, Popularization and Awareness Raising on Disability, Article 31: Protection from Abuse and Harmful Traditional Practices, Article 32: Situations of Risk and Humanitarian Emergencies, Article 33: Care and Support, Article 34: Accessibility, Article 35: Habilitation and Rehabilitation, Article 36: Statistics, Data and Other surveys, Article 37: Cooperation and Article 38: Partnership with Civil Society Organisations and Organisations of persons with disabilities.

9.69 Part 4 deals with Gender, Aging and Disability. The following articles are mentioned: Article 39: Women with Disabilities, Article 40: Older Person with Disabilities, Article 41: Children with Disabilities, and Article 42: Youth with Disabilities.

9.70 Part 5 deals with Implementation, Coordination and Monitoring. Articles in this part are Article 43: Establishment of a National Coordination Body for Persons with Disabilities, Article 44: Adjustment orders and discrimination, Article 45: Offences and Penalties and Article 46: Regulations.

## **E. The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa.**

9.71 South Africa has ratified this Protocol on 29 April 2019.<sup>605</sup> The Protocol deals with general principals in article 3. That content is similar to that of the Model Law discussed above.

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<sup>605</sup> African Union List of countries which have signed, ratified/acceded to Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa.

It defines “Deaf culture,” “Discrimination on the basis of disability,” “Habilitation,” “harmful practices,” “legal capacity,” “persons with disabilities,” “Reasonable accommodation,” “rehabilitation,” “Ritual killings,” “situations of risk,” “universal design,” and “youth.”<sup>606</sup>

9.72 The content deals with general obligations, non-discrimination, right to equality, equal recognition before the law, right to life, freedom and security of the person, freedom from torture or cruel, inhuman or degrading treatment or punishment and harmful practices. It also deals with situations of risk, right to access justice, right to life in the community, accessibility, right to education, right to health, habilitation and rehabilitation, right to work and right to adequate standard of living. Additionally, it also deals with the right to participate in political and public life, self-representation, right to freedom of expression and opinion, access to information, right to participate in sports, recreation and culture. Furthermore, the content also deals with the right to family, women and girls with disabilities, children with disabilities, youth with disabilities, older persons with disabilities, duties of persons with disabilities, statistics, data and other surveys, cooperation, implementation, popularisation of the protocol, safeguard clause, and then the administrative provisions like signature follows.<sup>607</sup>

9.73 As the mandate of the investigation is the CRPD, these documents can only be of explanatory value at this time. It can give guidance on the procedural and legal content of a possible South African act on disability.

## **F. Western countries**

9.74 The following countries were selected on the grounds of their common legal heritage with the law of South Africa.

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<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>

<sup>606</sup> *ibid* 3-4

<sup>607</sup> *ibid* 5 - 23

## 1. Canada

9.75 The Initial Report by Canada<sup>608</sup> states that Canada has ratified the CRPD on 11 March 2010.<sup>609</sup> The rights of people with disabilities are implemented through Canada's constitutional system. The rights are protected by the Canadian Constitution and in federal, provincial and territorial legislative areas.<sup>610</sup> Canada has a federal constitution, which creates legislative and executive powers for two levels of government.<sup>611</sup> Each level is sovereign. The federal government is responsible for the whole of Canada while province and territory governments deal with matters relating to them. Disability issues fall under both governments. They collaborate with each other and non-profit private sectors to ensure full participation for disabled people in Canadian society.<sup>612</sup> Some relevant documents are:

1. The Canadian Bill of Rights which applies to federal laws and "protects fundamental freedoms, legal rights and equality before the law,"<sup>613</sup>
2. Schedule B of the Canada Act 1982 (the Charter) applies to government action and guarantee all individuals' fundamental rights and freedoms, including disability.<sup>614</sup>
3. Federal, provincial and territory human rights legislation are applicable to the public and private sector and prohibits discrimination on accommodation.<sup>615</sup>
4. There is also specific federal, provincial and territory laws impacting on disability insurance plans and housing programmes.<sup>616</sup>
5. A broad range of federal, provincial and territory policies, programmes and services exists to improve accessibility, provide financial and other support to disabled people and to reduce barriers to include disabled people in society.<sup>617</sup>

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<sup>608</sup> Canada *United Nations Convention on the Rights of Persons with Disabilities CRPD/C/CAN/1 Committee on the Rights of Persons with Disabilities Consideration of Reports submitted by State Parties under Article 35 of the Convention Initial Reports of State Parties due in 2012* [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5). (hereinafter Report Canada)

<sup>609</sup> Report Canada 3

<sup>610</sup> Report Canada 5

<sup>611</sup> Report Canada 5

<sup>612</sup> Report Canada 5

<sup>613</sup> Report Canada 5

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<sup>615</sup> Report Canada 5

<sup>616</sup> Report Canada 5

<sup>617</sup> Report Canada 5

9.76 Canada's challenges are stated as:<sup>618</sup>

1. Barriers to language and communication
2. Learning and training, and
3. Safety and security.

9.77 Canada has an Office for Disability Issues.<sup>619</sup> This provides leadership on disability issues at federal level. It consults inter-governmentally as well as with private sector role-players. It is the article 33 focal point for CRPD issues.<sup>620</sup>

9.78 Human rights in Canada are protected by:

...representative and responsible government, constitutional guarantees, statute law, including specialized human rights legislation, the common law and an independent judiciary.<sup>621</sup>

**(a) *Representative and responsible government***

9.79 Canada's cabinet ministers are individually and collectively accountable for parliamentary decisions. They are accountable for the running of their departments and the exercise of their powers. There are parliamentary standing committees that have oversight over government. The Standing Committee on Justice and Human Rights have oversight over federal legislation in terms of human rights, amongst others. The Senate Standing Committee on Human Rights deals with the examination and monitoring of human rights to ensure federal legislative compliance with the constitutional documents.<sup>622</sup>

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<sup>618</sup> Report Canada 4

<sup>619</sup> Report Canada 4; 11

<sup>620</sup> *United Nations International Human Rights Instruments HRI/core/can/2019 Common core documents forming part of the report of States parties Canada 42* (hereinafter Common core document Canada)

<sup>621</sup> Common core document Canada 27

<sup>622</sup> Common core document Canada 27

**(b) Constitutional Guarantees and Bill of Rights**

9.80 The Canadian Charter of Human Rights<sup>623</sup> deals with amongst others, the following:  
the right to equality before and under the law, and the right to the equal benefit and protection of the law without discrimination, and in particular without discrimination on the basis, of ... mental or physical disability...<sup>624</sup>

**(c) Legislation and Human Rights Codes**

9.81 An anti-discrimination framework exists in all governments in Canada. Each of those governments have a human rights body. Functions of these commissions are as follows:<sup>625</sup>

- The determination or conciliation of complaints of discrimination brought under legislation operating in the particular jurisdiction, and
- Developing and conducting human rights education and awareness initiatives.

