

# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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WINDHOEK - 14 October 2025

No. 8759

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## Government Notice

### OFFICE OF THE PRIME MINISTER

No. 264

2025

#### AMENDMENT OF NATIONAL DISABILITY COUNCIL ACT: NATIONAL DISABILITY COUNCIL ACT, 2004

In terms of section 3(4) of the National Disability Council Act, 2004 (Act No. 26 of 2004), read with Proclamation No. 35 of 15 September 2025, I –

- (a) amend that Act by the substitution for the Schedule to that Act of the Schedule set out in this notice; and
- (b) determine that the amended National Disability Policy comes into operation on 14 October 2025.

**ELIJAH NGURARE**  
**PRIME MINISTER**

Windhoek, 1 September 2025

## “SCHEDULE

### FOREWORD

Namibia ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007 and the Protocol to the African Charter on the Rights of Persons with Disabilities. These International instruments and the Namibian Constitution place a duty on the State to protect and promote the rights of and, as a result, improve the lives of persons with disabilities in all spheres of life.

Namibia’s commitment to the promotion, protection, and fulfilment of the rights of persons with disabilities is evidenced by, amongst other things, the adoption of policies and enactment of legislation focused on the wider inclusion and protection of the rights of persons with disabilities.

In pursuit of this legal obligation, Namibia promulgated the National Disability Council, 2006 (Act No. 26 of 2004). This Act established the National Disability Council with the mandate to monitor the implementation of the National Policy on Disabilities through the issuance of the Disability Annual Monitoring Report (DARMT).

Whilst the legal and policy frameworks and the associated institutional architecture, such as the Disability Council established, has gone a long way in advancing disability inclusion in the Country, it is evident that persons with disabilities remain the most marginalised members of society and a lot more is yet to be done to enhance its efficiency the existing legal and policy frameworks to achieve adequate disability streamlining, inclusion and accommodation.

Data from the 2023 National Population and Housing Census underscores that persons with disabilities face multiple disadvantages and inequalities in various domains. The Census found that 4.4 percent of Namibia’s population, approximately 108,992 individuals, live with some form of functional disability, with prevalence rates higher in rural areas (5.8%) compared to urban areas (3.2%). Regions such as Omaheke (6.1%) and Kunene (5.8%) recorded the highest disability prevalence. These statistical findings are further substantiated by the Situational Analysis conducted in preparation for this Policy, which highlights persistent physical barriers (such as the lack of ramps, elevators, or accessible toilets), communication barriers (such as the absence of sign language interpreters or Braille materials), attitudinal barriers (including stigma and discrimination), and institutional barriers (such as inadequate laws, policies, or services that effectively address disability inclusion).

The first Disability policy was adopted 28 years ago, and was subsequently included as an Annexure to the National Disability Council Act, 2004 (Act No. 26 of 2004). There have since been several changes that warrant the review of the Policy, to enhance institutional efficiency and functionality of the Division for Disability and Marginalised Communities, now hosted in the Office of the Vice President. Moreover, to ensure visibility of disability inclusion spending through the introduction of disaggregated disability budget lines, in particular the development budget, as well as to address current disability accommodating infrastructure and other accessibility gaps, as well as to strengthen the data collection, monitoring and evaluation of the disability policy and legal framework through enforcing compulsory reporting contemplated under the National Disability Council, 2006.

The 2025-2030 National Policy on Disability was drafted in response to these challenges. Through this Policy, the Government aims to extend maximum inclusion, protection, and promotion of the rights of persons with disabilities corresponding to the constitutional guarantees and Namibia’s national, regional, and international obligations.

The drafting of this Policy and Strategy, is a call to action to all Stakeholders most particularly the new administration to enhance the protection, inclusion and accommodation of the rights of persons with disabilities by addressing the contemporary barriers faced persons with disability, as well as the shortcomings of 1997 Policy that must be braced by all Namibians.

It is our duty as the Government to work in collaboration with persons with disabilities and their families, and with relevant organisations in the civil society, private sector, and development community to address the special needs of our people with disabilities.

This policy, therefore, denotes our collective pledge to ensure that persons with disabilities participate in our social, political, and economic development processes.

**Her Excellency, Lucia Witbooi**

The Vice-President of the Republic of Namibia

## ACRONYMS AND ABBREVIATIONS

|                |                                                                            |
|----------------|----------------------------------------------------------------------------|
| <b>MDGs:</b>   | Millennium Development Goals                                               |
| <b>NDCN:</b>   | National Disability Council of Namibia                                     |
| <b>PWD:</b>    | Persons with Disabilities                                                  |
| <b>SDGs:</b>   | Sustainable Development Goals                                              |
| <b>UNCRPD:</b> | United Nations Convention on the Rights of Persons with Disabilities       |
| <b>UA:</b>     | Universal Access                                                           |
| <b>UD:</b>     | Universal Design                                                           |
| <b>CRC:</b>    | Convention on the Rights of the Child                                      |
| <b>NDP6:</b>   | Sixth National Development Plan                                            |
| <b>SPMP:</b>   | SWAPO Party Manifesto Programme                                            |
| <b>NQA:</b>    | Namibian Qualifications Authority                                          |
| <b>SSC:</b>    | Social Security Commission                                                 |
| <b>MVA:</b>    | Motor Vehicle Accident (Fund)                                              |
| <b>CPA:</b>    | Criminal Procedure Act                                                     |
| <b>CEDAW:</b>  | Convention on the Elimination of All Forms of Discrimination Against Women |
| <b>OPD(s):</b> | Organisations of and for Persons with Disabilities                         |
| <b>RISDP:</b>  | Regional Indicative Strategic Development Plan (SADC)                      |
| <b>AU:</b>     | African Union                                                              |
| <b>CRPD:</b>   | Convention on the Rights of Persons with Disabilities                      |
| <b>VET:</b>    | Vocational Education and Training                                          |

## EXECUTIVE SUMMARY

Namibia ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Protocol to the African Charter on the Rights of Persons with Disabilities. These treaties mandate States Parties to adopt legislative and administrative measures to promote and protect the rights of persons with disabilities, including their social, political, and economic rights. By virtue of Article 144 of the Constitution, these treaties are binding and thus form part of the law of Namibia. The obligations under these treaties have been domesticated through the promulgation of the National Disability Council Act, 2006 (Act No. 26 of 2004).

The Constitution of Namibia guarantees all persons, including persons with disabilities, several fundamental human rights. The Government has taken various strides to improve the living conditions of persons with disabilities and to advance the interests and rights as provided for in Article 95 of the Constitution to persons with disabilities. This was evidenced by the African Disability Alliance (“ADA”), which awarded Namibia Ambassadorial Status for its programs and policies promoting disability inclusion. The proposals contained in this policy do not infer the absence of the initiatives but rather serve as an extension, coordination and enhancement of public services and facilities already available to persons with disabilities.

However, despite the fact that various pieces of legislation have been enacted with the aim of ensuring wider inclusion and protection for persons with disabilities, and significant strides in this regard have been made over the years, much more is yet to be done. It is imperative that specific targeted policy and legal interventions be made to better protect, promote, and fulfil the rights of persons with disabilities in Namibia. Additionally, it has become imperative to devise strategies to implement these interventions and to monitor and evaluate the effectiveness of these measures to ensure that the policy achieves its intended objective(s), and that appropriate corrective action is taken in instances where it is not.

This policy focuses on various models of disability, with particular emphasis placed on the human rights model. It also addresses disability from a developmental perspective. It sets out the guiding principles underpinning the policy, particularly the principle of inclusion and the commitment to leaving no one behind. It identifies the special target groups, key areas, and strategies for the implementation of the Policy.

The Policy clearly enumerates the vision, mission, and aims of the Policy, against the constitutional, legislative, and binding international legal frameworks applicable to persons with disabilities.<sup>2</sup>

## **BACKGROUND**

The Government of the Republic of Namibia is committed to the protection, fulfilment, and promotion of the rights of persons with disabilities. This is evidenced by, amongst other things, the fact that it played an active role in the drafting of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and its Optional Protocol (the Optional Protocol to the Convention on the Rights of Persons with Disabilities). On 4 December 2007, just a day after the International Day of Persons with Disabilities, which is commemorated on 3 December, Namibia ratified the UNCRPD and its Optional Protocol. Namibia is among the first ten countries in the world and one of the first three countries in Africa to ratify the UNCRPD.

This commitment is further illustrated by the progressive enactment of legislation that protects and promotes the rights of persons with disabilities.<sup>2</sup>

Despite the above strides, the 2011 Disability Report based on the 2011 National Population and Housing Census (published 2016) indicates that “the estimated number of persons with disabilities in Namibia has increased from 42,932 in 1991 to 85,567 in 2001 and 98,413 in 2011.” The report also notes that there were more females (51,125) than males (48,288) with disabilities in Namibia. Resultantly, the Namibia Statistics Agency identified the increase in the number of persons with disabilities in Namibia as “a national health concern.” More recent data from the 2023 Population and Housing Census show a continued focus on disability, with prevalence estimated at approximately 4.4 % of the population, more common in rural areas (5.8 %) than in urban settings (3.2 %), translating to around 133,000 persons with disabilities across the country. The growing number and prevalence of disabilities in Namibia continue to pose important public health and inclusion challenges.

Against this background, the Government is compelled to adopt the 2025 National Policy on Disability with the hope that the new Policy will strengthen the implement of existing disability focused policy and legislation, programmes to ensure wider protection, fulfilment and promotion of the rights of persons with disabilities in compliance with Namibia’s national, regional and international obligations.

## **INTRODUCTION**

Namibia has a clear development vision to alleviate poverty and improve the living standards of its people, developing appropriate legal and policy interventions relating to persons with disability is a designated objective and focus groups in enabling the Government to achieve this developmental goal.

Vision 2030 envisages a prosperous and Industrialised Namibia, developed by its human resources, enjoying peace, harmony, and political stability.

Moreover, it is the Government's strategic objective is to ensure unity, peace, inclusiveness, and prosperity for all Namibians. Its consideration of the needs of persons with disability is underscored by the fact that the Swapo Party's 2025-2030 election manifesto was made available in Braille.<sup>3</sup> This Manifesto further highlights the Government's vision to include persons with disabilities in the mainstream of society by designing programmes and projects to increase access to basic services and commodities, especially for people with disabilities and the destitute.

## DEFINITION AND MODELS OF DISABILITIES

The importance of definitions is more than a matter of semantics since they can influence the way in which persons with disabilities are viewed by society and by themselves. They also influence the type of provision made to meet the needs of persons with disabilities.

There are several delineations of what constitutes a disability and or who should be considered a person with disability in various previous policy frameworks and existing Legislation. It is the policy position that in line with the definition of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, persons with disabilities must be defined to *"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"*.

Having participated in drafting the UNCRPD and being one of the first ten countries in the world to have ratified this Treaty, the Government of Namibia values respect for human rights, particularly human dignity, and non-discrimination.

There are different models of disability, and they include:

- the moral and/or religious model (under this model, disability is understood as an act of God);
- the medical model (disability is viewed as a disease);
- the economic model (proponents of this model view disability as a challenge to productivity);
- the cultural model (which takes disability as a cultural issue);
- the human rights model (supporters of this model view disability as a human rights issue);
- the identity model (proponents of this model argue that disability is an identity);
- the social model (proponents of this model understand disability as a socially constructed phenomenon); and
- the charity model (which approaches disability as victimhood).

This Policy is informed by and applies a blend of the various models, but emphasises the human rights model.

## **DISABILITY AS A HUMAN RIGHTS ISSUE**

In the past, disability was regarded as an issue with the responsibility of “caring” for people with disabilities falling on the family. Intervention was channelled through welfare institutions with little or no commitment to addressing disability in other areas of government and private sectors’ responsibilities, for example, access to health care, education, training, employment, service delivery, sport and recreation and public transport. The dependency which is at the centre of the welfare model has disempowered persons with disabilities, isolated, segregated, undermined their dignity, and marginalised them from mainstream society.

The adoption of the UN Convention on the Rights of Persons with Disabilities in 2006 paved the way for a human rights-based approach to addressing disability. The human rights and developmental model focus on creating equal opportunities and putting persons with disabilities on equal footing with others in society on account of their inherent self-worth. The principle of equal rights implies that the needs of every individual are of equal importance, and that those needs must be made the basis when planning and making policies. Furthermore, all resources must be employed in such a way as to ensure that every individual has equal opportunity to participate.

This model posits that persons with disabilities must assume wider inclusion and protection as a fundamental human right. Furthermore, they should receive the support they need within the ordinary structures of society in areas such as education, health, employment, and social services.

## **DISABILITY AS A DEVELOPMENTAL ISSUE**

Persons with disabilities are an integral part of society. Consequently, they are key stakeholders in the development of society. The exclusion of persons with disabilities from development programmes can lead to serious economic consequences for society. Disability-inclusive development is an essential condition for a sustainable future. Data from the Namibia Statistics Agency show that persons with disabilities participate in different economic activities, such as legislators and senior government officials, professionals, technicians, service workers and craft and related trading. The report shows that “the majority of persons with disabilities were skilled agriculture and fishery workers with 42.5 percent, followed by elementary occupations 14.6 percent,” and that “the least occupied was that of the armed forces with 2.3 percent.”

Unlike the Millennium Development Goals (MDGs), which made no reference to disability, the Sustainable Development Goals (SDGs) have explicitly recognised the need to include disability as part of the sustainable development agenda. Thus, reference to disability is made in different parts of the SDGs about education, growth and employment, inequality, accessibility of human settlements, as well as data collection and the monitoring of the SDGs. The implementation of the SDGs envisages that persons with disabilities must become productive members of their communities, contributing to sustainable economic development.

## **RATIONALE**

Namibia ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Protocol to the African Charter on the Rights of Persons with Disabilities. These treaties mandate State Parties to adopt legislative, administrative, and judicial measures to promote and protect the rights of persons with disabilities.

Despite the enactment of various legislative instruments aimed at ensuring broader inclusion and the protection of persons with disabilities, and the notable progress achieved over the years, significant gaps remain in policy implementation, institutional coordination, and inclusive service delivery. The Namibia Statistics Agency has identified the growing number of persons with disabilities as a national concern, with implications across sectors, particularly health, education, employment, and infrastructure.



A key motivation for the development of this 2025 National Policy on Disability is the recognition of the shortcomings of the 1997 Policy, which has not been able to effectively respond to the changing social, economic, and legal landscape. The 1997 Policy lacked a robust implementation framework, had limited mechanisms for accountability, and did not adequately address intersectionality, accessibility standards, or data-driven planning. These weaknesses have contributed to continued marginalisation and poor socio-economic outcomes for persons with disabilities.

The Situational Analysis conducted in preparation for this Policy revealed that many of the challenges faced by persons with disabilities stem from inadequate policy enforcement, fragmented institutional responsibility, and the absence of disability-responsive budgeting and planning. Key findings highlighted persistent barriers such as inaccessible public infrastructure, limited access to inclusive education and health services, underrepresentation in employment, and minimal participation in decision-making processes.

Therefore, this Policy seeks to address the mischief caused by the ineffective application of prior disability frameworks and to respond directly to the lived realities and challenges identified through evidence-based analysis. It aims to advance disability inclusion through a coherent, actionable, and rights-based policy aligned with Namibia's constitutional principles and international obligations.

## **ALIGNMENT**

From a continental and regional perspective, United Nations 2030 Agenda and the Sustainable Development Goals, which is aimed at securing a future of prosperity and peace for people and planet, leaving no one behind, moreover the Policy is further aligned with Africa Union's Agenda 2063; as well as the SADC Regional Indicative Strategic Development Plan (RISDP) 2020–2030 and Vision 2050.

From a national perspective, this Policy is aligned to the Constitution of the Republic of Namibia, Vision 2030, and the Sixth National Development Plan (NDP6), as well as the SWAPO Party Manifesto Programme (SPMP) 2025-2030 Implementation Plan.<sup>4</sup>

The Policy is overtly informed and is a response to Namibia's obligations under the United Nations Convention on the Rights of Persons with Disability and the African Disability Protocol<sup>5</sup> as well as other complementary Regional and International Treaties binding in Namibia.

In addition to the above, this policy is aligned to, informed by and in promotion of the Laws set out hereto below:

## **NATIONAL LAWS**

### **THE CONSTITUTION**

The Constitution is the supreme law of Namibia and accords all persons, including persons with disability, several fundamental human rights and freedoms<sup>6</sup> which demands the adoption of laws to strengthen the realisation of these fundamental rights and freedoms for persons with disability, by either adopting policy and legal frameworks, as well as administrative, judicial measures, with special consideration to protecting and promoting the rights and interests of persons with disability.

Article 5 of the Constitution enjoins the *Executive, Legislature, Judiciary, and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons* to respect and uphold the fundamental rights and freedoms entrenched under Chapter 3 of the Constitution. Moreover, chapter 11 of the Namibian Constitution encodes the States commitment to the primary *Principles of State Policy* enumerated under Article 95 that stipulates the state shall actively promote and maintain the welfare of the people by adopting policies that are aimed at *inter alia*,

<sup>4</sup> The Sixth National Development Plan (NDP6) is a final "leg" in the journey towards realizing Vision 2030 and translating the V2030 objectives. The NDP6 will cover the financial years 2025/26 to 2030/31.

<sup>5</sup> Available at <The African Disability Protocol: Enhancing Disability Rights Protection in Africa — African Law Matters>.

<sup>6</sup> Chapter 3 of the Constitution.

the implementation of the principle of non-discrimination particularly in respect of women, the protection of labour rights, fair and reasonable access to public facilities and resources, well as the maintenance of an acceptable level of nutrition and a decent standard of living and the enjoyment of social and cultural opportunities, the provision of social amenities and benefits, and equal access to justice and legal aid with due regard to the resources of the State, the ability to influence Government policies and the protection of the environment.

## NATIONAL DISABILITY COUNCIL ACT

The National Disability Council Act, 2004 (Act No. 26 of 2004) establishes the National Disability Council of Namibia (NDCN/ Council) that is mandated to implement the National Disability Policy and to make recommendations for law reform and development of issues relating to persons with disability. Council is *inter alia* mandated to gather information and receive annual reports from OMAS regarding issues relating to persons with disability and to report the findings from these reports to the National Assembly.

## CHILD CARE AND PROTECTION ACT

The Child Care and Protection Act, 2015 (Act No. 3 of 2015) extends protection to children, and it affirms the fundamental principle of the United Nations Convention on the Rights of the Child (CRC)<sup>7</sup>; namely that in all matters concerning the care, protection and well-being of a child arising under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the *best interests of the child concerned are the paramount consideration*.<sup>8</sup> It expressly incorporates the fact that a child with a disability is one of the paramount factors in determining the best interest of a child in a given circumstance.

Section 4 of this Act also requires that children with disability must be accorded the right to participate in matters concerning them and due consideration should be accorded in respect of any child who may experience barriers to participation for any reason, including disability.<sup>9</sup> It is a general principle under this Act that children must be protected from direct or indirect discrimination on the grounds of *inter alia* disability.<sup>10</sup> Furthermore, this Act stipulates that all proceedings, actions or decisions in matters concerning a child must adequately respond to any special needs that the child may have as a result of a disability or chronic illness.