9.82 Anti-discrimination laws are implemented by all Canadian governments. It works horizontally and vertically. These laws are related to:

1. Employment matters;
2. The provision of good, services and facilities customarily open to the public; and
3. Accommodation.<sup>626</sup>

9.83 The Human Rights Codes prohibit discrimination on the basis of, amongst others, disability, physical and mental. Legislation is subjected to these codes even if a specific Act excludes the operation of the Codes.

**(d) Remedies**

9.84 Available remedies are:

1. The courts; (applicable in cases of Charter violations)
2. Human rights commission or tribunals; (primary means of enforcing legislation and codes);
3. Civil claims;
4. Statutes;
5. Common law;

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<sup>623</sup> The Charter is applicable throughout all legislatures and governments in Canada. Common core document Canada 29

<sup>624</sup> Common core document Canada 28

<sup>625</sup> Common core document Canada 32

<sup>626</sup> Common core document Canada 39

6. Statutory bodies (created by legislation); and
7. Ombudspersons.<sup>627</sup>

**(e) Specific remedies**

9.85 Remedies are based on the:

...Canadian Charter of Rights and Freedoms, Human Rights Codes, penal and other legislation, the common law and, in Quebec, the Civil Code.<sup>628</sup>

9.86 However, voices have been heard recently asking for a federal legislation that guarantees the rights of people with disability across the country.

9.87 In an article "The ABC's of the Canadians with Disabilities Act (CDA)" Chris O'Brien states<sup>629</sup> that in October of 2015, the "... Canadian government announced its commitment to the creation of federal legislation that guarantees the rights of people with disabilities across the country."

9.88 The Globe and Mail in an article by Andre Picard<sup>630</sup> "*It's well past time for a Canadians with Disabilities Act*" feels that disability in Canada is being dealt with in a piece meal fashion with no continuous disability protection. He states that the purpose of the *Canadian with Disabilities Act* would be to create equality and inclusion. Barriers disabled people faces are:

1. physical
2. legal
3. bureaucratic, and
4. technological and attitudinal.

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<sup>627</sup> Common core document Canada 36 - 37

<sup>628</sup> Common core document 37

<sup>629</sup> Chris O'Brien "The ABC's of the Canadians with Disabilities Act (CDA)" *Accessible Media Inc.* December 9, 2016 <https://www.ami.ca/abcs-of-canadians-disabilities-act-cda>. Accessed on 11 July 2018.

<sup>630</sup> Andre Picard "It's well past time for a Canadians with Disabilities Act." *The Globe and Mail* Published August 11, 2015 Updated May 15, 2018 <https://www.theglobeandmail.com/opinion/its-well-past-time-for-a-canadians-with-disabilities-act/article25904732/>. Accessed on 26 October 2018

9.89 The article *An Overview of Canada's Accessibility Laws: A Look at the Old and the New*<sup>631</sup> states that disability should receive attention as a stand-alone area in government. They add the following legislation to the Canadian anti-discrimination protection framework: The Employment Equity Act and provincial human rights acts.

9.90 The article *What will Canada's new accessibility law in 2018 look like?* discusses the content of an accessibility law at national level and state that such a law should create the required mechanisms for inclusion but not create undue burdens.<sup>632</sup>

9.91 The article *Federal Legislation Affecting People with Disabilities: Where are they today*<sup>633</sup> states that there is no overarching disability legislation in Canada. They state that the reasons why such legislation is necessary have been defined as:

1. lead to more consistent experiences of accessibility across Canada;
2. include monitoring and enforcement mechanisms;
3. apply to all areas under federal jurisdiction; and
4. change the existing culture regarding accessibility and people with disabilities.”

## 2. Germany

9.92 The CRPD has been binding on Germany since March 2009.<sup>634</sup> The CRPD provides overarching guidance for the federal government, the Länder<sup>635</sup> (Similar a province in SA) and local authorities, social benefit organisations and others in dealing with disability equality.

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<sup>631</sup> “*An Overview of Canada's Accessibility Laws: A Look at the Old and the New.*” March 16, 2018 <https://www.essentialaccessibility.com/blog/canadian-accessibility-laws/>. Accessed on 26 October 2018

<sup>632</sup> Michelle McQuigge “What will Canada's new accessibility law in 2018 look like?” *The Star The Canadian Press* Sat, Dec. 30, 2017 <https://www.thestar.com/news/canada/2017/12/29/what-will-canadas-new-accessibility-law-in-2018-look-like.html>. Accessed on 26 October 2018

<sup>633</sup> Mayra Perez-Leclerc, “Federal Legislation Affecting People with Disabilities: Where are they today?” *HillNotes* Research and Analysis from Canada's Library of Parliament <https://hillnotes.ca/2018/06/21/federal-legislation-affecting-people-with-disabilities-where-we-are-today/>. Accessed on 7 November 2018

<sup>634</sup> Germany *United Nations Convention on the Rights of Persons with Disabilities CRPD/C/DEU/1 Committee on the Rights of Persons with Disabilities Consideration of Reports Submitted by State Parties under Article 35 of the Convention Initial Report by State Parties* [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5). (hereinafter Report Germany) 4

<sup>635</sup> Lander are the states of the federation of Germany. <https://www.bundestag.de/en/parliament/function/legislation/competencies-245700> Accessed 4 September 2020

**(a) Protection of Human Rights**

9.93 Germany seems to deal with disability in the following way.<sup>636</sup> Human rights are founded in the Basic Law. These rights protect liberty against infringements by the State. Basic rights are constituted of human rights and civil rights.<sup>637</sup> Equal treatment is guaranteed in article 3 of the Constitution. It creates equality between men and women which right the State has to implement. Article 3 also prohibits discrimination as it indicates that no disadvantage or advantage may occur on amongst other grounds, disability. The concept of the “social right principle” is linked to dignity in article 1. This is the “constitutional basis” for the provision of subsistence survival.<sup>638</sup>

9.94 Protection for persons with disabilities commenced with the inclusion of disability discrimination in the Basic Law in 1994 and the separate Code for the Rehabilitation and Participation of Persons with Disabilities (Book IX of the Social Code). The next step was the Act on Equal Opportunities for Persons with Disabilities 2002.<sup>639</sup> This Act deals with accessibility, create a definition of disability, is aware of the needs of disabled women and promulgate regulations to mainstream disability rights in civil law. Accessibility in the Act deal with the “public-law domain” like sign language as a language, making available documents accessible for visually impaired persons in “administrative procedures,” and the design of barrier free internet documents of federal governments.<sup>640</sup> The next Act is the General Anti-discrimination Act of 2006, which deals with discrimination issues at work and in the civil law on amongst other grounds, disability.<sup>641</sup> The National Action Plan aims to create a system of social assistance and the assurance of equal inclusion in society.<sup>642</sup>

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<sup>636</sup> Report Germany

<sup>637</sup> *United Nations International Human Rights Instruments Common Core Document forming part of the reports of State Parties Germany HRI/CORE/DEU/2016* (Common core document Germany) 54

<sup>638</sup> Common core document Germany 55

<sup>639</sup> Report Germany 5

<sup>640</sup> Report Germany 5

<sup>641</sup> Report Germany 5

<sup>642</sup> Report Germany 6

**(b) Equality and non-discrimination**

9.95 Article 3 of the Basic Law provides equality to everyone. Discrimination is prohibited in Article 3 as well. Government is bound to these principles. These are basic rights and directly applicable law.<sup>643</sup>

9.96 It would seem that the “degree of disability” is measured. It seems to be focused on health functions but also how persons with disabilities can function in society.<sup>644</sup>

9.97 The General Equal Treatment Act is an anti-discrimination law and deals with the eradication of disadvantages on amongst others, disability. It defines its scope, and deals with discrimination, harassment and sexual harassment, and labour law protection. The remedies covered deal with compensation and damages. It further protects from discrimination under civil law and protects by affording the assistance of “...anti-discrimination associations.” It also places the burden of proof on the discriminating person once discrimination is established.<sup>645</sup>

9.98 The focal point for Germany is the Federal Ministry for Labour and Social Affairs. Focal points are in existence at the level of the Länder. The coordinating mechanism is the Commissioner of the Federal Government for Matters relating to Persons with disabilities. The German Institute for Human Rights has a monitoring and implementation role. It is independent from the political and civil sphere and operates according to the Paris Principles.<sup>646</sup>

### **3. USA**

9.99 The website “Global Disability Rights Now!”<sup>647</sup> list disability law in the USA as:

1. Americans with Disabilities Act of 1990 (ADA);
2. Section 504 of the Rehabilitation Act of 1973;
3. Individuals with Disabilities Education Act (IDEA); and
4. The Air Carriers Access Act.

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<sup>643</sup> Common core document Germany 65

<sup>644</sup> Report Germany 7

<sup>645</sup> Common core document Germany 66 - 67

<sup>646</sup> Report Germany 61 - 62

<sup>647</sup> Global Disability Rights Now! <http://www.globaldisabilityrightsnow.org/law/usa/national-disability-laws>. Accessed on 1 November 2018

9.100 The same website,<sup>648</sup> talking about disability in the USA, identifies other acts, including the Education for All Handicapped Children Act. This Act relates to the rights of all children to have their education needs met. This morphed into the Individuals with Disabilities Education Act (IDEA). In 1990, the Rehabilitation Act of 1973 was passed wherein section 504 "... requires that government-funded programmes be accessible for people with disabilities." In 1990, the American with Disabilities Act was passed while the CRPD was signed in 2009.

9.101 However, The US Senate failed to ratify the CRPD. The same website<sup>649</sup> further identifies the Housing Act and other economic support.

9.102 The website *Using this Guide-disability law\_reseach guides* at Harvard library<sup>650</sup> mentions the above acts as well as the Genetic Information Non-Discrimination Act of 2008, the Ticket to Work Act and Work Incentive Act of 1999.

9.103 AWID Women's Rights in an article "*US Failure to Ratify the Convention on the Rights of Persons with Disabilities*"<sup>651</sup> on why the USA did not ratify the CRPD, states that the issue of the impact of the ratification on the sovereignty of the USA, campaigning for and against the ratification of the CRPD, and a congressional session that failed to properly consider the ratification of the CRPD, are reasons why the USA did not ratify the CRPD.

**(a) *The Americans with Disabilities Act of 1990***

9.104 "A guide to disability Rights Laws"<sup>652</sup> mentions that the Americas with Disabilities Act deals with:

1. Employment;
2. State and local government activities;

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<sup>648</sup> Global Disability Rights Now! <https://www.globaldisabilityrightsnow.org/infographics/disability-usa>. Accessed on 7 November 2018

<sup>649</sup> Global Disability Rights Now! <http://www.globaldisabilityrightsnow.org/law/usa/national-disability-laws>. Accessed on 1 November 2018

<sup>414</sup> Harvard Law School Library <https://guides.library.harvard.edu/disabilitylaw>. Accessed on 1 November 2018

<sup>651</sup> AWID Rochelle Jones "US Failure to Ratify the Convention on the Rights of Persons with Disabilities." 19 April 2013. <https://www.awid.org/news-and-analysis/us-failure-ratify-convention-rights-persons-disabilities>. Accessed on 26 October 20; "AWID is an international, feminist, membership organization committed to achieving gender equality, sustainable development and women's human rights". <https://www.awid.org/>. Accessed on 7 November 2018.

<sup>652</sup> US Department of Justice Civil Rights Davison Disability Rights Section *A guide to Disability Rights Laws July 2009* <http://www.ada.gov/cguide.htm> Accessed on 4 November 2019. (hereinafter Guide)

3. Public transportation;
4. Public accommodations; and
5. Telecommunication relay services.

9.105 Further acts are:<sup>653</sup>

1. The Telecommunications Act - all telecommunication products and services should be accessible for persons with disabilities.
2. The Fair Housing Act - discrimination on the basis of amongst others, disability, are prohibited. Included are private housing, housing receiving federal funding and "... State and local ..." housing. Discrimination against a persons with disabilities or an associated person when renting or buying or in terms of the person who will live in the house is prohibited. Reasonable accommodation by owners of such housing is required for equal access. All new "multifamily with four or more units" housing should be built with access for persons with disabilities.
3. The Air Carriers Access Act - Qualifying persons with disabilities, using domestic and foreign air transport carriers, which carriers regularly provide flights to the population, may not be discriminated against.
4. The Voting Sensibility for the Elderly and Handicapped Act –voting stations in a federal election should be accessible for persons with disabilities or alternative measures have to be taken. Registration and voting aids should be provided, inclusive of "TDD's".
5. The National Voter Registration Act - makes available assistance to persons with disabilities in the voting process.
6. The Civil Rights of Institutionalized Persons Act (CRIPA) - this Act enables the Attorney – General to institute investigations into confinement conditions at all types of detention centres and institutions. Instances should be of a recurring institutionalized nature. A civil lawsuit can result if there is enough evidence to believe that there are blatant reoccurring harmful acts that are denying residents their "constitutional or federal rights."
7. The Individuals with Disabilities Education Act – all public schools must make available free of charge suitable public education in an environment that is optimally suited for the individual "Individualized Education Programmes" should be created to cater to the individual nature of each child.
8. The Rehabilitation Act – discrimination on the grounds of disability may not take place in federal agency programmes, if the programmes receive federal funding or in employing federal contractors.