In order to ensure that the perspectives of children with disabilities receive national consideration in policy and legal framework of the country, the Child Care and Protection Act, 2015 provides for the appointment of the Chairperson of the National Disability Council established under the National Disability Council Act, 2004 (Act No. 26 of 2004) as a statutory member of the National Advisory Council on Children.<sup>11</sup>

Most especially, the Act sets out the processes and procedures to deal with children in need of protective services (vulnerable children, which invariably includes children with disability) and contains a number of provisions to cater for children with disabilities.<sup>12</sup> In the same spirit the Act provides that an superintendent of a hospital or the regional director of a clinic or an acting superintendent or Section 241 of the Child Care and Protection Act, 2015, sets out the requirements and procedure for

Section 114 of the Act further prohibits discrimination against persons on account of, among others, disability in the recruitment, promotion, transfer, and termination of teachers applying for disability grants for children with disability. It provides that the disability grant may be extended in addition to any other welfare grants (State maintenance grant) and is payable until the child becomes eligible for a disability pension in terms of the National Pensions Act, 1992 (Act No. 10 of 1992).

<sup>7</sup> Article 2 of the CRC.

<sup>8</sup> Section 3 of the Child Care and Protection Act, 2015.

<sup>9</sup> Section 4 of the Child Care and Protection Act, 2015.

<sup>10</sup> Section 5 of the Child Care and Protection Act, 2015. regional director and in the case of a private hospital or clinic an equivalent official, may consent to a medical intervention in respect of or a surgical operation on a child if the intervention or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical harm or disability.

<sup>11</sup> Established in terms of Section 11 of the Child Care and Protection Act, 2015

<sup>12</sup> Section 145 (3) (n).



## **BASIC EDUCATION ACT**

In amplification of the right to education guaranteed under Article 20 of the Constitution, the Basic Education Act, 2020 (Act No. 3 of 2020) extends the right to education, proscribes any conduct and practice that deprives persons of the right to education on account of, amongst others, disability and criminalises this conduct.<sup>13</sup> The Minister is thus authorised to approve that a learner receives education and instructions at a school conducted at home and known as home schooling, if a situation relating to health or disability exists that prevents the learner from attending or fully benefiting from regular school attendance.

Section 12 is dedicated to learners with disabilities and special needs; to this end, it provides that the Minister responsible for basic education must ensure that the basic education curriculum is inclusive and disability sensitive and that adequately trained human resources and adequate instructional resources are catered for at the school level. The Minister is further mandated to provide for a separate vote for the funding of education for learners with disabilities to cater for inclusive education and resource schools in accordance with the decentralisation policy; and where it is reasonably possible, establish specialised centres of resources which support schools in the implementation of the policy on inclusive education addressing the specific needs of learners with disabilities and special needs in education.

The Act further provides that the Minister must consult with the Ministers responsible for disability, amongst others, in the process of developing the national policy framework on basic education that must incorporate a policy on integrated early childhood education.<sup>14</sup>

Similarly, the Minister is authorised to set minimum standards for schools and hostels for school infrastructure for schools and hostels which must accommodate learners that has special needs arising from physical, medical, sensory, learning, emotional or behavioural difficulties which require provision which is additional to, or different from, that generally required by learners of the same age in schools other than resource schools; and to include infrastructure that is disability friendly and gender sensitive or responsive.

As a quality assurance measure, the Act empowers quality assurance officers to visit State schools and centres for education, to assess the implementation and effectiveness and efficiency of any programme of education which have been devised in respect of individual learners who have a disability or special educational needs.<sup>15</sup>

In order to ensure that the concerns and needs of pupils with disability are adequately considered the Act provides that the regional education forum established under section 96 of the Basic Education Act, 2020 should include three persons representing persons with disabilities, nominated by the National Disability Council established by the National Disability Council Act, 2004 (Act No. 26 of 2004).

In the same vein, the Act also requires that the National Examination, Assessment and Certification Board must comprise one person representing persons with disabilities nominated by the National Disability Council established by the National Disability Council Act, 2004 (Act No. 26 of 2004).

## **NAMIBIAN QUALIFICATIONS AUTHORITY ACT**

The NQA is a public enterprise that is responsible for quality assurance in higher education and training in Namibia. Some of the NQA's statutory functions include accrediting training providers, evaluating qualifications and managing the National Qualifications Framework (NQF) of Namibia.

<sup>13</sup> Section 6 read with Section 7 of the Basic Education Act, 2020.

<sup>14</sup> Section 4 and 14 of the Basic Education Act, 2020.

<sup>15</sup> Section 4 and 14 of the Basic Education Act, 2020.

The Regulations under the Namibian Qualifications Authority Act, 1996 (Act No. 29 of 1996) expressly stipulate accommodating the needs of persons with disabilities in all buildings, facilities, and resources, as an accreditation requirement, for the Accreditation of Persons, Institutions and Organisations, Learning facilities.

### **AFFIRMATIVE ACTION (EMPLOYMENT) ACT**

Pursuant to Article 23 of the Constitution, which authorises Parliament to enact laws that will directly and indirectly provide advancement of persons that has been socially, economically, or educationally disadvantaged by past discriminatory laws and policies.

For this reason, the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998) designates suitably qualified persons with disabilities as the category of persons who must enjoy preference in recruitment decisions by private and public Employers to achieve equal opportunity and representation in employment in accordance with Article 10 and Article 23. This Act defines affirmative action as action measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment and are equitably represented in the workforce of a relevant employer. It also regards making reasonable efforts in the workplace to accommodate, physically or otherwise, persons with disabilities as an affirmative action measure.

The Employment Equity Commission is mandated to monitor and evaluate the implementation of the affirmative action policy and law through appropriate affirmative action plans.

### **PUBLIC ENTERPRISES ACT**

The Public Enterprises Act, 2019 (Act No. 1 of 2019) provides for the efficient governance of public enterprises, the monitoring of their performance, and provides for the restructuring of public enterprises. It provides that when contemplating restructuring Minister must consider the inclusion of schemes aimed at achieving empowerment objectives through increasing private sector participation, and in particular for the empowerment of persons who have been disadvantaged by past discriminatory laws and practices that were applied before the date of Namibia's independence, which includes persons with disabilities.

### **NATIONAL PENSIONS ACT**

National Pensions Act, 1992 (Act No. 10 of 1992), defines a “disabled person *as any person who is, owing to any physical or any mental disability, incapable to obtain from any employment or the practising of any profession or trade, or from the rendering of any service, the means needed to enable him or her to adequately provide for his or her own maintenance, and has attained the age of 16 years*”.

Section 2 of the Act authorise the Minister in consultation with the Minister of Finance, to pay out of moneys appropriated by law for such purpose, to aged, blind and disabled persons basic state pensions, blind persons' pensions and disability pensions, respectively; to any person to whom such pension is paid, additional and supplementary allowances; and to or on behalf of any person to whom such pension is paid who is in such a physical or mental condition that he or she needs to be cared for, an attendant's allowance.

### **WORKMAN'S COMPENSATION ACT**

The Workman's (Employees) Compensation Act, 1941 (Act No. 30 of 1941) renders it compulsory for Employers employing at least one person to register with the Social Security Commission of Namibia. Following registration, employers are required to contribute a specific percentage of gross payroll, in line with the industry classification.

The Act classifies injuries sustained in four (4) categories, namely: permanent total incapacity, permanent partial incapacity, temporary incapacity, and fatal injury leading to the death of a worker.

Subject to a number of rules, it provides that in case of Permanent Total Disability (more than 30% disability), an employee is entitled to up to 75% of the insured worker's last monthly earnings before the disability began. In the case of permanent partial disability (for an assessed disability of 30%), a lump sum of up to 15 times the insured worker's last monthly earnings are paid. In the case of Temporary Disability, 75% of the insured worker's average monthly wage is paid up to 12 months. The benefit may be extended for up to 6 months. After 18 months, the Social Security Commission must decide either to extend the temporary disability benefit or initiate permanent disability pension.

In case of death, survivor benefits are paid to the spouse and orphans.<sup>16</sup> The maximum survivor benefit is 100% of the permanent disability pension the deceased person received or was entitled to receive. The funeral grant is also paid as a lump sum amount. There is also provision for a lump sum death benefit, which is generally twice the deceased worker's earnings at the time of death.

## **SOCIAL SECURITY ACT**

The Social Security Act, 1994 (Act No. 34 of 1994) establishes the Social Security Commission of Namibia (SSC) who is mandated to inquire into and advise the Minister of Justice and Labour Relations on matters relating to social security in Namibia, including the administration of any fund or scheme including the Workman's Compensation Act, 1941 whether established by this Act or any other law, and the determination of contributions and benefits.

Employers must register with the SSC, this registration renders them eligible for membership the Maternity Leave, Sick Leave and Death Benefit Fund; the National Medical Benefit Fund, except if he or she is a member of any other medical fund or scheme approved by the Minister on recommendation of the Commission; or the National Pension Fund, except if he or she is a member of any other pension fund or scheme approved by the Minister on recommendation of the Commission.

It, in essence, offers employees a social security safety net in the case of maternity, sickness, death and at retirement. This Act makes provision that pension benefits payable in respect of the retirement, permanent disability, or death of members are to be as prescribed.

The Act also established a Development Fund, which provides funding for training schemes for disadvantaged, unemployed persons and has a dedicated disability assistance focus as well.

## **MOTOR VEHICLE ACCIDENT FUND ACT**

The Motor Vehicle Accident Fund Act 2007 (Act No. 10 of 2007) was promulgated to respond to physical disabilities caused by motor vehicle accidents. The Motor Vehicle Accident Fund (MVA) Act provides for the establishment, administration, and management of the Motor Vehicle Accident Fund as an administrative body that provides assistance and benefits to persons injured in motor vehicle accidents, playing an important role in the health and rehabilitation of people with disabilities.

## **COMMUNAL LAND REFORM ACT**

Communal Land Reform Act, 2002 (Act No. 5 of 2002) in terms of the Regulations promulgated under this Act, persons with disabilities are given a higher score when applying for and being allocated leaseholds.<sup>17</sup> Regulation 23C(4) lists the factors considered during the evaluation with the point scoring system for infrastructure development support, that members of recognised marginalised groups, such as people with disabilities, score two points.

<sup>16</sup> The spouse pension is 40% of the permanent disability the deceased person received or was entitled to receive. The orphan's pension is 20% of the permanent disability pension the deceased person received or was entitled to receive. The orphan's pension is available until the child reaches the age of 18 years. However, the orphan pension ceases even before 18 years if the child marries before turning 18.

Regulation 23G(3) requires Traditional Authorities to use factors and an associated point scoring system when evaluating and recommending applications for members of recognised marginalised groups, such with disabilities.

## **ELECTORAL ACT**

Electoral Act, 2014 (Act No. 5 of 2014) Schedule 2 of this Act contains the Bill of Fundamental Voters' Rights and Duties that accords every Namibian voter the right to receive and cast a ballot paper in a polling booth constructed in a manner possible for physically disabled voters.<sup>18</sup>

In promotion of this right, Sections 89 and 91 provide that the Electoral Commission of Namibia must for in the determination of polling stations for any election, consider the convenience to and accessibility by people with disabilities. In a similar vein, Section 103 mandates that Presiding Officers assist voters who are incapacitated by blindness or other physical disability.

## **LABOUR ACT**

Section 5(1)(e) of the Labour Act, 2007 (Act No. 15 of 2007) sets out a definition of a person with disability and prohibits direct or indirect discrimination based on any degree of physical or mental disability in employment. In this regard, section 5(4)(a) sanctions the affirmation of racially disadvantaged persons, women, or persons with disabilities in employment decisions and mandates equality in their representation in the workforce of an employer.

## **CRIMINAL PROCEDURE ACT**

Chapter 13 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA) deals with the: Capacity of an Accused to Understand Proceedings: Mental Illness and Criminal Responsibility, sections 77, 78 and 79 of the CPA provide for procedures relating to the management of court processes and custody of remand detainees where mental illness affects the criminal proceedings.

## **ABORTION AND STERILIZATION ACT**

Notwithstanding the fact that abortion is illegal in Namibia, Section 3(1) of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975) authorise abortion in instances when there is a risk that the child will be born with a *physical or 'mental defect; seriously handicapped'* or when the mother is unable to handle parental responsibilities as a result of a *mental disability*.

## **MAINTENANCE ACT**

Section 16(4) of the Maintenance Act, 2003 (Act No. 9 of 2003) sets out guidance to Presiding Officers when issuing maintenance orders, it mandates them to, where the beneficiary has disabilities, consider, among others, the:

- (a) the extent of the disability;
- (b) the life expectancy of the beneficiary;
- (c) the period that the beneficiary would, in all likelihood, require maintenance; and
- (d) the costs of medical and other care incurred by the beneficiary as a result of the disability.

<sup>17</sup> Regulation 23C and 23G.

<sup>18</sup> Section 89(2)(g), 91(1)(b), 103(1)(a) of the Electoral Act, 2014.

## **NAMIBIA SPORT ACT**

Section 4(1)(d) of the Namibia Sport Act, 2003 (Act No. 12 of 2003) encourages the appointment of a person nominated by the national umbrella sports body for people with disabilities to the Namibian National Sports Commission.

## **NATIONAL YOUTH COUNCIL ACT**

It is a particular function of the National Youth Council to advocate for rights and opportunities for the youth with disabilities under section 3 of the National Youth Council Act, 2009 (Act No. 3 of 2009). In the same vein, this Act mandates that the National Federation of Persons with Disabilities must also nominate a person to serve on the National Youth Service Board, which is the decision-making body of the National Youth Service.

## **INTERNATIONAL LAWS**

### **CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>19</sup> The Convention adopts a human rights-based approach to addressing the challenges faced by persons with disabilities. It commits State parties to develop and carry out policies, laws, and administrative measures for securing the rights recognised in the Convention and to abolish laws, regulations, customs, and practices that constitute discrimination.<sup>20</sup>

The CRPD is founded on the notion of equality and provides that persons with disabilities will enjoy rights on an equal basis with other persons. The CRPD is premised on the fundamental principle of reasonable accommodation, legal capacity, and autonomy of persons with disability. This Treaty aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity.<sup>21</sup> It binds States to ensure the equal rights and advancement of women and girls with disabilities<sup>22</sup> and protect children with disabilities.<sup>23</sup>

With regard to education, the Convention calls for equal access to primary and secondary education, vocational training, adult education, and lifelong learning. It also obligates States to keep measures in place and ensure that pupils receive their education in the most appropriate modes of communication from teachers who are fluent in sign language and Braille.<sup>24</sup>

Article 25 of the CRPD furthermore binds State Parties to ensure that persons with disabilities have the right to the highest attainable standard of health without discrimination based on disability. The Convention also mandates States to enable persons with disabilities to attain maximum independence and to strengthen their ability to provide comprehensive rehabilitation services in the areas of health, employment, and education.<sup>25</sup>

The CRPD requires a shift from traditional ways of looking at disability as individual impairment to a focus on State obligations to creating enabling environments that promote inclusiveness and accommodate all human beings in their diversity. State parties to the Convention commit to combat stereotypes and prejudices and promote awareness of the capabilities of persons with disabilities.<sup>26</sup>

<sup>19</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.

<sup>20</sup> Article 4 of the CRPD.

<sup>21</sup> Countries must protect the physical and mental integrity of persons with disabilities, just as for everyone else (Article 17), guarantee freedom from torture and from cruel, inhuman, or degrading treatment or punishment, and prohibit medical or scientific experiments without the consent of the person concerned (Article 15). Laws and administrative measures must guarantee freedom from exploitation, violence, and abuse. In case of abuse, States shall promote the recovery, rehabilitation and reintegration of the victim and investigate the abuse (Article 16). Persons with disabilities are not to be subjected to arbitrary or illegal interference with their privacy, family, home, correspondence, or communication. The privacy of their personal, health and rehabilitation information are to be protected like that of others (Article 22).

<sup>22</sup> Article 6 of the CRPD.

<sup>23</sup> Article 7 of the CRPD.

<sup>24</sup> Article 24 of the CRPD.

<sup>25</sup> Article 27 of the CRPD.



To this end, the CRPD advances that the policy and legal framework must enable persons with disability to live independently, to be included in the community, to choose where and with whom to live and to have access to in-home, residential and community support services.<sup>27</sup> It envisages that personal mobility and independence are to be fostered by facilitating affordable personal mobility, training in mobility skills and access to mobility aids, devices, assistive technologies and live assistance.<sup>28</sup> Countries further undertake to ensure that persons with disability have equal rights to own and inherit property, to control their financial affairs and to have equal access to bank loans, credit and mortgages.<sup>29</sup> State Parties are enjoined to recognise the right to an adequate standard of living and social protection; this includes public housing, services and assistance for disability-related needs, as well as assistance with disability-related expenses in case of poverty.<sup>30</sup>

It also recognise the right of persons with disabilities shall have the equal opportunity to experience parenthood, to marry and to found a family, to decide on the number and spacing of children, to have access to reproductive and family planning education and means, and to enjoy equal rights and responsibilities regarding guardianship, wardship, trusteeship and adoption of children Discrimination relating to marriage, family and personal relations shall be eliminated.<sup>31</sup>

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The CRPD also binds State Parties to promote access to information by providing information intended for the general public in accessible formats and technologies, by facilitating the use of braille, sign language and other forms of communication and by encouraging the media and Internet providers to make online information available in accessible formats. <sup>33</sup>The Convention place an obligation on Member States to ensure equal participation in political and public life, including the right to vote, to stand for elections and to hold office.<sup>34</sup>

Countries are to ensure equal participation in political and public life, including the right to vote, to stand for elections and to hold office (Article 29).

The Convention further commits States to promote participation in cultural life, recreation, leisure and sport by ensuring provision of television programmes, films, theatre and cultural material in accessible formats, by making theatres, museums, cinemas and libraries accessible, and by guaranteeing that persons with disabilities have the opportunity to develop and utilise their creative potential not only for their own benefit, but also for the enrichment of society. They are also to ensure their participation in mainstream and disability-specific sports (Article 30).

Article 13 also guarantees the right to access to justice FOR all persons with disabilities.

The Convention mandates States to designate a focal point in the government and create a national mechanism to promote and monitor implementation to ensure the implementation and monitoring of the Convention on a domestic level.<sup>35</sup>

On an international level, the Committee on the Rights of Persons with Disabilities<sup>36</sup> will monitor the implementation of the Convention and serve as the mandatory recipient of periodic implementation reports from State Parties.<sup>37</sup>

<sup>26</sup> Article 8 of CRPD.

<sup>27</sup> Article 19 of the CRPD.

<sup>28</sup> Article 20 of the CRPD.

<sup>29</sup> Article 12 of the CRPD.

<sup>30</sup> Article 28 of the CRPD.

<sup>31</sup> Article 23 of the CRPD.

<sup>32</sup> Article 23 of the CRPD.

<sup>33</sup> Article 21 of the CRPD.

<sup>34</sup> Article 29 of the CRPD.

<sup>35</sup> Article 33 of the CRPD.



In order to support the efforts by developing Countries in implementing the CRPD, the Convention makes provision for developmental assistance to developing countries.<sup>38</sup>

In order to ensure that State Parties are held accountable for their obligations under the CRPD, Article 18 under the Optional Protocol allows individuals and groups to petition the Committee, provided national recourse procedures have been exhausted.