- a. Section 501 – this section deals with affirmative action and non-discrimination in employment in executive branches of federal agencies
  - b. Section 503 – affirmative action are required and discrimination in employment is prohibited by “federal government contractors and subcontractors with contracts more than 10 000 US dollars.”
  - c. Section 504 - no exclusion, denial of benefits or any discrimination may take place if an activity or programme that is federally funded or is provided under an “Executive Agency or the United States Postal Service.” Each agency has its own requirements, like reasonable accommodation, accessibility, and effective communication.
  - d. Section 508 - this article indicates the requirements for the development, maintenance, procurement and use of telecom equipment by the “federal government.” It defines “accessible information technology...” as technology that can be used in a variety of ways and with more than one sense.
9. The Architectural Barriers Act (ABA) - federal standards of accessibility are applicable to buildings and facilities created with federal funding or leased by a federal entity. The Standards are limited to new and refurbished buildings and new leases.

9.106 The ADA National Network Disability Law Handbook explains that the American with Disabilities Act (ADA) protects from discrimination in areas such as: <sup>654</sup>

“... employment, state and local governments, public accommodations, commercial facilities, transportation, and telecommunications.”

9.107 Protection is available to a person with disabilities or an associated person. Not all disabilities that is covered are mentioned in the Act.<sup>655</sup>

9.108 The Act defines “an individual with a disability” as someone who:

... has a physical or mental impairment that substantially limits one or more major life activity. This includes people who have a record of such an impairment, even if they do not currently have a disability. It also includes individuals but are regarded as having a disability. The ADA also makes it unlawful to discriminate against a person based on that person’s association with a person with disability.<sup>656</sup>

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<sup>654</sup> Jacquie Brennan *The ADA National Network Disability Law Handbook* Southwest ADA Center a programme of the ILRU (hereinafter ADA Network) [www.ada.gov/cguide](http://www.ada.gov/cguide)

<sup>655</sup> Guide 2

<sup>656</sup> ADA Network 2

**(b) Title I: Employment**

9.109 This part of the Act forces persons who employs 15 persons or more to provide equal opportunities to disabled prospective and employed employees on an equal basis with others. Reasonable accommodation is required.<sup>657</sup>

**(c) Title II: State and Local Government Activities**

9.110 The part of the Act forces all governments in a State or locally to provide persons with disabilities with equal opportunities. Persons with disabilities should have access to all “programmes, services and activities.” States are required to adhere to “architectural standards” in the building of new and the refurbishing of old buildings. If not, alternative access should be provided. Communication with persons with disabilities (hearing, visual or speech) should be effective. Governments are required to make reasonable accommodation.<sup>658</sup>

**(d) Title II: Public transportation**

9.111 This part of the Act covers public transportation like buses and railways. Persons with disabilities may not be discriminated against in these services. Accessibility requirements should be adhered to in these vehicles. “Paratransit” should be provided if it will not create an undue burden.<sup>659</sup>

**(e) Title III: Public accommodations**

9.112 Public accommodations are identified as:

... private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theatres, private schools, convention centres, doctors’ offices, homeless shelters, transportation depots, zoos, funeral homes and recreation facilities including sport stadiums and fitness clubs.

9.113 Private transportation services are included.

9.114 Their responsibilities toward persons with disabilities are to:<sup>660</sup>

1. adhere to disability non-discrimination;
2. comply with architectural standards for new and old buildings;

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<sup>657</sup> Guide 2 - 3

<sup>658</sup> Guide 3 - 4

<sup>659</sup> Guide 5

<sup>660</sup> Guide 5

3. provide reasonable accommodation in regard policies, practices and procedures;
4. Communicate effectively with hearing, speech and visibility impaired persons;
5. remove barriers to access in old buildings; and
6. provide reasonable accommodations for persons with disabilities during academic and administrative matters.

**(f) Title IV: Telecommunication relay services**

9.115 This title relates to access to television and telephone for disabled (hearing and speech) persons. Telephone companies must make available all week all day inter and intrastate relay services.<sup>661</sup> Minimum standards for “TRS services” are set by the Federal Communications Commission. In regard television, all federally funded “public service announcements” should have close captioning.

## **4. United Kingdom of Great Britain and Northern Ireland (UK)<sup>662</sup>**

**(a) Protection of human rights**

9.116 According to the Common core document<sup>663</sup> the United Kingdom of Great Britain and Northern Ireland has a devolved constitutional system to decentralise power.<sup>664</sup> There is no written constitution but human rights have been adhered to.<sup>665</sup>

9.117 The European Convention on Human Rights (ECHR)<sup>666</sup> is being indirectly incorporated and is indirectly enforceable through the Human Rights Act 1998.<sup>667</sup> The goal of this Act is to provide direct access to courts on infringements of the rights contained therein. The result is a remedy and damages if the claim is successful. The Act enables the ECHR and the decisions

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<sup>661</sup> Guide 6

<sup>662</sup> *Convention on the Rights of Persons with Disabilities CRPD/C/GBR/1 Committee on the Rights of Persons with disabilities Consideration of reports submitted by States parties under article 35 of the Convention Initial report of State parties due in 2011 United Kingdom of Great Britain and Northern Ireland* (hereinafter Report UK) Great Britain includes England, Scotland and Wales; Report UK 4;

<sup>663</sup> *International Human Rights Instruments HRI/core/GBR/2011 Common core document forming part of the reports of States parties United Kingdom and Northern Ireland* (hereinafter Common core document UK)

<sup>664</sup> Common core document UK 9

<sup>665</sup> Common core document UK 30

<sup>666</sup> Hereinafter Convention; After Brexit, the UK may not be subjected to the law of the European Court of Justice.

<sup>667</sup> Common core document UK 36 This Act came into force in 2000.

of the European Court of Human Rights to be applicable in the UK. Legal clarity is essential.<sup>668</sup> The Act makes it necessary for government to ensure that their actions are compatible with the Convention, unless a parliamentary act prescribes a different action.<sup>669</sup>

9.118 The Act firstly requires

...all legislation to be interpreted and give effect as far as possible compatibility of the Convention rights.

9.119 If challenged a court may nullify subordinate legislation or a higher court may declare an action incompatible with legislation. Parliament then have to rectify the legislation. "Public authorities" may not act incompatible with the Convention rights and remedies lies to a "court or tribunal". It is a lawful act, however, if the act was authorised by other legislation. The Human Rights Act needs to be interpreted in line with the Convention. This also means that public authorities have to act in line with the Convention. If this is not the case, a claim can be brought to court or to a tribunal. The test here is whether the infringement was needed:

... to achieve one or more of the stated aims recognized by the Convention. It also means that the courts will apply the Convention rights.<sup>670</sup>

9.120 The Human Rights Act requires a declaration to Parliament of compatibility of primary legislation when promulgated and must accompany the Act and indicate that the Act is compatible with the Convention. This Act applies to the devolved administration as well.<sup>671</sup>

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<sup>668</sup> Common core document UK 31

<sup>669</sup> Common core document UK 31

<sup>670</sup> Common core document UK 32

<sup>671</sup> Common core document UK 32

**(b) *Non-discrimination, equality and remedies***

9.121 On the issue of non-discrimination, equality and effective remedies, the following is stated: The CRPD is not legally binding in the UK.<sup>672</sup> The UK signed the CRPD in 2007.<sup>673</sup> It is, however, effective domestically through the implementation of the UK's vision of equality as found in the current legislative framework. The UK Report to the Committee on the Rights of Persons with Disabilities states that the UK disability dispensation is compatible with the CRPD.<sup>674</sup> It states that its equality dispensation focuses on the inclusion and mainstreaming of, providing additional support for, and the involvement of disabled people in decision-making relevant to them.<sup>675</sup>

9.122 All people are equal before the law in the UK. There were pieces of legislation that dealt with discrimination:

1. The Race Relations Act 1956 (replaced by the Race Relations Act 1976)
2. The Equal Pay Act 1970
3. The Sex Discrimination Act 1975 and
4. The Disability Discrimination Act (DDA) 1995.<sup>676</sup>

9.123 The DDA was applicable nation-wide.<sup>677</sup>

9.124 In existence is a parliamentary commission, the Joint Parliamentary Committee on Human Rights, which does oversight on human rights issues in the UK and report to Parliament. It deals with breaches by "government action" and not individual cases.<sup>678</sup>

9.125 There are three human rights commissions: Commission for Equality and Human Rights (EHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Human Rights Commission (SHRC), all three being independent from government.<sup>679</sup>

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<sup>672</sup> Report UK 10

<sup>673</sup> Report UK 4

<sup>674</sup> Report UK 10

<sup>675</sup> Report UK 4

<sup>676</sup> Common core document UK 44

<sup>677</sup> Common core document UK 44

<sup>678</sup> Common core document UK 36

<sup>679</sup> Common core document UK 37

9.126 First acts pertaining to disability were:

1. The Chronically Sick and Disabled Persons Act
2. The Disability Discrimination Act 1995

9.127 It states that these legislations were compressed into the Equality Act 2010.<sup>680</sup> The four parts of the UK each have their own initiatives, but the important act in the UK is the Equality Act.<sup>681</sup>

**(c) UK disability definition**

9.128 Great Britain defines disability as follows:

... a person is disabled if he or she has a physical or mental impairment<sup>682</sup> resulting in substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.<sup>683</sup>

**(d) The Equality Act**

9.129 The Equality Act applies to all governments in the UK. There is also a social security system and a proposed disability strategy.<sup>684</sup>

9.130 This Act has nine “protected characteristics” whereof disabilities count as one. It provides protection against indirect and direct discrimination resulting from “discrimination, victimization and harassment.”<sup>685</sup> Such actions toward disabled persons are prohibited. These actions can be experienced at the hands of public functionaries, providers of:

... goods, facilities or services to the public, housing providers, employers, education providers (schools, further and higher education colleges and universities), associations and public transport providers.<sup>686</sup>

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<sup>680</sup> Report UK 4, 6

<sup>681</sup> Report UK 11; This Act does not apply to Northern Ireland.

<sup>682</sup> It is stated by Mr AK Dube that there are arguments that this formulation excludes other disabilities.

<sup>683</sup> Report UK 9 Long terms is defined as when the impairment effect lasts 12 months at least. The definition is only applicable to the Act.

<sup>684</sup> Report UK 5 - 6; If such an Act is to put into national law in South Africa, when will it be unconstitutional? There is a similar argument in terms of PEPUDA.

<sup>685</sup> Report UK 12

<sup>686</sup> Report UK 12

9.131 A Public Sector Equality Duty is in existence. This means that all public functionaries must take into consideration (“must have due regard”)<sup>687</sup> all equality matters (also disability) when acting as public functionaries. The duty has three subdivisions:

1. The eradication of “unlawful discrimination, harassment and victimization;”
2. Ensure equality between persons with a “protected characteristic and those who don’t;”
3. Ensure proper relationships between these two categories.<sup>688</sup>

9.132 Public functionaries can be challenged either by a person or by the EHCR when deemed non-compliant. Public functionaries must be able to explain how the requirement of “due regard” has been executed in their decisions.<sup>689</sup>

**(e) England**

9.133 The Disability strategy will have three focus areas:

1. Individual control-Persons with disabilities are to make their own decision and make use of opportunities for independent living.
2. Realising aspirations-Provide support and intervention at crucial life stages and fulfil the desire to work and be educated.
3. Changing attitude and behaviours-For persons with disabilities to operate in society, positive attitudes and behaviours need to be cultivated.

9.134 The Minister for Disabled People will coordinate this strategy.<sup>690</sup>

**(f) Northern Ireland**

9.135 A Promoting Social Inclusion (PSI) Working Group was set up as part of the Anti-Poverty Strategy. A PSI Strategy on Disability based on this working group and the CRPD was being developed and will provide a framework for coordination in:

...public policy, drive improved performance of service delivery for disabled people, raise the profile of the needs of disabled people and ensure their involvement in policy development and implementation.<sup>691</sup>

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<sup>450</sup> The consideration of the effect of the action of the public functionary on the equality position of persons with disabilities before any decisions are made.