## **THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF PERSONS WITH DISABILITIES**

The Protocol to the African Charter on the Rights of Persons with Disabilities (African Disability Protocol) is a substantive supplementary document drafted under Article 66 of the African Charter on Human and Peoples' Rights (African Charter) and complements the CRPD and aims to cater for the unmet needs of Africans with disabilities and to fill the contextual gap under the CRPD.<sup>39</sup>

In this regard, Article 11(1) of the Protocol requires States to modify, outlaw, criminalise or campaign against cultural practices, attitudes based on tradition, culture, religion, superstition, or other reasons, which negatively affect the human rights and fundamental freedoms of persons with disabilities. It contains Articles addressing issues such as ritual killings, the role of the family, caregivers, and community (Article 25); and also includes marginalised groups such as persons with albinism.

Its overall purpose of the Protocol is to ensure the full and effective participation and inclusion of persons with disabilities in society.

## **GUIDING PRINCIPLES**

In implementing this policy, Namibia must be guided by the following principles:

- (a) Respect for and protection of inherent and fundamental rights and freedoms of persons living with disability;
- (b) Equality and non-discrimination;
- (c) Individual autonomy and self-governance, and independence of persons;
- (d) Full and effective participation, representation, and inclusion in decision-making processes relating to persons with disability;
- (e) Accessibility: to achieve maximum accessibility for persons with disability, take measures to. Identify and eliminate barriers to accessibility, including those relating to physical environments, transportation, information, and communications. In line with this principle, implementers must embrace the:

Universal access (UA): principle that refers to the removal of cultural, physical, social, and other barriers that prevent people (including people with disabilities) from entering, using, or benefiting from the various systems in a society that are available to other citizens and residents; and

Universal design (UD): principle that holds that the design of products, environments, programmes, and services contemplated in this policy must be implemented in ways that make these facilities usable by all persons to the greatest extent possible without the need for adaptation or specialised design by the user.

<sup>36</sup> The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States parties.

<sup>37</sup> Articles 34 to 39 of the CRPD.

<sup>38</sup> Article 32 of the CRPD.

<sup>39</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) was adopted on 28 January 2018 and entered into force on 5 July 2024. Namibia ratified this Protocol in June 2023.

All assistive technologies that some individuals, including people with disabilities, may require should meet the principles of UD, a valuable means of achieving UA;

- (f) Respect for the evolving capacities of children with disabilities and to preserve their identities;
- (g) Consideration of the best interests of the child in all decisions relating to children with disability;
- (h) Reasonable accommodation: respect for difference and acceptance of persons with disabilities, as part of human diversity and humanity, it is necessary to make appropriate modifications and adjustments, not imposing a disproportionate or undue burden, where needed, to ensure persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms;
- (i) Access to Information: to make information available in formats accessible to persons with disability;
- (j) Family care and community support: the family is the best safety net for a person with a disability to live, grow and enjoy their fundamental human rights and freedoms;
- (k) Sector-specific Guidance and Implementation: notwithstanding the fact that the human rights enshrined in the CRPD are interrelated, interdependent and indivisible; sector-specific disability interventions must be employed where necessary to ensure the inclusion and full enjoyment of human rights by persons with disabilities;
- (l) Disability-inclusive development: including disability-sensitive measures in the design, implementation, monitoring and evaluation of all development policies and programmes employing the twin-track approach at social, political, and economic structures;
- (m) Cooperation and Coordination: the successful realisation of the objectives of this Policy hinges on effective coordination, cooperation amongst national and international stakeholders; and
- (n) Progressive realisation: owing to available resources, competing national interests, and constitutional imperatives, the objectives and aspirations expressed in this Policy will only be realised progressively.

## **POLICY DIRECTION**

### **THE VISION**

A socially just, accessible, and inclusive country, in which the human rights, belonging, contribution, potential and diversity of all people with disabilities are recognised, respected, and celebrated.

To create a human rights-based, inclusive, and barrier-free society in which persons with disabilities are empowered to contribute to the development process of their communities and Namibia on an equal basis with others.

### **THE MISSION**

To offer forward-thinking strategic direction for the Government, its partners, and stakeholders to ensure a human rights-centric disability-inclusive agenda for Namibia.

## THE GOAL(S)

The primary goal of this Policy is to accelerate the recognition of the fundamental rights and freedoms of persons with disabilities, to improve their equality and quality of life by increasing their inclusion and participation in socio-cultural, civil and economic processes and opportunities and providing an enabling environment through a strong legal framework and strengthened partnerships and collaboration to foster disability-inclusive development in accordance with the Constitution, UNCRPD and the AU Protocol on the Rights of Persons with Disabilities and in alignment all other complementary domestic policy and legislative framework.

## POLICY OBJECTIVES AND STRATEGIES

**The critical objectives of this Policy and the Strategies that will be employed to achieve them are set out below:**

**Objective 1: To further enhance full accessibility for persons with disabilities to all public and private infrastructure, services, ICT and live independently, being included in the community and have personal mobility.**

*Strategy 1: Facilitate the Development, Accreditation, and Implementation of the national disability accessibility standard(s) on infrastructure.*

Although Namibia ratified the UNCRPD, national accessibility standards are still lacking. To ensure full access to spaces, services, and information, Namibia must align with the UNCRPD's principles of universal design and inclusion.

**Objective 2: To further fast-track the repeal of all discriminatory laws, abolish all discriminatory practices, ensure the legal rights of persons with disabilities shall be protected, including being free from discrimination, abuse and exploitation and eliminate discrimination and inequality for Persons with disability and access to justice and legal protection.**

*Strategy 1: Enactment of the Person with Disabilities Bill.*

Namibia's laws offer general protection for persons with disabilities, but key gaps remain. Enacting the Persons with Disabilities Bill is crucial to ensure comprehensive legal protection and foster inclusive, disability-sensitive systems.

**Objective 3: To sustainably provide funding support to adopt policies and programs to improve the living conditions of persons with disabilities. This will include providing social security for persons with disabilities and poverty reduction for persons with disabilities.**

*Strategy 1: Establish the mechanism to strengthen existing and additional funding protocols;*

*Strategy 2: Coordinate social and economic strategies to empower persons with disability;*

*Strategy 3: Ensure adequate housing and sanitation for persons with disabilities; and*

*Strategy 4: Provide intensive training to caretakers/givers on the rights of persons with disabilities and the use of the disability grants and incentives.*

Namibia has increased the disability grant and included persons with disabilities in the Affirmative Action Act, but gaps remain in housing, social security, and economic inclusion. Increasing disability-centric funding and strengthening support services can help improve their quality of life.

**Objective 4:** To enhance the Disaster Management Programme by giving special attention to the vulnerability of persons with disabilities during disasters and other emergencies.

*Strategy 1:* Review National Disability Natural Disaster Plan/ Strategy.

Namibia has a disaster framework but lacks disability-specific strategies and accessible plans. Reviewing the strategy to include these measures will ensure better inclusion and protection.

**Objective 5:** To further enhance the right to education to ensure that learners and students with disabilities have equal access to quality basic and higher education.

*Strategy 1:* Strengthen the implementation of the National Sector Policy on Inclusive Education and provide funding to learners with disabilities; and

*Strategy 2:* Regulate reasonable Resource School fees for learners with disabilities.

Namibia has promoted inclusive education through the 2013 policy, grants, and hostel fee exemptions. To improve progress, implementation should be strengthened, and resource school fees regulated.

**Objective 6:** To strengthen the prioritisation of inclusive adult education and literacy improvement for persons with disabilities, with a focus on eliminating illiteracy, particularly among individuals with mental disabilities and learning difficulties, as a means to promote equal opportunities and independence.

*Strategy 1:* Review the National Policy on Adult Education and Lifelong Learning.

Namibia's policies support inclusive adult education, but gaps remain for persons with mental disabilities and learning difficulties. Reviewing the adult education policy can improve literacy and inclusion for these groups.

**Objective 7:** To enhance the productivity of persons with disabilities by ensuring that all vocational training programmes and facilities are integrated and accessible, in line with the Vocational Education and Training Act 1 of 2008, as an alternative pathway to formal education.

*Strategy 1:* Review Vocational Education and Training Act 1 of 2008.

Namibia has a strong vocational training framework, but the current Act lacks clear provisions on accessibility for persons with disabilities. Reviewing it to include inclusive measures will ensure equal access and improve employability for persons with disabilities.

**Objective 8:** To continue strengthening equal employment opportunities for persons with disabilities in the labour market, while improving sheltered employment for those unable to meet competitive job demands, through the creation of jobs and the promotion of fair, non-discriminatory labour practices.

*Strategy 1:* Enhancing Employment Opportunities for Persons with Disabilities in Namibia.

Namibia has laws promoting inclusive employment, but persons with disabilities still face barriers to securing and retaining jobs. To improve this, inclusive employment opportunities should be enhanced.

**Objective 9:** To continue promoting all cultural, religious, recreational, sports and political activities that are inclusive to persons with disabilities by guaranteeing Social

**Integration and environmental sustainability for the benefit of persons with disability.**

*Strategy 1: Coordinate, improve and implement the disability accessibility standards and other social welfare programs.*

Namibia has promoted disability inclusion through public awareness and government representation, but barriers remain in social and cultural participation. Coordinating and implementing accessibility standards and social programmes can help ensure full inclusion of persons with disabilities in all areas of community life.

**Objective 10: To continue advancing disability inclusion by providing training and sensitisation to personnel and integrating comprehensive disability-related content into the curricula of professionals such as health workers, teachers, social workers, and community personnel, to reduce discrimination and improve inclusive public service delivery.**

*Strategy 1: Establish inclusive training curricula and enhance personnel training on disability issues to foster a more inclusive environment for individuals with disabilities.*

Namibia has introduced disability awareness and training efforts, but coverage remains limited. Establishing inclusive training curricula and expanding sensitisation will help reduce discrimination and improve inclusive public services for persons with disabilities.

**Objective 11: To strengthen data collection and research on persons with disabilities by obtaining comprehensive, evidence-based information on their social, economic, and living conditions, to inform inclusive planning and development efforts.**

*Strategy 1: Strengthen Disability Annual Monitoring and Reporting; and*

*Strategy 2: Conduct a needs assessment for disability data.*

Namibia has improved disability data collection through surveys, digital tools, and the 2023 Census. Strengthening annual monitoring and conducting a data needs assessment will ensure reliable, disaggregated data to guide inclusive planning and services.

**Objective 12: To continue to promote the general health and full participation of persons with disabilities in family life by protecting the right to personal integrity and ensuring that the laws do not discriminate against persons with disabilities concerning sexuality and parenthood.**

*Strategy 1: Create a Sexual and Reproductive Health Strategy for persons with disabilities that addresses their needs and improves access to inclusive healthcare services; and*

*Strategy 2: Improve Accessibility of General Healthcare Services.*

Namibia has updated health policies and held dialogues on sexual and reproductive health for persons with disabilities. However, stigma and inaccessible services remain barriers. A dedicated strategy and improved healthcare access will support dignity, autonomy, and inclusion.

**Objective 13: To continue strengthening support for Organisations of and for Persons with Disabilities (OPDs), recognising their critical role in advocacy, service evaluation, awareness-raising, and identifying the needs of persons with disabilities.**



*Strategy 1: Provide Capacity Building and funding for OPDs.*

Namibia has supported OPDs through training and policy involvement, though funding is still limited. Continued capacity building and sustainable funding will strengthen their role in advocacy, awareness, and advancing disability rights.

**Objective 14: To continue promoting international co-operation and international compliance by considering all relevant conventions, treaties, protocols, and agreements pertaining to disability and rehabilitation of persons with disabilities, which shall be studied to ratify and accede to such agreements eventually.**

*Strategy 1: Align national frameworks with the CRPD and ensure timely reporting to strengthen international cooperation and promote the rights of persons with disabilities; and*

*Strategy 2: International cooperation and compliance by participating in peer reviews and increasing international funding for people with disabilities.*

Namibia ratified the CRPD, is aligning national laws, and submitted its first report in 2020. Ongoing global partnerships and regular reporting will strengthen inclusion and secure international support for persons with disabilities.

**Objective 15: To continue improving the lives of persons with mental and/or intellectual disability by developing strategies and interventions that address the needs for Health care, which includes mental health, innovative thinking, and integrated learning for persons with disabilities.**

*Strategy 1: Improve the lives of persons with mental and/or intellectual disabilities by facilitating the finalisation and implementation of the Mental Health Bill and enhancing support systems.*

Namibia provides psychiatric services and has a Mental Health Policy, but outdated laws and limited support remain issues. Finalising the Mental Health Bill and expanding community care will improve support and rights for people with mental and intellectual disabilities.

## STRATEGIC TARGET GROUPS

Although disability affects all persons in a society, including persons without disabilities, who are often caretakers, educators, employers, service providers, etc. However, the following groups of persons are designated as strategic target groups under the Policy, on account of the fact that the persons in these groups are invariably disproportionately affected and face peculiar needs and challenges. The government will adopt, intensify, and prioritise interventions in respect of the strategic target groups over the implementation period.

### Women with Disabilities

In light of the 2025/2011 Namibia Census Statistics, it was found that females (51,125), compared to males (48,288), live with disabilities in Namibia. In many areas, women in general and women with disabilities in particular have continued to experience discriminatory practices and are subjected to cultural, social, political, and economic disadvantages. This has impeded their access to, for example, education, healthcare, training, and employment. While the government is committed to realising gender equality by inter alia acceding to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Bangul Charter) and has adopted a myriad laws policies and other measures to address discrimination against women, women with disabilities are yet to enjoy the full benefit of thereof and continues to live on margins of society, deprived of socio-

economic opportunities and enjoyment of their fundamental human rights. Therefore, the Government commits that women with disabilities must be accorded prioritised support and protection.

### **Children and Young Persons with Disabilities**

In the same vein, data from the Namibia Statistics Agency Population and Housing Census Report shows that “children with disabilities aged 0-4 that are not attending Early Childhood Development programs has increased from 3,359 (2001) to 5,135 (2011)” and that school there was decrease from 30.4 percent (2001) to 28.9 percent (2011) of “children aged 5 years and above that never attended school. It is therefore critical that the Government adopts measures to intensify responses to the needs of children and young persons with disabilities.

Based on the fundamental principles under the international to children’s rights law, more particularly the Convention on the Rights of the Child, Namibia undertook to ensure that children and young persons with disabilities enjoy their fundamental rights on equal basis with others and that children and young persons with disabilities are visible and integrated into Additionally, the State is obligated to respect the evolving capacities of children and young persons with disabilities, as well as the right to preserve their identity. The State is also under a duty to adhere to adopt policies, legislation and interventions that are within the best interests of the children and young persons with disabilities.

While there exist policies and programmes towards ensuring the development and well-being of children and young persons, children and young persons with disabilities are often excluded. There is thus an obligation to engage all efforts to ensure that children with disabilities have equal opportunities, primarily equal access to education (including Early Childhood Education), sports and recreation, and receive support and protection to enable them to actualise themselves and to fully participate and contribute in all spheres of life.

### **Elderly Persons with Disabilities**

Data from the Namibia Statistic Agency Population and Housing Census Report also informs that “*there is a high incidences of disabilities amongst persons 65 years and older*” To this end, the State must ensure that elderly persons with disabilities remain integrated and are provided with support and specialised care to enable them to continue participating within their communities. Given that disability increases with age, the Government shall ensure that elderly persons with disabilities enjoy access to essential services, such as health, transportation, housing, social protection, and the built environment, based on the internationally recognised principles of independence, participation, care, self-fulfilment, and dignity.

### **Persons with severe Intellectual and/or Mental Disabilities**

Persons with severe intellectual and/or mental disabilities also face serious challenges in society. It is reported that persons with intellectual and/or mental disabilities are twice as likely to encounter stigma and discriminatory practices. In addition, they are susceptible to abuses and other human rights violations, including forced or coercive treatment and unjustified institutionalisation.

Consequently, the Government will strengthen the protection and promote the human rights of persons with severe intellectual and/or mental disabilities, including fully informed and supported decision-making. In line with international practice and current draft law, the Government commits, through provisions in the Mental Health Bill now under review, to gradually move away from institutionalisation of persons with severe intellectual or mental disabilities. Instead, it will prioritise community-based care, supported living arrangements, inclusive housing, family-based support systems, halfway houses, day-care centres, and primary healthcare integration. These alternatives are guided by utmost respect for their rights and dignity. To facilitate this shift, the Mental Health Bill includes measures to regulate and license community facilities, de-emphasise restrictive interventions, and ensure support for caregivers and practitioners assisting individuals with severe intellectual and/or mental disabilities.

**Persons with disabilities living in Rural Areas**

Data from the Namibia Statistics Agency Census Report further reflects that in persons with disabilities in rural areas are invariably disproportionately disadvantaged, owing to the peculiar socio-economic challenges faced by persons living in rural areas that is exacerbated in respect of persons with disabilities in rural areas. For example, on the issue of education, data show that “proportion of persons with disabilities without any formal education was higher in rural areas (82.3%) than in urban areas (17.7%).” The Government undertakes to ensure that people with disabilities in rural areas are included and prioritised in all the national, regional, local and constituency development programmes and interventions. The Policy further calls for regional and constituency platforms to incorporate and accord preference to persons with disability in all issues in their programmes and activities.

**War veterans with disabilities**

There is a similar recognition that the Government must expand the also recognise implementation programmes for the rehabilitation and reintegration of war veterans with disabilities.

**Refugees with disabilities**

The Policy will moreover, in collaboration with all the relevant Ministries, as well as the United Nations High Commissioner for Refugees and other relevant refugee agencies and organisations to ensure and fortify respect for the rights of refugees with disabilities and to also ensure, based on the principle of equal opportunities that refugees with disabilities are integrated into general socio-economic development programmes. This Policy envisages wider inclusion and protection of Refugees with disabilities shall not be sidelined, especially during the implementation of national and international humanitarian intervention.

**Inmates with disabilities**

The Policy further turns special focus to the special needs, rehabilitation, and reintegration of inmates with disabilities in all correctional centres across the country. Additionally, Government commits to ensure the promotion and protection of the rights of inmates with disabilities, including access to support and facilities that will enable them to live a dignified life whilst serving their sentences particularly protection from any form of abuse from fellow inmates or correctional services authorities, as well as in preparation for re-integration afterwards.

**Indigenous minority persons with disabilities**

Another group that will enjoy specialised consideration are persons with disabilities among the indigenous minority peoples whose participation is hampered by several peculiar challenges. The Government shall ensure that programmes and policies developed will address the specific needs of persons with disabilities among the indigenous minority population in conjunction with all relevant stakeholders, to enable them to access the services and the support they need to participate fully in society at large and their own communities.

**STRATEGIC FOCUS AREAS**

Whilst this Policy must be applied broadly and is aimed at extending comprehensive and wide-ranging protection, promotion and actualisation of the rights and interests of persons with disability, special attention must be paid to the following key strategic areas to achieve the Policy objectives:

**Accessibility**

One of the greatest challenges persons with disabilities encounter relates to difficulty in accessing public or private buildings and facilities. Inability of persons with disabilities to access social services

and institutions perpetuates discrimination, undermines their right to dignity and the enforcement of their rights under the applicable legal and policy framework.