<sup>688</sup> Report UK 12

<sup>689</sup> Report UK 12

<sup>690</sup> Report UK 7

<sup>691</sup> Report UK 7

**(g) Scotland**

9.136 This country aims to implement the CRPD through “Common purpose targets, National Outcomes and A National Performance Framework.” This framework promotes equality.<sup>692</sup>

**(h) Wales**

9.137 Wales has a Single Equality Scheme which promotes engagement and inclusion lead to the creation of equality duties.<sup>693</sup>

**5. Australia****(a) Protection of human rights**

9.138 The democratic institutions in Australia seem to be enough protection for human rights. It does not see the need for a Bill of Rights.<sup>694</sup> Federal law has the following human rights legislative framework:<sup>695</sup>

1. The Racial Discrimination Act 1975 (Cth)
2. The Sex Discrimination Act 1984 (Cth)
3. The Disability Discrimination Act 1992 (Cth)
4. The Age Discrimination Act 2004 (Cth)
5. The Human Rights and Equal Opportunities Act 1986 (Cth)
6. The Privacy Act 1988 (Cth)
7. The Workplace Relations Act 1996 (Cth).

9.140 States and territories also developed anti-discrimination legislation as well as a “human rights, anti-discrimination or equal opportunity board or commission.” Their functions are, broadly speaking, determination or conciliation of complaints under the relevant anti-discrimination acts.<sup>696</sup>

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<sup>692</sup> Report UK 8

<sup>693</sup> Report UK 9

<sup>694</sup> *International Human Rights Instruments HRI/CORE/AUS/2007 Core document forming part of the reports of state parties Australia* (hereinafter Common core document Australia) 21

<sup>695</sup> Common core document Australia 18

<sup>696</sup> Common core document Australia 20; *Convention on the Rights of Persons with Disabilities CRPD/C/AUS/1 Committee on the Rights of Persons with Disabilities Implementation of the Convention on the Rights of Persons with Disabilities Initial report submitted by States parties under article 35 of the Convention Australia* 8 ( hereinafter Report Australia)

9.141 These Acts are, amongst others:

1. WA Charter of Multiculturalism (Western Australia)
2. The ACT Human Rights Act 2004 (Australian Capital Territories)
3. The Victoria Charter of Human Rights and Responsibilities Act 2006<sup>697</sup>

9.142 Australia has taken measures to enhance equality.<sup>698</sup> Special measures have been taken regarding telecommunications: The Australian Communications and Media Authority (ACMA) can create standards regarding equipment for persons with disabilities along with the National Relay Service (NRS), which is a telephone service enabling persons with disabilities with hearing and speech impairments to use a normal telephone to communicate.<sup>699</sup>

9.143 The Australian Human Rights Commission (AHRC) is the national human rights institution and has investigative powers to investigate complaints under this Act. It is an independent institute established according to the Paris Principles.<sup>700</sup> If the Commission cannot conclude a complaint under the first four acts, its President will terminate it. If such a complaint was on disability, amongst others, legal proceedings can be brought to the courts.<sup>701</sup>

**(b) Disability protection**

9.144 Australia's Report indicates that the Disability Discrimination Act 1992<sup>702</sup> prohibits:

...direct and indirect discrimination... in work and employment, education, access to premises, the provision of goods, services and facilities, accommodation, disposal of an estate or interest in land, membership of clubs and incorporated associations, sport, and in the administration of Australian federal laws and programmes.

9.145 This Act also applies to the administration of Australian government, states and territories.<sup>703</sup>

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<sup>697</sup> Common core document Australia 20

<sup>698</sup> Common core document Australia 29

<sup>699</sup> Common core document Australia 66

<sup>700</sup> Common core document Australia 18

<sup>701</sup> Common core document Australia 19

<sup>702</sup> Report Australia 7

<sup>703</sup> Report Australia 7

9.146 The Act functions with two sets of standards: Access to Public Transport: Disability Standard for Accessible Public Transport and the Education Standard: Education: Disability Standards for Education. There is also the Access to Premises (Disability) which regulates access to premises. This has, however, just been tabled in parliament at the time the Report was written.<sup>704</sup>

9.147 Standards are legally binding regulations and gives more clarity on equality for persons with disabilities.

9.148 Also applicable are guidelines, that are non-binding and acts as interpretative guides. Standards and guidelines relates to areas of:

1. Employment
2. Education
3. Public transport
4. Services
5. Access to premises
6. Accommodation
7. Administration of commonwealth laws and programmes<sup>705</sup>

9.149 The Report<sup>706</sup> also mentions the two existing policies relating to disability: the National Disability Strategy (NDS) and the National Disability Agreement (NDA). The NDA will commit all Australian government to work together to ensure acceptable services for persons with disabilities. The NDS will fulfil Australia's commitment under the CRPD by creating a framework to promote, protect and monitor.<sup>707</sup>

9.150 Australia has an Australia's National Framework for Human Rights-National Action Plan, which sets out the government's five priority areas for human rights.<sup>708</sup> These are:

1. Promoting a strong, free democracy;
2. Human rights education and awareness;
3. Assisting disadvantaged groups to become more independent;
4. Supporting the family; and
5. Promoting human rights internationally

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<sup>704</sup> Report Australia 7 - 8

<sup>705</sup> <https://www.humanrights.gov.au/our-work/disability-rights/disability-standards>

<sup>706</sup> Report Australia 9

<sup>707</sup> Report Australia 9 – 10

<sup>708</sup> Common core document Australia 21

9.151 All Australian discrimination legislation have prominent principles of reasonable accommodation.<sup>709</sup>

9.152 The website “Women with Disabilities Australia”<sup>710</sup> adds the following act as relevant to equality in Australia:

1. the National Disability Insurance Scheme Act 2013

9.153 The focal point is the Attorney-General’s Office together with the Department of Families, Housing, Community Services and Indigenous Affairs. These entities deal with the implementation of the CRPD. The monitoring framework will be established by the NDS.<sup>711</sup>

## **G. Conclusion on western countries**

9.154 These are jurisdictions where it seems, upon a very cursory glance at their systems, that disability is dealt with in existing legislation dealing with human rights and specific areas of law. The legislation is not the result of the implementation of the CRPD, but rather the implementation of the CRPD is done through existing legislative frameworks.

9.155 Some countries, however, places the prohibition of discriminating in their constitutional frame work and follow through with general anti-discrimination acts covering the whole range of discrimination grounds. Others have a single anti-disability discrimination Act and various other laws that deals with the specific areas of discrimination.