The Policy underscores the acceleration of the development of mandatory national construction/compliance standards and guidelines to make the physical environment accessible to all persons with disabilities, which will be compulsory for building compliance requirements.

This will include all public buildings and essential service facilities designated under the National Disability Council Act, 2004 (Act No. 26 of 2004), for example, transport, health, education, telecommunication, sport, and recreation facilities.

This further underscore the need to continuously sensitise and educate architects, construction engineers, their professional regulatory bodies and building construction compliance authorities that are involved in the design and construction of the buildings and structures, and to advocate for the inclusion of the same in their training curricula to promote accessibility to essential services by persons with disabilities.

### **Non-discrimination and Equality**

Despite the guarantee of equality under Article 10 of the Namibian Constitution and the myriad of legislations and international laws, persons with disabilities face unique prejudice and discrimination daily that unfairly excludes them from participating in socioeconomic and political spheres of life equally.

Discriminatory practices against persons with disabilities not only undermine their right to dignity<sup>40</sup> and self-worth, but it may also exacerbate their living conditions.

The principles of non-discrimination and equality are well recognised in Namibia. The government aims to put measures in place to alleviate prejudice, unfair exclusion, and discrimination.

Measures must be put in place to address discriminatory practices against persons with disabilities and ensure respect for their fundamental rights and freedoms. The government commits to removing all barriers that hamper the enjoyment of the guarantee of equality for persons with disabilities.

### **Poverty**

While extreme poverty is generally a serious concern in the country, the poverty rate among persons with disabilities in many communities is exacerbated. Moreover, families of persons with disability and persons with disability invariably incur additional costs (of living) to accommodate the disability, which consideration should be incorporated into informing policies and programmes. Additionally, due to discriminatory practices, persons with disabilities are often denied the opportunities to engage in productive activities and participate in socioeconomic activities. These contribute to an astronomical poverty rate among persons with disabilities. Poverty, in turn, undermines the realisation of the human rights of persons with disabilities.

Notwithstanding the fact that, the Government has established different types of social welfare protection mechanisms, which includes amongst others a disability grants for citizens in an effort to address the poverty in Namibia, the Government shall continue to adopt policies and programmes to improve the living and economic participation of conditions of persons with disabilities, as part of its commitments to eradicate poverty and social inequality under the SDGs and AU Agenda 2060. This will include actively promoting educational and maximising employment opportunities and other economic participation for persons with disabilities. In accordance with Namibia's obligations under the UNCPRD and other international human rights instruments, the Government is committed to ensuring that persons with disabilities enjoy the right to an adequate standard of living for themselves and their families, including adequate food, clothing, and housing.

<sup>40</sup> Article 8 of the Constitution.

## **Natural Disaster**

Notwithstanding the fact that there has been renewed commitment at the international level to ensure disaster risk reduction rather than disaster response, many Government agencies still fail to incorporate persons with disabilities into disaster management policy, programmes, and responses. This has resulted in severe inequalities in access to immediate response, as well as long-term recovery resources for people who have disabilities prior to the disaster and those who acquire a disability as a result of the disaster. Resultantly, persons with disabilities are more often than not disproportionately affected by natural disasters compared to other members of society. Mindful that the CRPD obligates States to ensure that special attention is given to the needs of persons with disabilities during natural disasters, conflict, or humanitarian emergencies.

The Government shall ensure that its Disaster Management Programme accords special consideration to the inimitable vulnerability of persons with disabilities during [national] disasters and other emergencies.

Furthermore, the Government shall ensure that the voices and participation of persons with disabilities are recognised in disaster management planning, policies, and programmes to reduce the negative impacts of disasters and humanitarian emergencies on persons with disabilities. This will also go a long way in ensuring the effectiveness of the government's response to disaster management.

The Government shall commit to exploring innovative and assistive emerging technologies as a form of early warning systems and navigation applications to save the lives of persons with disabilities.

## **Education and Training**

Article 20 of the Namibian Constitution guarantees the right to education for all. In line with the principles of free and compulsory basic education, and to ensure equitable, inclusive, quality education and lifelong learning, the Government reaffirms its commitment under the Basic Education Act, 2020 (Act No. 3 of 2020). In collaboration with all relevant stakeholders, the Government will give effect to section 12 of the Act by strengthening the capacity of the education system to include and respond to learners with disabilities, who often have special educational needs.

To ensure these commitments translate into practice, the Government shall provide assessment, early intervention, and specialised services for learners with special needs within the regular education system. Recognising that inclusive education depends on competent and well-prepared educators, the Government will work closely with the Namibia Qualifications Authority (NQA), established under the Qualifications Authority Act, 1996 (Act No. 29 of 1996), and all training institutions. This collaboration will ensure that curricula for educators at all levels include the skills, competencies, and expertise necessary to deliver quality inclusive education. Where needed, learners with disabilities and their families will also receive additional support services to ensure meaningful participation and development.

Recognising that education is a fundamental human right and a foundation for a more just society, the principle of equitable and inclusive quality education shall guide all educational policies and practices. These efforts are in line with Namibia's obligations under international and regional instruments, including the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and other international agreements binding on Namibia.

In addition, the Government will promote lifelong learning opportunities for persons with disabilities, including those in rural areas and those deprived of their liberty due to intellectual disabilities. This will include basic skills training (such as literacy and numeracy) and specialised education, while also addressing the unique needs of elderly persons with disabilities, who shall be actively encouraged to participate in lifelong learning programmes.



In line with the objectives of the Vocational Education and Training Act, 2008 (Act No. 1 of 2008) to promote access, equity, and quality in vocational education and training, the Government will expand access and improve accessibility for persons with disabilities. Vocational education, training, and rehabilitation services will support persons with disabilities in obtaining or retaining employment, advancing in their careers, and integrating or reintegrating into society. Equal attention will be given to the development of services in both rural and urban areas, and accreditation criteria mandating the accessibility of training facilities and resources shall be strictly enforced.

## Health

The right to the highest attainable standard of health, including reproductive health care, is a fundamental right recognised at international law.<sup>41</sup> In order to ensure the realisation of this right, the Government shall ensure that persons with disabilities are guaranteed access to health care services that allow for the full enjoyment of their human rights.

As implored under Article 95 of the Namibian Constitution Government shall engage its best endeavours to grant persons with disabilities fair and reasonable access to healthcare services, including sexual and reproductive health services, that are respectful and dignified, and extend due recognition to their fundamental human right to Privacy<sup>42</sup> and Non-discrimination<sup>43</sup>. The government will thus ensure that persons with disabilities enjoy access to preventive, rehabilitative, therapeutic, and orthopaedic services within their communities that are dignified and focused on facilitating independent living.

Mindful that disability is caused by an interplay of congenial and non-congenial factors that can be controlled and managed if detected early. In light of this, the Government shall strive towards early identification, prevention, and management of disabilities. In this regard, the Government will engage with communities and mobilise resources with a view to the extent possible, strengthening prevention, promoting early intervention, as well as managing and treating disabilities at personal, family and community levels.

Furthermore, the Government shall ensure the development and supply of support services and gradually dedicate funding for the procurement of, amongst others, assistive devices for persons with disabilities to minimise the consequences of the disability and to increase their level of independence. In addition, the government shall ensure that medical rehabilitative programmes include the provision and supply of appropriate prostheses, orthoses, technical aids, eyeglasses, hearing aids and other relevant goods and services.

## Employment

Notwithstanding the Labour Act, 2007 (Act No. 15 of 2007) that embeds the government employment policy of equal opportunity for all its citizens and the fact that persons with disability are listed as a designated group, enjoying preference under the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998)<sup>44</sup>, the latest labour force report, based on the 2023 Population and Housing Census, shows that people with disabilities make up just 2.3% of Namibia's 46.2% labour force. This means that out of 546,805 employed Namibians, only 12,508 are people with disabilities. The government has ensured the increment of persons with disabilities in employment by 5%, and this reflects that real progress has been made to ensure persons with disabilities are considered in the employment initiatives.

<sup>41</sup> The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services." The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights,<sup>2</sup> as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.

<sup>42</sup> Article 13 of the Constitution.

<sup>43</sup> Article 10 of the Constitution.

<sup>44</sup> Section 18 of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998).



The UN Convention on the Rights of Persons with Disabilities and its Optional Protocol without reservation in 2007. Article 2 includes “denial of reasonable accommodation” as discrimination based on disability. Article 5, dealing with “Equality and non-discrimination”, requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination. Article 27, focusing on “Work and employment”, requires States Parties to, among several measures, ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

Against this backdrop, the Government remains committed to widening the scope of persons with disability to access opportunities for productive and gainful employment and economic activity that provides a living wage, ensuring the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities. This will include the identification and elimination of employment barriers and making reasonable accommodations for the limitations of persons with disabilities.

Additionally, the Government will encourage public and private sector employers to adopt and strengthen workflow and processes to accommodate persons with disability, to perform work with the assistance of and to invest in technical aids and assistive devices to enable maximal participation of persons with disability in decent jobs.

Therefore, the government will ensure full implementation of legislation extending preference to persons with disability to ensure that labour-related legislation does not discriminate against persons with disabilities and those obstacles to their economic participation are removed.

To permit the fullest possible vocational integration of people with disabilities, whatever the origin, nature, and degree of their disability, and thereby promote their social integration and personal fulfilment, measures shall be taken to enable them to work, whenever possible, in an ordinary working environment as salaried employees.

### **Sheltered Employment**

Sheltered employment refers to structured work opportunities provided in a supportive and adapted environment for persons with disabilities who, due to the nature or severity of their disability, are not yet able to obtain, retain, or cope with the demands of employment in the open or competitive labour market.

The Government shall ensure that sheltered employment is made available through the establishment of sheltered workshops and work centres, where individuals are engaged in productive tasks within a protected setting. These facilities shall not only provide meaningful work but also focus on developing the skills, confidence, and independence of workers, with the aim of preparing them, where possible, for eventual integration into the open labour market.

Sheltered employment shall be subject to the supervision of competent authorities to ensure that it adheres to standards of dignity, safety, and inclusion. Workers with disabilities in these settings shall enjoy clear contractual status, reflecting their rights to fair remuneration, access to personal support services, and opportunities for personal and professional development. The employment relationship shall mirror that of any formal employer-employee arrangement, with appropriate legal protections and labour standards.

Sheltered employment is intended as a supportive and empowering form of economic participation, not as a substitute for inclusion in the open labour market, but as a complementary measure that recognises the diversity of support needs among persons with disabilities.

## **Social Integration and the Environment**

### **Sign Language**

Recalling Article 3(2) of the Namibian Constitution that sanctions the use of any other language as a medium of instruction in private and public schools, subject to requirements that may be imposed under a relevant Law. Similarly, Article 3(3) thereof authorises the use of a language other than English for legislative, administrative, and judicial purposes if such is spoken by a substantial component of the population.

Government is thus committed to expanding the use and proficiency in sign language.

In order to encourage and strengthen communication between deaf and hearing people, including engagement with electronic information systems and commit to paying special attention to the need for information to be availed in a format accessible to persons with disability.

In quest of this aim, the Government shall ensure that interpreter services by qualified sign language interpretations and other appropriate disability accessible formats are available for legislative, administrative, and judicial purposes, to facilitate appropriate communication with and amongst people with disabilities.

### **Braille**

To facilitate access to information in accordance with the spirit and purport of the Access to Information Act, 2022 ( Act No. 8 of 2022) <sup>45</sup> subject to the Government shall engage concerted effort to ensure that information available to the general public for legislative, administrative and judicial purposes is also converted into Braille or in large print and other formats responsive to the needs of persons with disability.

## **Culture, Religion, Recreation and Sports**

Recognising the talents, abilities and potential of people with disabilities, the Government shall encourage, support, and promote that persons with disabilities have reasonable access and make reasonable accommodations for persons with disability to attend and participate in cultural, religious, recreational and sports programmes, events and activities nationally, regionally and internationally.

The Government further enjoin all ecclesiastical authorities to make their facilities, services, and activities accessible to all persons with disabilities.

Despite the wide-ranging achievements of inclusion of persons with disability in sport through initiatives such as the Special Olympics Namibia,<sup>46</sup> which provides year-round sports training and athletic competition in a variety of Olympic-type sports for children and adults with intellectual disabilities.

Those activities give them continuing opportunities to develop physical fitness, demonstrate courage, experience joy, and participate in a sharing of gifts, skills, and friendship. The government shall ensure that public sports, recreation facilities and events are made accessible to persons with disabilities. The Government shall initiate and support the development and integration of sports for persons with disabilities within the national sports development programme and ensure that Disability Sport in Namibia is prioritised.

<sup>45</sup> Section 1, 36 and 44 of the Access to Information Act.

<sup>46</sup> There is also a national committee in Namibia- the Special Olympics Namibia (SON), founded in 1998 - which works to strengthen the participation of young people and adults with mental disabilities and their social involvement through sport.

## Social Welfare

The Government shall expand the social welfare allowances and grants and commits to gradually increasing these allowances to assist persons with disability and their primary caretakers/ assistants, where justified, to live a decent standard of living in accordance with applicable laws.

The Government shall enforce occupational health and safety regulations to ensure that workers, including those with disabilities, are adequately protected and rehabilitated to prevent permanent disability.

## Housing

The Government shall ensure that the national housing policy and relevant policy and legal framework, public housing schemes and initiatives make provision for prioritised access to housing for persons with disabilities, in the planning and development phases, subject to necessary reasonable accommodations.

## Transport, Traffic and Road Safety

In order to enable persons with disability to give expression to their fundamental right to liberty and the freedom *to move freely through Namibia*, as provided for under Articles 7 and 21(1)(g) of the Constitution Government commits to develop a policy on public transport of all modes of transport that will ensure access to transportation for persons with disabilities without discrimination and unreasonable inconvenience.

To this end, the Government shall ensure that public transport authorities pay special consideration to the transportation needs of persons with disability and plan, design, or adapt the various public transport schemes and infrastructure, including traffic infrastructure, which are responsive to the needs of persons with disabilities across Namibia. Additionally, the Government shall ensure that the policy on road and traffic safety is developed and that citizens receive continuous education to prevent road accidents that may contribute to disability and ensure rehabilitation to prevent permanent disability by those involved in road accidents.

## Social, Economic and Legal Protection

In order to develop personal autonomy and economic independence, persons with disabilities shall have the right to receive social security to ensure that they live a decent standard of living. The exercise of basic legal rights of persons with disabilities shall be protected and promoted to the fullest extent possible. The Government and all key stakeholders must strengthen awareness on the economic independence of persons with disabilities through the Nationhood and similar national campaigns.

In cases where persons with disabilities are partially or unable to administer their own affairs and or property, they shall be provided with appropriate assistance through the Namibia Disability Council, and where necessary, include legal representation by a legal guardian or court-appointed curator<sup>47</sup> or legal representative in accordance with the relevant applicable Laws.<sup>48</sup>

## Training of Personnel

Comprehensive information about the various needs of all persons with disabilities shall be included in the training *curricula* of strategic professions for example, health workers, social workers, teachers,

<sup>47</sup> A curator is a natural person, who can be a trusted relative of the patient or someone of a legal nature and background who is independent and able to make decisions in the interest of the patient.

<sup>48</sup> There are three types of curators for which a person can apply:

**Curator ad litem**, which is a curator that is appointed to litigate on behalf of the patient during legal proceedings;

**Curator ad personae**, which is a curator that is appointed to oversee the patient's daily living needs; and

**Curator Bonis**, which is a curator that is appointed to protect the patient's property and financial interests.

community workers, judicial officers, police and correctional services staffs, architects, engineers to ensure the realisation of the objectives of this Policy and complementing domestic and international Laws.

### **Information, Statistics and Research**

In pursuance of sections 15 to 17 of the National Disability Council Act, 2004 (Act No. 26 of 2004) which among others authorise the National Disability Council to gather information enumerated under section 15 (Council may gather information) and further mandates the Executive Directors of all OMAS to submit a Report to Council within 90 days after the end of the financial year regarding persons with disability. Council further mandated to conduct campaigns to raise public awareness concerning any matter relating to persons with disability and to furnish the Minister responsible for disability affairs with an annual report setting out *inter alia* the reports received from OMA's and the Council's comments thereto, which the Minister in turn must lay before the National Assembly within 28 days following receipt thereof.

Measures shall be put in place to enforce the abovementioned obligations of the National Disability Council Act, 2004 (Act No. 26 of 2004) to ensure that information relating to persons with disability is accurately captured and annotated, and that statutory reports are submitted within the required timelines, to enable policy makers to make data informed decisions, regarding persons with disability and to monitor and evaluate the implementation of this Policy and relevant legislation for purposes of deciding on appropriate interventions.

The government commits to liaise with the National Statistics Agency and all other relevant stakeholders to include issues relating to persons with disability during national census and other enumeration exercises, and to present their findings in a disability desegregated fashion.

The government will also encourage research regarding the prevention of disabilities, the nature and prevalence of causes, types, frequencies, and treatment of disabilities in a Namibian context.

### **Family Life and Personal Integrity**

Persons with disabilities enjoy the family right espoused under Article 14 of the Constitution. It is a fundamental principle of this Policy that the family is the best safety net for a person with a disability to live, grow and enjoy their fundamental human rights and freedoms. Government shall therefore promote the full participation of persons with disabilities in family life and protect the free and voluntary consent to sex, marriage, and parenthood. Furthermore, a person with disability should not unreasonably be deprived of family life and/or to live with their family.

In order to promote their right to personal integrity, Government shall particularly put measures in place to limit the risk of abuse and violence of persons with disability within the family, community and in institutions and to hold perpetrators accountable who do so in the same vein, the State shall ensure that adequate counselling and support services are provided for those who become victims of violence or abuse.

### **Effective Participation and Representation**

The Government shall ensure that persons with disabilities are extended a reasonable opportunity to meaningfully participate and or be represented in the inception, design, discussion, implementation, monitoring of legislation, policies and programmes that affect them

The National Disability Council is mandated to facilitate and coordinate the effective and meaningful representation of persons with disabilities in consultation with the relevant stakeholders, including organisations for and of persons with disabilities. Additionally, the Government should strengthen the Council in their obligation under section 4 of the National Disability Council Act, 2004 to make representations on behalf of any person with a disability before any organ of the State, or provide or

procure legal assistance for any persons with disabilities, if the matter in question relates to the rights of, or the integration of persons with disabilities in society.

## **IMPLEMENTATION FRAMEWORK**

This is a national policy and as such, it will be implemented through a sector-wide and multi-sectoral approach. The Government shall adopt a **twin-track** approach in the development, implementation and monitoring of the disability policy and legal framework and related programmes and activities.

This entails mainstreaming disability into every sector and institution in society, while at the same time engaging mainstreamed efforts led by the National Disability Council.

An annual work plan and budget aligned to the IAP shall be drawn up and will serve as the primary reference documents for the purpose of implementing and monitoring the achievement of results over a particular financial year. Based on the reports submitted in terms of the National Disability Council Act, 2004, annual reviews should be conducted in the fourth quarter of the financial year or shortly after, to assess progress made against this National Policy for Persons with Disabilities and to review the annual plan for the following year. The reports should include updated information, and a narrative summary of results achieved against this National Policy and its Implementation Plan, as well as lessons learnt and the way forward.

Due to the nature of mainstreaming disability into all government functions and programmes, it is important to note that all Government Offices, Ministries and Agencies play a key role in the implementation of this Policy in relation to their particular mandates.

In a similar fashion the private sector plays an equally important role in ensuring that the Policy objectives are attained, the private sector is particularly implored to engage their best efforts to respect and promote, widen the scope of protection and promote the fundamental rights and freedoms of persons with disability as mandated under Article 5 of the Namibian Constitution. Additionally, the private sector is called upon to collaborate with and support the Government to achieve disability-inclusive development, especially to develop disability focused corporate social responsibility initiatives.

Government commits to strengthening the monitoring and implementation of the Constitution, mandating Laws and this Policy through the National Disability Council, which will cooperate with both the public and private sector to ensure that the policy environment is conducive to expanding the protection and promoting the rights, interests and legitimate expectations of persons with disabilities.

## **INSTITUTIONAL FRAMEWORK**

The key institutions that will take the lead to coordinate and implement this Policy are:

### **Office of the Vice President: Division of Disability Affairs**

The Marginalised and Disability functions will be placed in the Office of the Vice President to improve national coordination. The Division for Marginalised and Disability Affairs has been vested in the Office of the President: Office of the Vice President. This Division is mandated to strengthen the implementation of the National Disability Council Act, 2004 and other regional and international instruments that relate to disability and exercises superintendent oversight regarding disability affairs in Namibia.

### **Office of the Prime Minister**

Article 36 of the Namibian Constitution specifies that the Prime Minister leads government business in Parliament, coordinates Cabinet activities, and advises and assists the President in executing



government functions. The Public Service Act, 1995 (Act No. 13 of 1995) further assigns the Prime Minister overall responsibility for the management and efficiency of the Public Service, including ICT within the service.

The National Disability Council will work closely with the Office of the Vice-President, the Office of the Prime Minister and the Inter-Agency committee to coordinate government initiatives and programmes and the database for persons with disabilities.

### **National Disability Council of Namibia**

The National Disability Council of Namibia is established in terms of the National Disability Council Act of 2004, (Act No. 26 of 2004), in broad terms the mandate of the Council is to ensure the promotion of the general welfare of persons with disabilities, more specifically its objectives as outlined in section 3 of the Act includes among others, to monitor the implementation of the National Policy on Disability.

### **Employment Equity Commission**

The Employment Equity Commission is responsible for implementing, monitoring, and enforcing Namibia's Affirmative Action policy, which promotes equality and representation of designated groups, including women and persons with disability of persons in the workforce within both the public and private sectors, and to hold Employers accountable for non-compliance. The Employment Equity Commission must equally ensure that all categories of employment within the workforce of every relevant employer reflect the equitable representation of all designated groups, including persons with disabilities, in accordance with national employment equity targets and the intersectionality of these groups.

### **Public Service Commission**

The Public Service Commission, as defined by the Constitution and the Public Service Commission Act, is mandated to advise the President and Government on matters relating to the public service, inclusive of advising on appointments, disciplinary control, remuneration, and retirement benefits. The Public Service Commission also performs functions assigned to it by the Act of Parliament and advises the President on appointments to offices in terms of the Constitution or other laws<sup>49</sup>. The Public Service Commission plays a pivotal role in ensuring that public services are inclusive and advance the interests of persons with disability, noting that the Government is the largest employer in the country.

### **Ministry of Justice and Labour Relations**

Office of the Labour Commissioner is an alternative dispute resolution mechanism (outside the formal court system) mandated to facilitate a cost-effective and less formal mechanism for resolving labour disputes, including discrimination based on disability, sex or sexual harassment, etc, within the workplace.

The Ministry equally plays a crucial role in the criminal justice system and ensuring persons with disabilities enjoy equal protection of and access to their right to justice.

### **Ministry of Defence and Veterans Affairs**

The Ministry is responsible for the well-being of war veterans, and as per this policy, war veterans are listed and considered a special target group. The Ministry forms part of the Inter-Agency Committee to ensure that Regional Coordinators assist and facilitate in the identification of war veterans with severe disabilities to benefit under this policy.

<sup>49</sup> [https://www.google.com/search?q=Public+Service+Commission+of+Namibia+Mandate&rlz=1C1GCEA\\_enNA1105NA1105&oq=Public+Service+Commission+of+Namibia+Mandate&gs\\_lcrp=EgZjaHJvbWUyBggAEUUYOdIBCjE0OTA3ajBqMTWoAgwAgHxBdvstd8NAp-h&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=Public+Service+Commission+of+Namibia+Mandate&rlz=1C1GCEA_enNA1105NA1105&oq=Public+Service+Commission+of+Namibia+Mandate&gs_lcrp=EgZjaHJvbWUyBggAEUUYOdIBCjE0OTA3ajBqMTWoAgwAgHxBdvstd8NAp-h&sourceid=chrome&ie=UTF-8)

## Office of the Ombudsman/ Ombudsman

The overall function of the Ombudsman is to promote and protect the human rights and freedoms of all persons (including persons with disabilities) in Namibia. The Ombudsman is inter alia responsible for *‘investigating, alleged or apparent instances of violations of fundamental human rights and freedoms, abuse of power, unfair, harsh, insensitive and discourteous treatment of an inhabitant of Namibia, failure to achieve a balanced structure or equal access in the recruitment processes and to misappropriation of public monies.’*<sup>50</sup> The Ombudsman is further empowered to conduct independent and impartial investigations and resolve complaints by taking corrective action, as appropriate in particular circumstances, as well as to raise public awareness.

## Organisations of and for Persons with Disabilities

As guaranteed under Article 21(1)(e), the Government recognise the right of persons with disability to form, join and be represented by organisations advancing their common interest be at national, regional and local levels, as well as their role in identifying needs, evaluating services, advocating change and raising awareness.

To this end, the government shall continue to encourage and support the formation and strengthening of such organisations, given the vital role they play. In addition, the government shall encourage the meaningful participation of these organisations in decision-making with regard to policy and programmes relating to persons with disability.

## RESOURCE MOBILISATION

The Government shall ensure that dedicated disaggregated funding is budgeted for and progressively allocated to comprehensively cater for all disability related programmes and services during each financial year.<sup>51</sup> The Ministry of Finance shall designate a particular budget line, and OMAS shall budget and allocate funding for reasonable accommodation and other measures to implement this Policy and complementary Laws.

One of the greatest challenges militating against the realisation of the policy objectives as per the situation analysis is attributable to relates to the lack of adequate funding. Consequently, the Government shall make all reasonable efforts to strengthen existing funding modalities in accordance with due process and adherence to relevant law and policy.

This Government shall provide financial assistance for certain areas or activities/projects necessary for empowering persons with disabilities, which are not covered under the budget that the government allocates to the relevant ministries. Similarly, the funding mechanisms will be used to support the activities of the National Disability Council and organisations or associations of/for persons with disabilities.

As part of its commitment to funding disability-related activities, the Government shall establish and impose a disability levy on employers and employees and allocate a fishing quota in accordance with relevant applicable Legislation.

Government shall require public procurement processes to give special attention to the needs of persons with disabilities by including the requirement that public entities require suppliers to include adherence to the UD and UA principles in their bidding requirements for the supply of goods and services under the Public Procurement Act, 2015.

Consideration will also be afforded to secure additional funding avenues for the implementation of this national policy, including seeking technical and financial support from relevant development partners and agencies.

<sup>50</sup> Article 91 of the Constitution.

## ADVOCACY

The effective implementation of the National Policy on Disability and the IAP hinges on a comprehensive understanding of the Namibian Constitution and relevant complementary Laws, the international and regional instruments relating to persons with disability binding on Namibia, this Policy, and the IAP.

The Office of the Vice President, in cooperation with relevant public and private institutions, shall sensitise key stakeholders using print, electronic media, and targeted outreach programs on national and international matters relating to persons with disability.

As a continuous advocacy measure, the Disability Day will be celebrated on 10 June every year.

As contemplated Government shall support the Council to effectively execute its mandate in terms of section 16 of the National Disability Council Act, 2004, *to provide information and raise awareness on issues relating to persons with disability.*

Efforts shall be engaged in line with the principles of this Policy and in collaboration with relevant stakeholders to ensure that persons with disabilities and, where necessary, their families and/caregivers are educated on their fundamental human rights and freedoms, duties, diagnosis, medical records, and available services and programmes pertaining to their disability, as well as those services which are generally available to the general public.

Special consideration must be accorded to ensure that the information is accessible to all persons with disabilities. In formats responsive to their particular needs.

## CO-ORDINATION

In order to ensure that the rights and issues of persons with disabilities are given the priority and visibility, the Government shall establish an inter-agency technical committee under the Office of the Vice- President, that shall primarily be responsible to advice the Vice-President within the scope of her superintendence power over the Council accorded in terms of the Constitution<sup>51</sup>, the National Disability Council Act, 2004, any other relevant Law, as well as any other matter relating to persons with disability, including coordinating the activities and issues relating to persons with disabilities, as stipulated in this policy.

All stakeholders dealing with rights or issues of persons with disabilities, including organisations for persons with disabilities, relevant international agencies, and professional bodies, will also be represented on this body.

The Office of the Vice President, Division of Disability Affairs, will serve as Secretariat to the Inter-Agency Technical Committee.

## INTERNATIONAL CO-OPERATION

In compliance with its obligations under Article 32 of the UNCRPD, the State recognises the importance of international cooperation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the Convention.

With due consideration to the right sovereignty and full and effective participation of persons with disability, the Government reaffirms its commitment to effectively cooperate with international, regional organisations and civil society involved in disability issues to:

- a) facilitate and support capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices; and

<sup>51</sup> Article 126 of the Constitution.

<sup>52</sup> Articles 40 and 41 of the Constitution.

- b) facilitate cooperation in research and access to scientific and technical knowledge; providing, as appropriate, technical and economic assistance, including facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

Concerted efforts will be made to recommend the adoption or ratification of international law instruments relating to persons with disability that align with the Namibian Constitution.

## MONITORING AND EVALUATION

In accordance with section 3 of the National Disability Council Act, 2004, the National Disability Council of Namibia, is mandated to monitor and evaluate the implementation of the National Policy on Disability as per their establishing Act, under the superintendence of the Office of the Vice-President, to whom the disability portfolio has been assigned.

The **Disability Division: Office of the Vice President** shall serve as the national focal point for disability affairs for Namibia will be responsible for facilitating the implementation of this Policy and its Implementation Plan, through collaboration with other Ministries, Government Agencies, Non-Governmental Organisations (NGOs), Private Sector Organisations (PSO), and Development Partners.

Moreover, the Government, through the National Disability Council, shall ensure that the Policy is implemented in accordance with the milestones and key performance indicators enumerated in the National Disability Policy Monitoring and Evaluation Plan.

In order to bolster the monitoring and evaluation of this Policy the Council must ensure that OMAS comply with section 17 of the National Disability Council Act, 2004 which mandates the Executive Directors of all OMAS to furnish Council with a report concerning the implementation of the National Disability Policy within 90 days after the end of the financial year, annually; and must prepare and present the Annual Disability Report to the authority that exercises legislative accountability for the Council, who must in turn transmit the Report to the National Assembly with the timelines contemplated under section 21 of the National Disability Council Act, 2004.

More generally, in order to ensure the coherent implementation of this Policy, the National Disability Council should be consulted in respect of all matters, including the reform and development of legislation and policies relating to or that are likely to affect persons with disabilities in Namibia. Moreover, the National Planning Commission will (in collaboration with all ministries) also scrutinise all the different ministries' plans and programmes to ensure that they include the needs of people with disabilities [ before acknowledging and approving them.

## IMPLEMENTATION ACTION PLAN

The 2025-2030 Implementation Action Plan ("IAP") annexed to this Policy sets out key indicators related to the policy objectives, strategies, activities, and outputs of this policy and indicates timelines and targets, budget estimates and responsible entities, including state and non-state implementers.

The goals and strategies to be implemented to attain set policy goals by different responsible bodies in the short, medium, and long term/during the period of the plan. Short term refers to a period of one year, medium term includes activities that should be implemented within three years, and long term refers to activities that may extend until the end of the planning period, beginning from the approval of the Policy & IAP.

The IAP depicts the implementation strategies over a five (5) year period, segregated by financial year. The policy objectives and strategies that will be implemented by the responsible body or bodies within the stipulated timeline for implementation of the strategies and the performance indicators are outlined in the IAP.

The IAP will be subject to review annually, across a 5-year duration of this policy or sooner, as might prove necessary in light of the annual Disability Reports, with due consideration to the progressive nature of the realisation of disability inclusion as outlined in this Policy.

## **POLICY GOVERNANCE**

The Policy is approved by Cabinet on 8 July 2025 and repeals and replaces the National Policy on Disability of 1997.

## **CONCLUSION**

Namibia has ratified Regional and International human rights instruments that directly or indirectly provide for the rights of people with disabilities. Such instruments, therefore, place several obligations to give effect to the statutory provisions, which include enacting relevant legislation and policies.

Such legislation and policies should speak to the current and future circumstances that persons with disabilities may face. In this case, the policy will therefore help develop a basis of understanding of the environment in which such legislation and programmes are developed in the best interest of persons with disabilities.

This policy provides a common reference point for the planning process and prioritises actions and solutions to problems faced by persons with disabilities. Namibia has made significant strides in recognising and addressing the rights of persons with disabilities. However, a comprehensive policy was developed to ensure the protection of the rights and interests of persons with disabilities.

This Policy shall be reviewed in 2028. Such review shall be done after due consultation with relevant stakeholders, including persons with disabilities or organisations representing their interests.

## **ANNEXURES**

- (a) Legal Review Report: National, Regional, and International Developments on the Rights of Persons with Disabilities, The Namibian Context, June 2024, published by the National Disability Council of Namibia.
- (b) Situational analysis on the National Policy on Disability for Persons with Disabilities in Namibia.
- (c) Resource Folder: Consultative workshop reports and attendance registers.

## **BIBLIOGRAPHY**

Appiagyei-Atua, K A comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities' [In No Linguistic Content] (2017) 21 *Law, Democracy & Development* 153-175.

Chilemba, EM 'Disability rights and emerging disability legislation in selected African jurisdictions: A diagnostic commentary' (2015) 3 *African Disability Rights Yearbook* 55-56.

Clifford, J 'The UN Disability Convention and its Impact on European Equality Law' (2011) 6 *Equal Rights Review* 11-25.

Degener, T, & G Quinn. A survey of international, comparative, and regional disability law reform. In *Disability rights law and policy: International and national perspectives*, edited by Breslin, ML & S Yee, 3-125. (New York: Transnational Publishers, 2002).



European Union Agency for Fundamental Rights and Council of Europe *Handbook on European non-discrimination law* [in English] (Luxembourg: European Union Agency for Fundamental Rights and Council of Europe, 2018).

Guarnizo-Peralta, D. 'Disability rights in the Inter-American System of Human Rights: An expansive and evolving protection' (2018) 36 *Netherlands Quarterly of Human Rights* 43-63.

Kalunga, F, & C Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & Others v Attorney-General & Another*' (2018) 6 *ADRY* 60-81.

Kanter, A *The development of disability rights under international law: From charity to human rights* [in English] (London: Routledge, 2015).

Kayess, R, & P French. Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities (2008) 8 *Human Rights Law Review* 1-34.

Mégret, F 'The Disabilities Convention: Human rights of persons with disabilities or disabilities rights?' [In English] (2008) 30 *Human rights quarterly* 494-516.

Mgijima-Konopi, I The jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for Africa. In *African Disability Rights Yearbook*, edited by Ngwena, CG, I Grobbelaar-du Plessis, H Combrinck & SD Kamga, 269-281. (Pretoria: Pretoria University Law Press, 2016).

Ngwena, C.G. 'Reproductive autonomy of women and girls under the Convention on the Rights of Persons with Disabilities' (2018) 140 *International Journal of Gynaecology & Obstetrics* 128-133.

Schulze, M. "Understanding the UN Convention on The Rights of Persons with Disabilities." 2010. Stein, MA, & J.E. Lord. 'Prospects for the United Nations Convention on the Rights of Persons with Disabilities'. In *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, edited by Arnardóttir, OM & G Quinn, 17-40. (Leiden: Martinus Nijhoff, 2009).

Szymanski, C 'The globalisation of disability rights law - From the Americans with Disabilities Act to the UN Convention on the Rights of Persons with Disabilities' (2009) 2 *Baltic Journal of Law & Politics* 18-34.

Van Reenen, TP, & H Combrinck. The UN Convention on the rights of persons with disabilities in Africa: Progress after 5 years' [In English] (2011) 8 *Sur* 133-166.

Wachira, M, & D Cassell. The interpretation of the right to mental health in the African and American systems. In *African Human Rights Yearbook*, 223-242. (Pretoria: Pretoria University Law Press, 2018).

**NATIONAL, REGIONAL AND INTERNATIONAL DEVELOPMENTS ON  
THE RIGHTS OF PERSONS WITH DISABILITIES  
THE NAMIBIAN CONTEXT  
REVIEW REPORT**

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**Prof. Jamil D. Mujuzi**

**Expert in International Criminal Law, Criminal Law and Procedure, Law of Evidence and Human Rights Law.**

**Prof. Ebenezer Durojaye**

**Expert in Sexual and Reproductive Health Rights, Gender Inequality and HIV/AIDS, International Human Rights Law and Human Rights and Democracy.**

**Project Assistant**

**Jeremia P. Shalukeni**

**Legal Research and Human Rights Assistant**

**Edited by:**

**Jessica J. !Gawachab**

## **FOREWORD**

It is with great honor that I present this Review Report on the ‘National, Regional, and International Developments on the Rights of Persons with Disabilities - The Namibian Context.’ This report aligns with our mandate to enhance the lives of persons with disabilities and to propose legal and policy recommendations that ensure their equal protection in Namibia.

This Council monitors the implementation of the National Policy on Disability and makes recommendations to the government. Additionally, strategies such as the disability grant and the establishment of special/re- source schools support an inclusive education approach, catering to the special needs of learners with disabilities.

The government continues to support persons with disabilities in various aspects such as access to healthcare, housing and sanitation, employment, education, and other services. Achieving a disability-inclusive and accessi- ble society requires a study of the current situation and an outline of best practices, as detailed in this report. The government’s commitment to inclusivity is not just a moral imperative; it aligns with the principles set forth in the CRPD.

This report underscores our dedication to creating an environment that upholds the rights of persons with disabili- ties. Through a comprehensive analysis of current national, regional, and international legal, social, and adminis- trative frameworks, coupled with a comparative study of best practices from other member states, we aim to provide actionable insights and recommendations supported by empirical data.

The primary goal is to emphasize the urgent need for legislative reform and the creation of policies that better address the rights of persons with disabilities in Namibia. This marks a significant milestone in our journey towards inclusivity and equity. Therefore, by ensuring effective implementation, we not only uphold the principles of justice and equality but also affirm our commitment to building a society where every individual, regardless of ability, can thrive.