9.156 The environment that is spoken about relates to: Employment, education, access to premises, provisioning of goods, services and facilities, accommodation, and public transport, amongst others.

9.157 Germany deals with the placement of the burden of proof. It places the burden on the perpetrator once discrimination has been established. The UK has a public sector duty, which looks similar to reasonable accommodation in two guises: affirmative action and anti-discrimination.

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<sup>709</sup> Report Australia 8

<sup>710</sup> Women with Disabilities Australia (WWDA). <http://wwda.org.au/govtdis/govtdisoverview/>.

<sup>711</sup> Report Australia 44

9.158 The conclusion can then be drawn that the CRPD as such does not need to be domesticated as such. It can be done with a general anti-discrimination act, and followed up with specific subject matter acts. The impression is that as long as all the key factors of the CRPD like equality and reasonable accommodation and anti-discrimination is covered in the areas suggested by the CRPD, it does not matter what the vehicle is.

9.159 The conclusion is also drawn that the definition of disability in both the African and western countries is important to define the scope and the how of protection.

# SOLUTIONS SUGGESTED BY THE UN

## CHAPTER 10: CREATING LEGISLATION

### A. Different scenarios in terms of legislation:<sup>712</sup>

10.1 The Handbook indicated three options for the content of a law:<sup>713</sup>

#### 1. Option 1:

10.2 Create a general anti-discrimination<sup>714</sup>law dealing with all discrimination grounds in every relevant area, for example including race discrimination.<sup>715</sup>

#### 2. Option 2:

10.3 Create individual laws dealing with each area of discrimination.<sup>716</sup>

#### 3. Option 3:

10.4 The creation of disability equality laws, which prohibits discrimination and addresses issues relating to persons with disabilities. For example dealing with

[A] broad policy framework for addressing disability issues, establish a number of bodies at the national and state level to do this, addresses prevention and early detection of disability, equality in employment and education, including affirmative action, social security.

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<sup>712</sup> It is submitted that the formation of a focal point and the like fall under the organizational part of the proposed law.

<sup>713</sup> Handbook 56 - 57

<sup>714</sup> Mr Dube indicates that there are arguments that ensuring the human rights of persons with disabilities are not just about discrimination.

<sup>715</sup> Handbook 56; It would seem that this is what the UK has done as well as to a limited extent Australia.

<sup>716</sup> Handbook 56; for example in, amongst others, employment law, education law? It would seem that this has been done by the USA

10.5 Specific separate legislation might be needed to address areas that need regulating in detail, like “social security, social support, and workers compensation.”<sup>717</sup>

10.6 If legislation dealing with discrimination exists, this could be amended to include disability. At a minimum, the Convention’s definitions of disability and “discrimination on the basis of disability” should be covered. New legislation will be needed if existing legislation does not deal with the areas of the CRPD. Regarding monitoring and enforcing of new laws, existing institutions can be utilised with persons with disabilities included in such monitoring and enforcing mechanisms.

## B. Core requirements of the legislation

10.7 The Handbook<sup>718</sup> indicates that legislation dealing with disability should have the following traits:

1. it should refer explicitly to the Convention and its views on the evolving nature of disability, “discrimination on the grounds of disability,” “reasonable accommodation” and other important terms;
2. it should prohibit all discrimination in all areas mentioned in the Convention;
3. it should identify all duty bearers at all government levels including third parties;
4. it should confer rights on individuals and groups to:
  - (a) be able to lodge complaints on the basis of discrimination;
  - (b) investigate these claims; and
  - (c) have access to remedies.
5. it should provide for “independent agencies” to:
  - (a) hear allegations in terms of “systemic discrimination” and individual allegations
  - (b) investigate and report on the allegation; and
  - (c) seek systemic remedies and change.<sup>719</sup>
6. it should reflect the social model of disability to identify barriers and create remedies;<sup>720</sup>
7. it should include the minimum disabilities as set out in the CRPD.<sup>721</sup>

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<sup>717</sup> It is indicted that abusive language in all legislation regarding persons with disabilities should be investigated and changed. Handbook 57. This seems to be the approach followed by the African countries.

<sup>718</sup> *ibid* 58

<sup>719</sup> *ibid* 58

<sup>720</sup> *ibid* 58 - 59

<sup>721</sup> *ibid* 59

8. it could contain special or reasonable accommodation measures<sup>722</sup> (positive and negative) to achieve equality through affirmative action. The denial of reasonable accommodation is an act of discrimination and should be included in a definition of discrimination;<sup>723</sup>
  9. it could include awareness-raising on these issues;
  10. it could include reporting obligations for the State and “private corporation” on measures taken to implement the affirmative action;<sup>724</sup> and
  11. it could include discrimination protection against public and private entities.<sup>725</sup>
- 10.8 It is submitted, that points 1- 3 indicate service provision indicators, while points 4 – 10 indicate organisational aspects.
- 10.9 Legislation should make provision for:
1. Creation of a definition of disability on terms of that created in the Convention;
  2. “Identify right holders;”
  3. “Identify duty-bearers” in government and private sectors. The government should be involved on all levels and it should regulate the private sector;
  4. Create the article 33 framework;
  5. Create the opportunity for “secondary legislation, administrative and budgetary measures;”
  6. Create effective remedies;<sup>726</sup> and
  7. Adequate budgets should be provided in accordance with article 4(2).<sup>727</sup>

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<sup>722</sup> Reasonable accommodation is limited by the doctrine of undue burden which means that for example, the employer only has to accommodate as far as it is not disproportionate to the requirement. Handbook 62

<sup>723</sup> Handbook 60, 66 - 67

<sup>724</sup> *ibid* 68

<sup>725</sup> *ibid* 68

<sup>726</sup> The Training guide states at 61 - 62 that all rights are to have remedies and can be adjudicated by national courts, and that some rights like problems relating to consumer matters will best be dealt with in an “consumer tribunal or through administrative remedies, national human rights commissions, ombudsmen, equality commissioners, disability commissions...” Mediation and arbitration, labour and school inspectors can provide cheaper, faster and effective remedies. Traditional justice forums are also available, if such courts or exists in the South African system.

<sup>727</sup> Training guide 59 - 60

10.10 The Handbook further states that there is no closed list of disabilities.<sup>728</sup> States can adopt a wider definition of disability than that in the CRPD.<sup>729</sup>

10.11 Some areas to be included:

1. Legal capacity and related assistance;
2. Right to liberty and security of the persons;
3. Right to freedom from torture;
4. Right to freedom from exploitation, violence and abuse in and outside the home;
5. Access to intellectual property like books, films and media (copyright issues);
6. Attention to persons with mental disabilities;
7. Recognition of sign language; and
8. Creation of effective remedies with the burden of proof being shifted to the defendant.<sup>730</sup>

10.12 Procedural aspects necessary to ensure equality for persons with disabilities are:<sup>731</sup>

1. Involvement of persons with disabilities associations in establishing relevant measures.
2. All law should be consistent with the CRPD.<sup>732</sup>

10.13 The Training guide states that the following actors are necessary to ensure equality for persons with disabilities:<sup>733</sup>

1. States;
2. International and regional organisations;
3. Private enterprises;
4. Service providers; and
5. Individuals and families.

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<sup>728</sup> Disability is defined as: "...those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation on society on an equal basis." Handbook 59

<sup>729</sup> Handbook 59 - 60

<sup>730</sup> Handbook 68 - 71

<sup>731</sup> Handbook 71 - 73

<sup>732</sup> Handbook 73 - 74

<sup>733</sup> Training guide 91 - 93

## C. Measures for implementation<sup>734</sup>

10.14 Article 4(1)(a) requires States to adopt all appropriate measures to implement the Convention, which measures are identified in each specific article. “Appropriate” means that measures should conform to the ethos of the Convention and should relate to legal, administrative, funding, development, and social programmes.<sup>735</sup> Further implementation measures are:

1. the creation of focal points, coordinating mechanisms and other government institutions to implement the CRPD;
2. creating CRPD compliant laws and budgets;
3. ensure sufficient funding;<sup>736</sup>
4. service delivery should be inclusive of persons with disabilities;
5. awareness raising on the CRPD;
6. training of professionals;
7. data collection and research on disability issues;
8. creating accessible technology; and
9. Provide for sufficient remedies.<sup>737</sup>

10.15 Article 33 requires the creation of focal points, coordinating mechanisms (optional) and independent monitoring mechanisms. Focal points are necessary for implementation, with no specific type of body specified. Coordinating mechanisms facilitate government action in the implementation of the Convention. These bodies create an authoritative measure with responsibility for implementation. These bodies have to have financial backing, the relevant expertise, and participation by persons with disabilities and their representative organisations. Such focal points should be developed to guarantee responsibility.<sup>738</sup>

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<sup>734</sup> Training guide 55

<sup>735</sup> Training guide 59

<sup>736</sup> Mr Dube is of the opinion that this should be applicable to all areas of government

<sup>737</sup> Training guide 55 - 56

<sup>738</sup> Training guide 57

## D. National implementation and monitoring mechanisms

### 1. Focal points and coordinating mechanisms

10.16 Focal points<sup>739</sup> are necessary to ensure equality for and full inclusion of persons with disabilities. It should have an explicit mandate. It is suggested that each department create a focal point, which report to one focal point in the responsible government department.<sup>740</sup> These focal points are cascaded down through government from the national level to the local level.

10.17 In South Africa currently, the mainstreaming of disability rights through these focal points is coordinated through the National Disability Rights Framework (NDRM). This is a non-statutory consultative forum where government, Disabled Persons' Organizations, business, and higher education institutions meet.

10.18 Focal points should:

1. have a mandate;
2. be created in all participating departments;
3. there should be one focal point in government which is responsible for the implementation of the Convention;
4. it should be established at all government levels;
5. its mandate should include the responsibility to create awareness of disability rights in the focal point Ministries, partake in the development of action plans, monitoring of and reporting on the CRPD by existing departmental reporting lines;
6. if one focal point is created, it should be placed in a ministry that does not subscribe to the medical model construct, be placed in a ministry close to the functioning of government, and it should focus on creating and managing a national policy for the Convention. As such, it can advise government on implementation but not necessarily implement the CRPD. The focal point could have the mandate to coordinate the "reporting, monitoring, awareness-raising" and liaison functions with the independent monitoring mechanism;
7. it should act as an entry point for persons with disabilities; and
8. it should be adequately staffed and resourced.<sup>741</sup>

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<sup>739</sup> Mr Dube is of the opinion that the focal point should be established amongst senior government officials.

<sup>740</sup> Training guide 98

<sup>741</sup> Training guide 99 Further tasks are indicated in the Training guide 100

## 2. National Monitoring Mechanism

10.19 States must have one or more independent monitoring mechanisms, which have the mandate to “promote, protect and monitor implementation of the Convention.” It is clear that this mechanism is visibly in the South African Human Rights Commission. This should be done in accordance with the “Paris principles”.<sup>742</sup>

10.20 Included herein should be persons with disabilities and their representative organisation and civil society. It can be newly created or an existing structure can be assigned this task, in terms of article 33.<sup>743</sup>

10.21 It must contain the following:<sup>744</sup>

1. human and financial resources;
2. the framework should be committed to the Convention;
3. have a “twin-track approach”, meaning that the monitoring of the Convention should relate to the monitoring of the mainstream rights and specific rights;
4. the framework can have one or more mechanisms, while a singular body like a human rights body is preferred; and
5. It should be based on the “Paris Principles” (at least one entity of the framework should comply with these principles).<sup>745</sup>

## 3. Budgeting

10.22 Budgets are to be in line with the instruments designed to implement the rights of persons with disabilities.

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<sup>742</sup> Training guide 58 The Paris Principles have relevance as “...the mechanisms must meet internationally agreed standards of independence, plurality and operating.”

<sup>743</sup> Training guide 101

<sup>744</sup> Training guide 101

<sup>745</sup> Training guide 102 The Paris Principles aim to create “... independent and credible national human rights institutions,...” It creates accountability measures that national human rights institutions should comply with. Handbook 97 - 98

## 4. Progressive and immediate realisation

10.23. Article 4(2) states:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.<sup>746</sup>

10.24 It states that economic, social and cultural rights should be immediately implemented notwithstanding monetary implications. If resources dictates that progressive realisation is required, the implementation can be tempered by the development of a plan informed by budget and time frames to develop such implementation. Sufficient funds should be made available and progress should be monitored.<sup>747</sup>

## E. Conclusion

10.25 The substantive and organisational issues mentioned (the why and the how) will need to be fleshed out in detail to ascertain how the CRPD can be domesticated in South Africa. Questions to this effect have been framed to elicit public participation and comments, directed not only at the disability sector, but also to any other member of the public that can contribute to the development of the law in this regard.

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<sup>746</sup> Training guide 66

<sup>747</sup> Training guide 66 - 67

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