I extend my profound gratitude to all who contributed to this report, including our dedicated team of researchers, project management, and stakeholders. It is my sincere hope that the findings and recommendations outlined herein will act as a catalyst for positive change and pave the way for a more inclusive and accessible future for all.

**Yours sincerely,**

**Mr. Chali Matengu**

**Chairperson of the Board**

## ACKNOWLEDGEMENT

I am humbled to extend my heartfelt gratitude to everyone who contributed to the development of this comprehensive Review Report on the 'National, Regional, and International Developments on the Rights of Persons with Disabilities - The Namibian Context.'

The National Disability Council of Namibia (NDCN) is a statutory body established under the National Disability Council of Namibia Act of 2004 (Act No. 26 of 2004). Section 3 of this Act mandates the NDCN to improve the lives of persons with disabilities and to make recommendations in law and policy that ensure their equal protection. The NDCN's mandate encompasses a broad range of responsibilities, which have significantly shaped the content and direction of this report.

First and foremost, I would like to thank our dedicated team of researchers, whose tireless efforts, comprehensive research and meticulous attention to detail have been instrumental in compiling this report. Your commitment to excellence and unwavering dedication to the rights of persons with disabilities are deeply appreciated. In line with our mandate to monitor and supervise, your work has been crucial in facilitating the development of this report.

This report aligns perfectly with our mandate to provide inputs on legislation and facilitating comments on proposed laws that affect persons with disabilities. Furthermore, I would like to acknowledge the continued support and collaboration of our portfolio Ministry, the Ministry of Gender Equality, Poverty Eradication and Social Welfare for the support.

Special thanks go to the members of the National Disability Council (the project management team), whose expertise and insights have been invaluable. Your contributions have greatly enriched the content and recommendations of this report, particularly in providing direction and policy guidance. Your strategic vision and organizational skills have ensured the successful completion of this report.

It is my sincere hope that the findings and recommendations outlined in this report will advance the rights of persons with disabilities and provide an academic benchmark for disability related research in Namibia.

**Yours sincerely,**

**Angelique Philander**  
**Chief Executive Officer**

## EXECUTIVE SUMMARY

Namibia is a democratic state with the Constitution as the supreme law of the country. The Constitution guarantees equal rights to all and permits the application of international laws and treaties ratified by Namibia which thus includes the United Nations Convention on the Rights of Persons with Disabilities (CRPD). When the convention and its Optional Protocol were ratified on December 4th, 2007, they became law, explicitly committing the government to uphold, promote, and protect the rights of persons with disabilities.

This means, inter alia, that it has an obligation to enact relevant legislation and policies that give effect to undertaken obligations under these instruments. The policies and pieces of legislation should be informed, not only by the principles enshrined in these treaties, but also the jurisprudence and/or practice(s) of the treaty enforcement mechanisms/bodies. In this report, Namibia's international and regional obligations in those treaties are discussed. The report highlights the jurisprudence of the relevant treaty enforcement bodies. The report also highlights the relevant general comments on the rights of people with disabilities. The relevant Namibian pieces of legislation on persons with disabilities are also mentioned. The report further refers to case law in which Namibian courts have dealt with the rights of people with disabilities. Much as many pieces of legislation have been

enacted and implemented to promote or protect the rights of persons with disabilities, however, they do not include all the rights that are provided for in the international and regional treaties on persons with disabilities. Thus, there is a need for a dedicated piece of legislation to address this loophole. The legislation should also provide for a statutory body with the mandate to ensure that the rights of persons with disabilities are promoted in the public and private sectors and at all levels of the Namibian society.

The project team is excited to roll out the first phase of the Legislative Review Project. This report will equally form a basis for the outline of the revised policy on disability and the enactment of proposed legislation to domesticate the principles entrenched in the international and regional instruments, as well as a source document for the development of academia relating to the rights and protection of persons with disabilities in Namibia.

**Yours sincerely,**

#### **PROJECT TEAM**

**Ms. Jessica J. !Gawachab**  
**Manager: Legal Compliance and**  
**Company Secretary**

**Mr. Jeremia P. Shalukeni**  
**Legal Compliance Intern**

#### **DISABILITY ACCEPTABLE TERMINOLOGY**

| <b>ACCEPTABLE/ USABLE</b>                                         | <b>UNACCEPTABLE/AVOIDABLE</b><br>(Includes any vernacular that directly translates into these terms/words)                                   |
|-------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| Persons with disabilities                                         | Disabled person or handicapped people, person/ persons living with disabilities                                                              |
| Person(s) with a disability                                       | Crippled, deformed, suffers from, affected by or victim of, invalid or any medical label; physically/mentally challenged or differently able |
| Disability or impairment                                          | Handicap, deformity or defect                                                                                                                |
| Wheelchair user or who uses a wheelchair                          | Wheelchair bound or confined to a wheelchair                                                                                                 |
| Person without a disability, non-disabled person, sighted person  | Normal person, Healthy Whole                                                                                                                 |
| Person with an intellectual disability or psychosocial disability | Mental retarded/deficient, insane, brain damage, learning disabled and slow learner, abnormal, sound mind, mentally disabled                 |
| Person with physical disability                                   | Cerebral palsied and spastic/epileptic/paraplegic/quadriplegic                                                                               |
| Person with albinism                                              | Albino                                                                                                                                       |
| Person with short stature                                         | Dwarf and midget                                                                                                                             |
| The deaf person, unable to speak, uses synthetic speech           | Deaf-mute or deaf and dumb, hearing impairment                                                                                               |
| Deaf-blind                                                        | Deaf and blind                                                                                                                               |
| Visually impairment                                               | Blind person                                                                                                                                 |
| Person with epilepsy                                              | Epileptic                                                                                                                                    |
| Seizure                                                           | Fit                                                                                                                                          |
| Person who has multiple sclerosis                                 | Afflicted by MS, victim of                                                                                                                   |
| Lives with/has/experiences a disability/impairment                | Suffers from                                                                                                                                 |
| Person who had polio, person with post-polio paralysis            | Post-polio, suffered from polio                                                                                                              |

|                                                                                                                                                                                                                                                |                                                                                                   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| Person with a developmental disability, person with mental retardation, person with a developmental delay, person with Down syndrome or person whose brain is injured, has traumatic brain injury, is brain damaged, with a closed head injury | Retard, mentally defective, moron, idiot, slow, imbecile, feeble-minded, Down's person, mongoloid |
| Person with cerebral palsy                                                                                                                                                                                                                     | CP victim, spastic                                                                                |
| People with emotional disorders, mental illness, mental health disability, psychiatric disability                                                                                                                                              | Crazy, maniac, lunatic, insane, nuts, deranged, psycho, demented                                  |
| Person who has a learning disability                                                                                                                                                                                                           | Slow learner, retarded                                                                            |
| Accessible parking, parking for people/persons with disabilities, accessible toilet, toilet for persons with disabilities                                                                                                                      | Disabled parking, disabled toilet, handicapped toilet, toilet for disabled, parking for disabled  |
| People living in poverty, people living in situations of vulnerability, people living in situations that make them more vulnerable to                                                                                                          | The poor, vulnerable people/groups (although the UN use the term vulnerable groups)               |
| Use gender neutral language such as referring to a person by their role rather than their gender: e.g. 'A doctor was running the hospital.'                                                                                                    | Gender information unless necessary: e.g. 'A woman doctor was running the hospital.'              |
| Language which shows respect for local context and the challenges of individual situations such as: 'X's family had not been told there was a way that they could help X to go to school.'                                                     | Language of blame such as: 'X's family didn't care about her and so didn't send her to school.'   |

## ACRONYMS

|          |                                                                                                               |
|----------|---------------------------------------------------------------------------------------------------------------|
| ACE:     | African Committee of Experts on the Rights and Welfare of the Child                                           |
| ACHPR:   | African Charter on Human and Peoples' Rights African Court of Human and Peoples' Rights                       |
| AfDP:    | African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa             |
| AU:      | African Union                                                                                                 |
| CIADDIS: | Inter American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities |
| CJEU:    | Court of Justice of the European Union                                                                        |
| CoE:     | Council of Europe                                                                                             |
| CRC:     | United Nations Convention on the Rights of the Child                                                          |
| CRPD:    | United Nations Convention on the Rights of Persons with Disabilities                                          |
| ECHR:    | European Convention on Human Rights and Fundamental Freedoms                                                  |
| ECtHR:   | European Court of Human Rights                                                                                |
| EU:      | European Union                                                                                                |
| IACHR:   | Inter-American Commission on Human Rights                                                                     |
| IACtHR:  | Inter-American Court of Human Rights                                                                          |
| ICCPR:   | International Covenant on Civil and Political Rights                                                          |
| ICESCR:  | International Covenant on Economic, Social and Cultural Rights IVF: In Vitro Fertilisation                    |
| MDA:     | Mental Disorders Act                                                                                          |
| NDP5:    | 5th National Development Plan                                                                                 |



|       |                                                                                                                                                                                          |
|-------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| OAS:  | Charter: Charter of the Organisation of American States OAU: Organisation of the African Unity                                                                                           |
| OPD:  | Organisations of Persons with Disabilities Standard Rules: Standard Rules on the Equalisation of Opportunities for Persons with Disabilities UDHR: Universal Declaration of Human Rights |
| UDHR: | Universal Declaration of Human Rights                                                                                                                                                    |

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## 1. Introduction

Namibia has ratified regional and international human rights instruments that directly or indirectly provide for the rights of people with disabilities. This means, inter alia, that it has an obligation to enact the relevant legislation and policies that give effect to its obligations under these treaties. Such legislation and policies should not only be based on the texts of these treaties but should also, as much as possible, reflect the jurisprudence and practice of the relevant committees or bodies with the mandate to monitor states parties' compliance with these treaties. Over the years, these treaty bodies have developed rich jurisprudence and practice relevant to the rights and duties of people with disabilities. The purpose of this report is to highlight those jurisprudence and practice which will ultimately indicate the issues that Namibian legislation and policies on the rights of people with disabilities have to address for them to comply with Namibia's international obligations. The report also deals with the practice from other regional human rights systems, in particular the Inter-American, the European and from some African countries, to illustrate some of the best practices that Namibia could adopt from there. The report will also, albeit briefly and broadly, indicate some of the legislative measures that Namibia has put in place to give effect to the rights of people with disabilities. Also included in the report is a highlight of how the Namibian judiciary has dealt with the rights of people with disabilities in the criminal justice system.

## 2. Background

The modern human rights framework setup traces back to the United Nations Charter of 1945 which amongst others recognised the need to promote the respect and protection of human rights to maintain world peace, stability and prosperity. The experience of the atrocities committed by people to fellow human beings during the world wars catalysed the development of political institutions and instruments including the International Bill of Human Rights: The Universal Declaration of Human Rights (UDHR, adopted in 1948), the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966) with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966).<sup>1</sup> Article 1 of the UDHR begins by recognising that "All human beings are born free and equal in dignity and rights."<sup>2</sup> It then states in the first part of Article 2 states that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 of the UDHR recognises the right to equality and proclaims that:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The principles of equality and non-discrimination proclaimed in the UDHR are restated in the ICCPR under Articles 2(1) and 26, and in the ICESCR under Article 2(2). However, in formulating the grounds for non-discrimination, the International Bill of Human Rights and the subsequent core treaties do not explicitly mention disability as a protected ground. Theoretically, disability is included in the collective term 'other status', and in the inclusive language of the core post-war treaties, that 'everyone' is born free and equal in dignity.<sup>3</sup> Theoretically, persons with disabilities enjoyed human rights as everyone else.

<sup>1</sup> A Kanter. *The development of disability rights under international law: From charity to human rights* (2015) 22-24.

<sup>2</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III).

<sup>3</sup> These core treaties include the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW, 1990), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED, 2006), and, finally, the Convention on the Rights of Persons with Disabilities (CRPD, 2006); See United Nations, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (Accessed 9 September 2019).

In practice, however, persons with disabilities found it difficult to enforce their rights under the core treaties.<sup>4</sup> It is only with the adoption of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), and its Optional Protocol, on 13 December 2006, and their coming into force on May 3, 2008 that for the first time an international treaty provided for the comprehensive protection of the rights of persons of persons with disabilities.

The CRPD sets itself apart as the primary international legal instrument that has comprehensively articulated and reaffirmed the human rights of persons with disabilities and provided for a robust mechanism for monitoring their implementation. It is arguably the most important treaty of the 21st century. The CRPD articulates the legal standards, but it is for each state party to implement the measures that are needed to guarantee its subjects human rights as recognised in the treaty. Incorporating standards into domestic laws, in other words, domestication, involves three possible processes. It could be by creating new legislation, or reforming of existing legislation, or when national tribunals draw on treaty norms in determining legal rights of subjects. For countries that follow the monist system, the rules on international law and municipal law are, in theory of equal force, so that international law is enforceable by municipal courts directly.<sup>5</sup> On the basis of Article 144 of the Constitution,<sup>6</sup> the Namibian Supreme Court has held that once Namibia has ratified or acceded to a treaty, it becomes part of Namibian law.<sup>7</sup>

In dualist legal systems, international rules and municipal law are two separate systems, the state party must undertake an act of incorporation for international law to become enforceable. Sometimes, but not always, this means adopting the rules as they are in the standard-setting document.<sup>8</sup> In some cases, states parties will modify the norms, often in ways that water down the international standards.

Taking the CRPD as the frame of reference, this report follows the development of standards and norms on the protection of the human rights of persons with disabilities. It explores how the CRPD has and continues to influence regional systems and domestic systems as these adapt and align themselves with the CRPD

### 3. Disability rights and the United Nations

#### 3.1. The CRPD entrenches an important paradigm shift

The UDHR was the first UN instrument to mention disability in the following terms: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>9</sup> When the UDHR was framed, disability was conceptualised under the social welfare and medical models, as a condition requiring treatment or rehabilitation, much like sickness or misfortune, rather than as a status or a result of the person's interaction with society.<sup>10</sup>

<sup>4</sup> MA Stein & JE Lord 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, ed. Arnardóttir OM & Quinn G (2009) 18.

<sup>5</sup> TP Van Reenen & H Combrinck 'The UN convention on the rights of persons with disabilities in Africa: Progress after 5 years' (2011) 8 *Sur* 145.

<sup>6</sup> Article 144 of the Constitution provides that 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

In *Chairperson of the Tender Board of Namibia v Pamot Trading Enterprises CC and Circle Hospitality Services (PTY) LTD* (SA 87/2014) [2016] NASC 6 (17 November 2016) para 40, the Supreme Court held that 'The right to freedom of expression including "freedom to seek, receive and impart information" is set out in Art. 19 of the International Covenant on Civil and Political Rights which Namibia acceded to on 28 November 1998 and thus, by virtue of Art 144 of the Constitution forms part of the law of Namibia, as was acknowledged by this court in *Namunjepe v Commanding Officer, Windhoek Prison* 1999 NR 271 at 284I – 285D. It follows that the right to freedom of expression enshrined in Art 21 (1) of the Constitution includes the right to receive and impart information without interference by public authority.' Likewise, in *J J T v A I E* (SA 17/2005) [2012] NASC 19 (12 October 2012) para 18, the Supreme Court held that 'in Namibia, international agreements such as the Convention [United Nations Convention on the Rights of the Child], appear to have similar force of law as accorded to legislation, in the absence of any constitutional provision or Act of Parliament contradicting the law or agreement in question.' See also generally Government of the Republic of Namibia and Another v *Cultura 2000 and Another* (SA 2/92) [1993] NASC 1 (15 October 1993) (on the effect of Articles 144 and 145 of the Constitution); *Waterberg Big Game Hunting Lodge Ojshewita (Pty) Ltd v Minister of Environment & Tourism* (SA13/04 ) [2005] NASC 9 (23 November 2005); *S v Mushwena and Others* (SA4/04 ) [2004] NASC 2 (21 July 2004) (in which the Court mentions several international treaties which have become part of Namibian law through ratification). In *Shilengudwa and Another v Prosecutor-General and Others* (HC-MD-CIV-MOT-GEN-2020/00374) [2023] NAHCMD 496 (11 August 2023) para 89, the Court held that Article 44 shows that 'seriousness and commitment in respect of Namibia's international obligations'.

<sup>8</sup> Van Reenen & H Combrinck (2011) 145.

<sup>9</sup> Section 4 of the Child Care and Protection Act, 2015.

<sup>10</sup> Section 5 of the Child Care and Protection Act, 2015.

This perceptive continued to shape formulations of subsequent international and regional instruments that addressed disability. The concept of disability rights did not yet exist at the international level, therefore, persons with disabilities were not recognised as having the right to claim human rights as a group.<sup>11</sup> In fact, none of the subsequent core human rights treaties prior to the CRPD recognised persons with disabilities as category worthy of legal protection, except the United Nations Convention on the Rights of the Child (CRC) that refers to children and parents with disabilities in Articles 2 and 23. Even then, these two provisions do not state in unequivocal terms that children with disabilities should be treated on an equal basis with children without disabilities.<sup>12</sup>

Failure to recognise that persons with disabilities deserve human rights protections has meant that despite the human rights treaties using the language of ‘universal human rights without distinction of any kind’, persons with disabilities have been systematically denied the enjoyment of rights on equal basis with persons without disabilities. For instance, the right to vote is considered a basic civil right, yet persons with disabilities have largely been excluded from realising this right because no accommodations are made for them to vote. Another example is the right to education which is rendered meaningless for learners and students who are deaf, blind, or have an intellectual or learning disability when reading and learning materials are not available for them in a format they can access and understand.<sup>13</sup>

Over the years, persons with disabilities continued to advocate for recognition. Eventually, the UN responded by developing various instruments and programs recognising the need to promote and protect the rights of persons with disabilities. In the 70s, the UN began to modify its orientation and shift towards a human rights approach. It adopted the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons to address disability as a human rights concern.<sup>14</sup> However, though the UN declarations were intended to mark a shift from a focus on welfare and rehabilitation to a human rights-based approach, they, nonetheless, failed to capture the role played by society in creating disability.

The 80s and 90s saw the UN gradually abandon a medical approach to remedying disability. In 1982, the General Assembly adopted the World Programme of Action Concerning Disabled Persons<sup>15</sup> which in turn was to guide the UN Decade of Disabled Persons (1983- 1992).

<sup>16</sup> The cardinal goal under the World Programme of Action was securing ‘equal opportunities’ for disabled people. ‘Equality of opportunities’ was conceived as ‘the process through which various systems of society such as the physical and cultural environment, housing, and transport, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, *are made accessible to all*’.<sup>17</sup>

Another important development in the 80s and 90s was the attempt to move towards the adoption of a global treaty dedicated to protecting the human rights of disabled people. The most significant development during this period was the adoption by General Assembly of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules) in 1993.<sup>18</sup> Equalisation of Opportunities under the Standard Rules principally means removing barriers so as to ensure that impairments do not disable. The equality duty upon Member States was to ensure that ‘the various systems of society and the environment, such as services, activities, information and documentation are made available to all, particularly persons with disabilities’.<sup>19</sup> However, while the Standard Rules, unlike the earlier UN declarations, signalled the advent of an approach to disability as a substantive equality the Rules were, nonetheless, a mere resolution of the UN and not part of an international treaty.

<sup>11</sup> Established in terms of Section 11 of the Child Care and Protection Act, 2015

<sup>12</sup> Section 145 (3) (n).

<sup>13</sup> Section 6 read with Section 7 of the Basic Education Act, 2020.

<sup>14</sup> Section 4 and 14 of the Basic Education Act, 2020.

<sup>15</sup> Section 34 of the Basic Education Act, 2020.

<sup>16</sup> The spouse pension is 40% of the permanent disability the deceased person received or was entitled to receive. The orphan’s pension is 20% of the permanent disability pension the deceased person received or was entitled to receive. The orphan’s pension is available until the child reaches the age of 18 years. However, the orphan pension ceases even before 18 years if the child marries before turning 18.

<sup>17</sup> Regulation 23C and 23G.

<sup>18</sup> Section 89(2)(g), 91(1)(b), 103(1)(a) of the Electoral Act, 2014.

<sup>19</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.

<sup>20</sup> Article 4 of the CRPD.

These initiatives progressively culminated in the CRPD, which is a milestone in the evolution of the concept of disability rights. The CRPD represents but also entrenches a paradigm shift described by the UN High Commissioner for Human Rights in these words:

the Convention enshrines a “paradigm shift” in attitudes that moves from a view of persons with disabilities as objects of charity, medical treatment and social protection to subjects of rights, able to claim those rights as active members of society.<sup>20</sup>

The prevailing meanings of disability had been through the charity/welfare and medical models, where society perceived persons with disabilities as objects of pity, recipients of welfare and services, and primarily as subjects for rehabilitation.<sup>21</sup> This gradually gave way to the social model in which disability is understood as socially constructed, which is to say that disability is the meaning and value which society assigns to differences based on personal traits. Disability is not simply a condition that is inherent in a person, it is a complex collection of conditions, created by the social environment and the value that society assigns to the person.<sup>22</sup> It is in these acts of valuation of people that society marginalises and devalues persons with disabilities, so that, for instance, the education system is designed to cater only for students without disabilities but not those students who are deaf, visionally impaired, or have intellectual and learning disabilities. The awareness that it is society that disables people led to the insight that it is not simply help, welfare services or rehabilitation that would change things for persons with disabilities, but a radical revaluation of people. Previous human rights treaties laid the framework for this revaluation, but it is the CRPD that finally effects the seismic shift. To achieve this the CRPD, without creating any new rights, reworks with the same traditional human rights to include persons with disabilities in a manner that is novel. The CRPD’s effort, as Frédéric Mégret puts it, is a very subtle mix of the old and the new, which confirms existing rights even as it amplifies upon, evolves from and even departs from them in the sort of creative ways required by the issue of disability.<sup>23</sup>

Mégret suggests that the CRPD works with previously articulated human rights standards and concepts in four ways: It affirms, it reformulates, it extends, and it innovates. This report adopts this schema as described by Mégret to explain how the CRPD achieves a paradigm shift by interpreting traditional human rights to bring out a fresh way of perceiving persons with disabilities as subjects of human rights, without creating rights that were not already recognised in traditional human rights treaties.

First, the CRPD restates and reaffirms rights just as they are articulated in the other human rights treaties.<sup>24</sup> The CRPD calls on states parties to re-recognise their obligations to promote, protect and ensure the full realisation of human rights and fundamental freedoms for persons with disabilities.

These include the right to life, recognition before the law, liberty and security of person, respect for physical and mental integrity, liberty of movement, to marry and found a family, education, the highest attainable standard of health, to work, an adequate standard of living, social protection, and to take part in cultural life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom to choose one’s residence and to a nationality, freedom of expression and opinion, and freedom from arbitrary or unlawful interference with his or her privacy. In restating the traditional human rights, the CRPD draws attention to persons with disabilities by unambiguously prohibiting discrimination against persons with disabilities, something which other treaties have only done implicitly when they prohibit discrimination based on ‘other status’.

<sup>21</sup> Countries must protect the physical and mental integrity of persons with disabilities, just as for everyone else (Article 17), guarantee freedom from torture and from cruel, inhuman, or degrading treatment or punishment, and prohibit medical or scientific experiments without the consent of the person concerned (Article 15). Laws and administrative measures must guarantee freedom from exploitation, violence, and abuse. In case of abuse, States shall promote the recovery, rehabilitation and reintegration of the victim and investigate the abuse (Article 16).

Persons with disabilities are not to be subjected to arbitrary or illegal interference with their privacy, family, home, correspondence, or communication. The privacy of their personal, health and rehabilitation information are to be protected like that of others (Article 22).

<sup>22</sup> Article 6 of the CRPD.

<sup>23</sup> Article 7 of the CRPD.

<sup>24</sup> Article 24 of the CRPD.



It is important for the CRPD to affirm these rights for persons with disabilities to emphasise that they apply to persons with disabilities. Secondly, beyond restating human rights, the CRPD presents certain rights in a new way by adding new language to familiar formulations, and by spelling out in substantial detail how states should realise human rights of persons with disabilities so that these rights do not remain abstract.<sup>25</sup> The CRPD does this, for instance, with the right to equal recognition before the law.<sup>26</sup> Instead of just affirming that “persons with disabilities have the right to recognition everywhere as persons before the law,”<sup>27</sup> it adds further text to bring out the meaning that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life,”<sup>28</sup> and that persons with disabilities must have access to “the support they require in order to exercise their legal capacity.”<sup>29</sup>

The CRPD goes on to articulate the obligations of states to realise this rights, including to “ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.”<sup>30</sup> The CRPD gives a detailed explanation of what these safeguards should be.<sup>31</sup>

The CRPD does the same with other rights, including the right to security and liberty of the person, freedom of expression and opinion, the right to privacy, education, work and adequate standard of living.<sup>32</sup> Therefore, the CRPD not only reaffirms the previously recognised human rights provisions, but it reformulates them to show how they specifically apply to persons with disabilities, and what state obligations these entail.

The third way the CRPD uncovers new shades of meanings to human rights is to emphasize certain rights that in their classical formulation have not been articulated independently but rather are inferred or extrapolated from other rights. What the CRPD does is to recognise these directly by incorporating them in the CRPD as separate categories independent from the rights from which they draw. Owing to this, these rights appear to be novel and yet the CRPD is not making up new rights because these rights are already recognised albeit indirectly through inference and extrapolation.

One such right is freedom from exploitation, violence and abuse in Article 16 of the CRPD. No previous treaty has articulated this freedom in such a manner. The CRPD is the first to present it as a self-standing right. Yet it is not a new right. It is there but has been understood as deriving from or an extrapolation of a combination of rights, including the right to life, liberty and security of the person and freedom from torture, cruel, inhuman and degrading treatment or punishment.<sup>33</sup>

The CRPD, without creating a new right, crafts an ‘existing’ right to stand alone. The aim of the CRPD is to emphasize rights that speak to the experience of persons with disabilities. For instance, exploitation, violence and abuse has been an all too common experience for persons with disabilities even in those spaces that are assumed to be safe for everyone such as the home.<sup>34</sup>

By positing freedom from exploitation, violence and abuse as an independent category, the CRPD is then able to make visible a fundamental right that otherwise tends to be buried under layers of inference and extrapolation.

Another example is the “right to participation” which in the CRPD is framed under the general principles of the CRPD as “full and effective participation and inclusion in society.”<sup>35</sup> Again, just like freedom from exploitation, violence and abuse, participation is not traditionally a self-standing right in other treaties. However, it has always been there. In the UDHR it appears as participation in cultural life under Article 27(1). In the ICCPR, it appears as the right to participate in public affairs under Article 25. However, the CRPD gives participation more emphasis.

<sup>25</sup> Mégret (2008) 503.

<sup>26</sup> Mégret (2008) 503.

<sup>27</sup> Art 12(1) CRPD.

<sup>28</sup> Art 12(2) CRPD.

<sup>29</sup> Art 12(3) CRPD.

<sup>30</sup> Art 12(3) CRPD.

<sup>31</sup> Art 2(4) CRPD.

<sup>32</sup> Mégret (2008) 503.

<sup>34</sup> Mégret (2008) 508.

<sup>35</sup> Mégret (2008) 508.



It calls upon states to guarantee participation of persons with disabilities in political and public life and stipulates in more detail the obligations this entails such as “ensuring voting procedures, facilities and materials are appropriate, accessible, and easy to understand and use.”<sup>36</sup> It also affirms the right to participation in cultural life, recreation, leisure and sport. The CRPD, therefore, articulates participation in a way that broadens the zones of participation to include community and education. Just as the CRPD did with ‘freedom from exploitation, violence and abuse’ it puts participation in the limelight because it has been taken for granted for persons without disabilities. Participation in community and many aspects of life have been denied of person, and this is why the CRPD gives it emphasis.

The fourth way in which the CRPD transforms traditional human rights concepts is innovation, which Mégret describes as coming very close to “either creating new rights or formulating rights the formulating rights in the context of disability that have never been framed as such.”<sup>37</sup> The CRPD does this with autonomy. Ngwena observed that “the CRPD inscribes autonomy as one of its key principles and is the first human rights treaty to do so.”<sup>38</sup> Mégret claims that the CRPD’s just falls short of being proclaiming autonomy as a human right.<sup>39</sup> The CRPD corrects this by highlighting aspects of the lives of persons with disability that reflect the failure to appreciate autonomy. The limelight of this is when it recognises legal capacity as a component of the right to recognition before the law.<sup>40</sup> Autonomy means the ability of persons to exercise free and autonomous choice.

The CRPD vests in ensuring that persons with disabilities are not denied autonomy to live independently, to develop their full physical, mental, social and vocational abilities fully, to have a sexual life, and to take up responsibilities they want such as parenting. In fact, the CRPD makes autonomy its cardinal goal.<sup>41</sup>

### **3.2. The work of the Committee on the Rights of Persons with Disabilities**

#### **3.2.1. Overview**

The Committee on the Rights of Persons with Disabilities (Committee, Committee on RPD) is the body of independent experts whose work is to monitor the implementation of the CRPD by states parties. It fulfils this function in several ways. First, it receives and considers the reports of states parties on measures they have taken to implement the CRPD.

Following its consideration of a state party’s report, the Committee issues its opinions in the Concluding Observations. Second, the Committee issues authoritative interpretations of any part or aspect of the treaty through General Comments for the guidance of states parties or relevant institutions in applying the CRPD. Finally, by virtue of the Optional Protocol to the CRPD, the Committee is competent to entertain individual complaints from states parties that recognise the jurisdiction of the Committee.

So far, the Committee has published eight General Comments.<sup>42</sup> The Committee has also issued a number of communications from the complaints it has received since its inception.

#### **3.2.1. A highlight of Articles of the CRPD discussed in the General Comments**

##### *Article 12 – Equal recognition before the law*

One of the areas in which persons with disabilities have been discriminated against pervasively, especially persons with intellectual, mental and psychosocial disabilities is legal capacity. The Committee on RPD emphasises that Article 12 affirms that persons with disabilities have the right to full legal capacity, and the recognition of this right is indispensable for the exercise of other rights.

<sup>36</sup> Article 29(a)(i) CRPD.

<sup>37</sup> Mégret (2008) 510.

<sup>38</sup> CG Ngwena ‘Reproductive autonomy of women and girls under the Convention on the Rights of Persons with Disabilities’ (2018) 140 International Journal of Gynecology & Obstetrics 3.

<sup>39</sup> Mégret (2008) 511.

<sup>40</sup> Mégret (2008) 511.

<sup>41</sup> Ngwena (2018) 3.

This right impinges on the person's capacity to make their own decisions about various aspects of their lives. A deprivation of the right leads to the deprivation of many other rights including the right to vote, right to marry, reproductive rights, consent to medical treatment and consent to sex.<sup>43</sup>

According to the Committee on RPD, legal capacity has two components: the ability to hold rights and duties (legal standing), and to exercise those rights and duties (legal agency). The Committee advises that using terms such as 'unsound mind' and other discriminatory labels should not be reasons for denying persons with disabilities legal capacity.<sup>44</sup>

The obligations of the state include to provide the necessary support to enable persons with disabilities to exercise legal capacity. This means respecting the will and preferences of persons with disabilities which should not amount to substituted decision-making.<sup>45</sup> Rather, person with disabilities must be supported to make their own decisions. States must take steps including provide for reasonable accommodation to ensure that persons with disabilities enjoy the right to legal capacity on equal basis with others.

### *Article 9 – Accessibility*

The crux of the right is stipulated in Article 9(1) in the following manner:

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

Accessibility is another important area in which persons with disabilities have experienced pervasive discrimination. It is a right which has been taken for granted for persons without disabilities. The built environment, transport systems, and information and communication technology have often been inaccessible to persons with disabilities. To live as independently as possible and participate in all aspects of community life, everyone must realise the right to accessibility as a precondition.<sup>46</sup>

The right to accessibility obliges states to apply universal design to goods, facilities, services, products and technologies to allow all persons including persons with disabilities easy access.<sup>47</sup> According to the Committee on the RPD, the duty of states parties to implement accessibility is unconditional, and states parties may not excuse themselves from meeting their obligations by claiming that it is financially burdensome to do so.<sup>48</sup>

### *Article 24 – The right to inclusive education*

Many persons with disabilities have been denied education because of prejudicial views against them. Education systems have been designed for persons without disabilities and have excluded persons with disabilities. Ensuring inclusive education means transformation in culture, policy and practice to accommodate everyone's needs including persons with disabilities. The Committee on CRPD defined inclusion as:

[A] process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences.<sup>49</sup>

<sup>42</sup> See, United Nations, Committee on the Rights of Persons with Disabilities, <https://www.ohchr.org/en/treaty-bodies/crpd/general-comments> (Accessed 01 April 2024).

<sup>43</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No 1: Article 12: Equal recognition before the law, CRPD/C/GC/1, (2014), para 8.

<sup>44</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.1) para 13.

<sup>45</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.1) para 17.

<sup>46</sup> The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States parties.

<sup>47</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.2) para 15.

<sup>48</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.2) para 25.

<sup>49</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 On the right to inclusive education, CRPD/C/GC/4, (2016) para 11.

Education must be designed to enable persons with disabilities to participate fully and effectively in a free society. In order to achieve this, states must provide support and reasonable accommodation without any cost to the person.

The Committee on CRPD drew upon the recommendation of the Committee on Economic Social and Cultural Rights on the right to education which advises that inclusive education should reflect the following features; availability, accessibility, acceptability and adaptability.<sup>50</sup> States must guarantee availability of places for learners with disabilities in public and private educational institutions. The educational facilities must also be fully accessible for persons with disabilities in terms of obligations that flow from Article 9 on accessibility. The design of the educational system must take into account the views and needs of persons with disabilities. The educational system must be flexible and adapt rather than rigid, to provide reasonable accommodation for persons with disabilities.

#### *Article 19 – Living independently and being included in the community*

Persons with disabilities were largely condemned to live a life of dependency on others and at the same time excluded from participating in the life of the community. Living independently and making choices about how one wants to live is part of personal autonomy. Persons with disabilities must also be allowed to exercise choice about their daily activities rather than be controlled.

Sometimes persons with disabilities have been taken out of the community and institutionalised under conditions that do not envisage integrating them in the community. Independent living is first and foremost about “not losing personal choice and autonomy as a result of the imposition of certain life and living arrangements.”<sup>51</sup> Persons with disabilities have the right to choose their own independent living arrangements. The state must ensure that persons with disabilities have the support they need to exercise their choice. This includes individualised support tailored to the needs of the person.

#### *Article 5 – Equality and non-discrimination*

Equality and non-discrimination are the most fundamental values of international human rights law. The Committee describes a new model of inclusive equality that has four dimensions:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity.<sup>52</sup>

State parties have the duty to eliminate all forms of discrimination that manifest in several forms: direct discrimination, indirect discrimination, denial of reasonable accommodation and harassment. The other three forms can in principle be experienced by anyone, but denial of reasonable accommodation pertains more to persons with disabilities. Reasonable accommodation means transforming or refashioning the world in such a manner that recognises that persons with disabilities have the same rights as everyone. It means dismantling those social barriers erected for persons with disabilities. Discrimination is any attitude or practice that maintains these barriers. Failure to provide reasonable accommodation is one way of maintaining such barriers and is therefore discrimination. The duty to provide reasonable accommodation can be understood as made up of two parts. The first part imposes legal duty on states to make the necessary modifications and adjustments to ensure that a person with disability can enjoy his or her rights.

<sup>50</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No. 4) para 20.

<sup>51</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 5 On living independently and being included in the community, CRPD/C/GC/5, (2017) para 16.

<sup>52</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 On equality and non-discrimination, CRPD/C/GC/5, (2018) para 18.

The second part recognises that providing reasonable accommodation should not impose a disproportionate burden on the duty bearer.<sup>53</sup> The Committee on RPD makes a distinction between reasonable accommodation and affirmative measures:

While both concepts aim at achieving de facto equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights.<sup>54</sup>

States are therefore obligated to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality, including, to modify or abolish existing laws and regulations, customs and practices that discriminate against persons with disabilities, for instance, guardianship laws, forced institutionalisation, non-consensual sterilisation, segregated education, and marriage laws that exclude persons with disabilities from founding a family.

#### *Article 6 - Women and girls with disabilities*

Women and girls with disabilities experience various forms of discriminatory practices. This situation is compounded by patriarchy and cultural practices in many African countries. Thus, women and girls with disabilities are often treated with ignominy and unable to live a dignified life as envisaged in human rights instruments such as the CEDAW and CRPD. Under the CRPD, a special attention is paid to the need of women and girls who on daily basis encounter stigma and discrimination. Women and girls may experience multiple forms of discrimination by reason of gender, disabilities and social status.

Taking the peculiar situations of women and girls with disabilities into consideration, the Committee in its General Comment 3 notes that women and girls with disabilities are not a homogenous group but may include refugees, asylum seekers, internally displaced women, women in detention, indigenous women, women living in poverty and women from different religious or ethnic backgrounds.<sup>55</sup> The Committee reasons that gender equality is crucial to the enjoyment of human rights. It declares that: Ensuring the human rights of women requires, first and foremost, a comprehensive understanding of the social structures and power relations that frame laws and policies, as well as of economic and social dynamics, family and community life, and cultural beliefs.

Ensuring the human rights of women requires, first and foremost, a comprehensive understanding of the social structures and power relations that frame laws and policies, as well as of economic and social dynamics, family and community life, and cultural beliefs. Gender stereotypes can limit women's capacity to develop their own abilities, pursue professional careers and make choices about their lives and life plans.<sup>56</sup>

According to the Committee, reference to multiple levels of discrimination in article 5 (2) of the CRPD requires states to not only 'prohibit any kind of discrimination based on disability, but also to protect against discrimination on other grounds'.<sup>57</sup> The Committee further asserts that by the provisions of article 2 of the CRPD the principle of reasonable accommodation is recognised, which requires states to 'ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.<sup>58</sup> The Committee identifies five types of discriminations, which include (a) direct discrimination; (b) indirect discrimination; (c) discrimination by association; (d) denial of reasonable accommodation; and (e) structural, or systemic, discrimination. Irrespective of the form it takes, the impact of discrimination violates the rights of women with disabilities.

<sup>53</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.6) para 25.

<sup>54</sup> UN Committee on the Rights of Persons with Disabilities (General Comment No.6) para 25.

<sup>55</sup> CRPD Committee General Comment 3 on Women and girls with disabilities adopted in 2016.

<sup>56</sup> See para 8.

<sup>57</sup> See Committee on the Elimination of Discrimination against Women, general recommendation No. 25, para. 12.

<sup>58</sup> General Comment 3 (n 55) para 15.

The Committee highlights steps that states must take in order to address gender inequalities experienced by women and girls. These include reforms of laws and policies that are discriminatory against women and girls in general, and women and girls with disabilities in particular.<sup>59</sup> In this regard, states are to repeal all discriminatory laws and practices and enact laws and policies that safeguard the rights and freedoms of women and girls with disabilities. States are to refrain from taking steps that may undermine the rights to equality of women and girls with disabilities.<sup>60</sup> More importantly, states are to ensure that the activities of a third party do not interfere with the right to equality of women and girls with disabilities.<sup>61</sup> Equally, states are to adopt positive measures, including administrative, judicial and financial that would ensure that women and girls with disabilities enjoy their rights to equality.<sup>62</sup>

*Articles 4.3 and 33.3 Participation of person with disabilities in the implementation of the Convention*

In this General Comment, the Committee explains the importance of two provisions of the CRPD in relation to involving persons with disabilities and organisations of persons with disabilities in decision-making process at the national level.<sup>63</sup> The first being Article 4 (3), which requires states to work with organisations of persons with disabilities (OPD) when enacting laws and during implantations of those laws.

The second relates to Article 33(3), which requires states to consult persons with disabilities whether they are truly enjoying the rights in the CRPD and how the governments can better implement the CRPD at the national level.

The Committee explains that it is important that states and other stakeholders include persons with disabilities and organisations of persons with disabilities in decision-making that relates to the implementation of the CRPD and other national laws in their countries. According to the Committee, OPD must be led, directed and controlled by persons with disabilities. A majority of members must be recruited from persons with disabilities themselves. In the Committee's view, the following should be considered as essential characteristics of OPD:<sup>64</sup>

They are established predominantly with the aim of collectively acting, expressing, promoting, pursuing and/or defending the rights of persons with disabilities and should be generally recognized as such;

They employ, are represented by, entrust or specifically nominate/appoint persons with disabilities themselves;

They are not affiliated, in the majority of cases, to any political party and are independent from public authorities and any other non-governmental organizations of which they might be part/members of;

They may represent one or more constituencies based on actual or perceived impairment or can be open to membership of all persons with disabilities;

They represent groups of persons with disabilities reflecting the diversity of their backgrounds (in terms of, for example, sex, gender, race, age, or migrant or refugee status). They can include constituencies based on transversal identities (for example, children, women or indigenous people with disabilities) and comprise members with various impairments;

They can be local, national, regional or international in scope;

They can operate as individual organizations, coalitions or cross-disability or umbrella organizations of persons with disabilities, seeking to provide a collaborative and coordinated voice for persons with disabilities in their interactions with, among others, public authorities, international organizations and private entities.

<sup>59</sup> General Comment 3 para 24.

<sup>60</sup> General Comment 3 para 25.

<sup>61</sup> General Comment 3 para 26.

<sup>62</sup> General Comment 3 para 27.

<sup>63</sup> CRPD Committee General Comment 7 on articles 4 (3) and article 33 (3) of the CRPD.

<sup>64</sup> See para 11.



The Committee explains that a distinction must be made between organisation of persons with disabilities and organisation for persons with disabilities. While the former relates to organisations made up of persons with disabilities championing their own cause, the latter could be civil society groups advocating for the rights of persons with disabilities.<sup>65</sup> While the Committee recognises that organisations of persons with disabilities may belong to mainstream civil society groups, nonetheless, it notes that organisations of persons with disabilities are a unique form of civil society group made up of mainly persons with disabilities. The Committee enjoins states to give priority to the interests of OPD and ensure that they receive the needed support to enable them function effectively.<sup>66</sup> In addition, states must ensure that persons with disabilities, including women and children are accorded the full right to participate in decision-making affecting their rights.<sup>67</sup> The Committee further urge states to ensure transparency in involving organisations of persons with disabilities in decision-making process. Moreover, States are to facilitate access to information and communication devices for persons with disabilities and organisations of persons with disabilities to enable them participate meaningfully in decision-making process.

### 3.2.3. Selected decisions on individual complaints

Since its inception, the Committee has received and determined several communications. Innocentia Mgijima-Konopi has discussed some of these including *HM v Sweden*, *Szilvia Nyusti and Péter Takács v Hungary*, *Marie-Louise Jungelin v Sweden*, *Liliane Gröninger v Germany*, *SC v Brazil* and *Zsolt Bujdosó & 5 Others v Hungary*.<sup>68</sup>

This report describes two of the most recent communications the Committee has determined.

#### ***Y v Republic United of Tanzania Communication 023/2014 (Views adopted on 31 August 2018)***

The author, a citizen of Tanzania, was a person with albinism. He alleged that because of his condition, his family abandoned him (and his brother who also had the same disability). In 2008, when killings and violence against persons with albinism escalated in Tanzania, he could not attend school. Furthermore, in 2011 when he was 12 years old, he was attacked by a man with a machete, and had three fingers from his right hand cut off. His attacker also hacked his left shoulder with a machete and due to his injuries he was unable to use his right hand and left arm. The State party did not provide any medical aid or rehabilitation. Since then he had difficulties to go back to school.

The State party initiated an investigation into the crime suffered by the author, which led to the apprehension of three people; his biological father, his step mother, and uncle. However, charges against them were dropped due to lack of evidence. The prosecutor asked for more time to gather the necessary evidence, but two years went by without any development. The author also provided the Committee with evidence of failure to investigate and prosecution perpetrators, including that, out of 72 murders of persons with albinism that occurred in 2000, only 5 were successfully prosecuted.

The author claimed that the State party failed to provide him with protection during his childhood when his life was constantly in danger due to albinism. He also claimed that he suffered humiliations, insults, and marginalisation due to the failure of the State party to prosecute perpetrators. He submitted that the State party had failed to provide a safe and secure environment for persons with albinism to ensure that they are protected from attacks and any form of violence.

The author alleged violations of several human rights provisions protected under the CRPD including the States parties' obligations under Article 4, the right to equality and non- discrimination under Article 5, the rights of children with disabilities under Article 7, the obligation of the state to raise awareness under Article 8, the right to liberty and security of the person under Article 14, freedom from torture or cruel, inhuman or degrading treatment or punishment under Article 15, freedom from exploitation, violence, and abuse under Article 16, protecting the integrity of the person under Article 17 and the right to education under Article 24.

<sup>65</sup> General Comment 7 Para 12.

<sup>66</sup> General Comment 7 para 13.

<sup>67</sup> General Comment 7 paras 44-45.

The Committee found that Article 5 was violated because despite the attacks he suffered, the State party did not take any serious measures to investigate the matter. Since these attacks are a form of violence exclusively directed to persons with disabilities, failure to investigate constituted a form of discrimination against person with albinism.

The Committee found a violation of Article 7 because the State party failed to take the appropriate measures to ensure that children with disabilities share all human rights and fundamental freedoms on equal basis with others.

The Committee noted that despite the discrimination against persons with albinism and the threat to their security, the state did not take any measures to raise awareness, or any initiative to end the situation. The State party's inactivity and passivity therefore amounted to implicit acceptance of the crimes perpetrated against persons with albinism and there a violation of Article 8.

The Committee found that the author had experienced pain and suffering not only because of the acts of violence by non-state actors, but also because of the State party's failure to investigate and punish the perpetrators. It is for this reason that the Committee found the State party to be in violation of Article 15 on freedom from torture, because even if it did not directly cause the physical injury, its failure to investigate and punish perpetrators amounted to psychological torture and ill-treatment.

The Committee observed that, under Article 16 (4) the State party was obligated to take all necessary measures to promote physical, cognitive and psychological recovery, rehabilitation and social integration of persons with disabilities who become victims of any form of exploitation, violence and abuse. It noted that the State party in this matter did not provide such measures to the author when he was attacked resulting in other disabilities. The Committee therefore found that there had been a violation of the author's rights under Article 16 of the Convention.

The Committee also found violation under Article 17 on integrity of the person. It noted that crimes committed against the author had remained unpunished. The state did not provide him with support to live independently and had not taken any measures to prevent similar acts of violence from occurring. Failure to take such necessary measures were a violation of Article 17 as read with Article 4.

Finally, the Committee also found a violation of Article 24 because the State party failed to protect the author from the general climate of increasing violence and attacks that forced him to abandon school at one point, and later when he re-joined school, had difficulties because of the disability sustained after he was attacked.

The Committee therefore held that the State party has failed to fulfil its obligations under Articles 5, 7, 8, 15, 16, 17 read alone and in conjunction with Articles 4 and 24.

***Munir al Adam v Saudi Arabia* Communication 038/2016 (Views adopted 20 September 2018)**

The complainant had a partial impairment in the right ear when he was arrested by Saudi security authorities for suspicion of crimes against the state. While in detention he was tortured which worsened his ear impairment condition. While his hearing could have been saved had he received medical attention sooner, he was denied medical services. Further, throughout his detention he could not have access to legal counsel until a prosecutor recommended death sentence.

The applicant submitted that his case fell within the competence of the Committee because when he was detained by the state party, he had a partial hearing impairment. He claimed violation of his right to freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15) because of his ill-treatment while in detention. He also claimed that the failure to afford him medical services to prevent permanent hearing loss in his ear was an infringement of the right to health under Article 25(b). He further claimed an infringement of his right to access to justice (Article 13) read alone and in conjunction with Article 4 which spells out the obligations of states parties to ensure and promote

the full realisation of all human rights and fundamental freedoms of persons with disabilities without discrimination.

The Committee found that the facts before it disclosed a violation of Article 15. It also found that the applicant's treatment in detention violated his right to be treated with humanity and with dignity and amounted to violence and abuse prohibited by Article 16 which recognises the right to freedom from exploitation, violence and abuse. The Committee also found that Article 13 had been infringed because he was convicted based on forced confession and he was denied assistance of legal counsel. The Committee also concluded that there was a violation of Article 25(b) because despite that the authorities had been aware that he needed urgent surgery to save his ear impairment from becoming permanently worse, the authorities ignored his requests to access medical services.

The Committee therefore held that the State party had failed to fulfil its obligations under Article 13 (1) read alone and in conjunction with Articles 4, 15, 16 and 25 of the Convention.

#### **4. The Organisation of African Unity/African Union**

##### **4.1. Overview of the principal organs and instruments relevant to disability rights**

Independent African states first organised themselves under the Organisation of the African Unity (OAU) with the adoption of the Charter of the OAU on 23 May 1963. Though efforts to address disability in Africa started to take shape in the 1970s, it was only in the late 1990s, spurred by the African Charter on Human and Peoples' Rights,<sup>69</sup> adopted by the OAU in 1981, and entered into force in 1987, that Africa started to pay a more focused attention on the rights of persons with disabilities.<sup>70</sup> This Charter was ratified by Namibia and has been invoked directly in Namibian courts.<sup>71</sup> Other major instruments which were adopted under the OAU include the African Charter on the Rights and Welfare of the Child adopted 1 July 1990 and entered into force on 29 November 1999.<sup>72</sup> This treaty was domesticated in Namibia by the Child Care and Protection Act.

On the official launch of the AU on 9 July 2002 in Durban, the OAU also ceased to exist. The major instruments that mention the rights of persons with disabilities that have been adopted under the AU include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Rights Protocol) adopted on 1 July 2003 and entered into force on 25 November 2005<sup>74</sup> and ratified by Namibia in August 2004; the African Youth Charter adopted on 2 July 2006 and entered into force on 8 August 2009<sup>75</sup> and ratified by Namibia in July 2008; and the African Charter on Democracy, Elections and Governance adopted on 30 January 2007 and entered into force on 15 February 2012<sup>76</sup> and ratified by Namibia in August 2016.

##### **4.2. The Protocol to the African Charter on the Rights of Persons with Disabilities**

A major milestone in disability rights was the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol, AfDP) on 29 January 2018. Namibia acceded to this Protocol in May 2023. The Protocol embodies most of the rights included in the CRPD and its discussion is critical. The discussion below draws on Appiagyei-Atua's comparative analysis of the CRPD and the draft protocol in which he uses Mégret's approach described in the discussion above on the CRPD, to bring out the salient features of the AfDP.<sup>77</sup> This discussion therefore, only highlights the features that make the AfDP different from the CRPD and avoids unnecessary repetitions since the AfDP substantially draws on the CRPD.

<sup>68</sup> See, I Mgijima-Konopi 'The jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for Africa' (2016) 4 ADRY 269.

<sup>69</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5.

<sup>70</sup> K Appiagyei-Atua 'A comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities' (2017) 21 Law, Democracy & Development 155.

<sup>71</sup> In *Prosecutor General v Daniel and Others* (SA 15/2011) [2017] NASC 31 (28 July 2017) para 40, the Supreme Court held that the minimum sentences violated Article 5 of the African Charter. See also *Alexander v Minister of Justice and Others* (Case No.: A 210/2007) [2008] NAHC 19 (02 July 2008) para 64; *Chairperson of the Immigration Selection Board v Frank and Another* (SA8/99) [2001] NASC 1 (05 March 2001); *Chairperson of the Tender board of Namibia v Pamo Trading Enterprise cc and Another (Pty) Ltd* (SA 87/2014) [2016] NASC 8 (17 November 2016) para 38.

<sup>72</sup> Article 13 of the Charter provides for "handicapped children" by guaranteeing a mentally or physically disabled child the right to "special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community".

<sup>73</sup> With the entry into force of the Constitutive Act of the African Union on 26 May 2001, a new institution, the African Union (AU) was created to replace the OAU.

<sup>77</sup> Appiagyei-Atua (2017).

Just as the CRPD, the AfDP reaffirms rights that are recognised in other human rights treaties. These include the right to life, equal recognition before the law, right to liberty, security of person and freedom from torture or cruel, inhuman or degrading treatment or punishment; right to family, right to education, right to highest attainable standard of health, right to work, right to adequate standard of living and right to social protection, right to participate in sports, recreation and culture, equality and non-discrimination, right to participate in political and public life, and right to freedom of expression and opinion and access to information.

However, this is not a purposeless restatement of rights. Rather, it is to emphasise the “right to have rights,”<sup>78</sup> of persons with disabilities because despite the language of inclusion in human rights treaties, persons with disabilities were largely perceived or treated as outsiders to human rights. This is the discrimination to which the AfDP draws attention in reaffirming the classical rights.

The AfDP also reformulates some rights, that is, it articulates traditional rights in a new way to focus on the experience of persons with disabilities. An example of this is Article 8 on the right to life. Instead of just stopping at recognising the right to life as it has been traditionally stated in human rights documents, it adds, amongst others, that states parties should ensure “[t]hat persons with disabilities have access to services, facilities and devices to enable them to live with dignity and to realise fully their right to life.”<sup>79</sup>

Another right that has been reformulated in AfDP is Article 7 on equal recognition before the law.<sup>80</sup> Article 7(1) states in traditional terms the right to equal recognition before the law. But then it goes beyond the traditional formulation because it spells out in greater detail under Article 7(2) the obligations of states including that “[p]ersons with disabilities are provided with effective legal protection and support they may require in enjoying their legal capacity consistent with their rights, will and specific needs,”<sup>81</sup> and that “[a]ppropriate and effective safeguards are put in place to protect persons with disabilities from abuses that may result from measures that relate to the enjoyment of their legal capacity.”<sup>82</sup>

The AfDP separates the right to access information which traditionally has been bundled with freedom of expression and opinion. Article 24 on the right to access information adds something new that is not in the CRPD in the following manner:

Ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies.<sup>83</sup>

The AfDP also adds some progressive elements to the right to access to justice under Article 13 which refers to the inclusion of the provision of procedural, age and gender-appropriate accommodations; that state should ensure that customary laws are inclusive, and that legal aid is available for persons with disabilities.<sup>84</sup>

Some of the features of the AfDP that Appiagyei-Atua points out fall short of the CRPD include that the AfDP does not provide for prevention against concealment, abandonment, neglect and segregation of children with disabilities, specifically, which is common in Africa. Also, the AfDP leaves out entirely the right to privacy, and yet it is a right that is commonly abused for persons with disabilities in Africa.<sup>85</sup>

A third way in which the AfDP reconstructs rights is by extension.<sup>86</sup> These are rights that draw from other rights and traditionally do not appear independent of the rights from which they draw. Examples that are both in the CRPD and the AfDP are the right to “freedom from exploitation, violence and abuse” and “the right to participation”.<sup>87</sup>

<sup>78</sup> Appiagyei-Atua (note 49 above) 160.

<sup>79</sup> Art 8(2)(b) AfDP.

<sup>80</sup> Appiagyei-Atua (note 49 above) 165.

<sup>81</sup> Art 7(2)(c) AfDP.

<sup>82</sup> Art 7(2)(d) AfDP.

<sup>83</sup> Art 19(2) AfDP.

<sup>84</sup> Appiagyei-Atua (2017) 165.

<sup>85</sup> Appiagyei-Atua (2017) 166.

<sup>86</sup> See Mégret (2008) 507.

<sup>87</sup> Appiagyei-Atua (2017) 167.

An extension right that is unique to the AfDP is Article 22, the right to self-representation. This is not a typical classical right, but it can be inferred from the right to participation. It is interesting that it is inferred from a formulation of a right that is not itself a classical formulation, because the right to participation is not in itself a right *per se*.<sup>88</sup> It would appear therefore that the right to self-representation is a right that is doubly extended.

Appiagyei-Atua describes other novel elements that the AfDP introduces that are absent in the CRPD. These include harmful practices in Article 11 which recognises issues that are particularly pertinent on the African continent including that states parties should take measures to eliminate harmful practices including “witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.”<sup>89</sup> It also prohibits stereotyped views and use of derogatory language against persons with disabilities.<sup>90</sup>

Another unique feature to the AfDP is that it recognises that persons with disabilities have duties on an equal basis with others as recognised in the African Charter.<sup>91</sup> The AfDP urges states parties “to ensure that persons with disabilities are rendered the forms of assistance and support, including reasonable accommodations, which they require in the performance of such duties.”<sup>92</sup> This affirms that persons with disabilities have the capacity to undertake duties in an equal manner to persons without disabilities and therefore contribute to national and personal development.

### 4.3. Disability rights jurisprudence

The ACtHPR created the African Commission on Human and People’s Rights (African Commission) which monitors the implementation of the ACHPR by states parties. It is also mandated to receive communications from individuals, organisations or states parties. Since its establishment, it has received one communication from Namibia.<sup>93</sup> The African Commission also receives periodic reports from states parties detailing the measures they have taken to give effect to the African Charter. In its reports, Namibia has informed the African Commission of the measures it has taken to implement the provisions of the African Charter and these measures have included the protection and promotion of the rights of people with disabilities.<sup>94</sup> For example, in its latest report to the African Commission, the Namibian government reported that:

According to the National Population and Housing Census of 2011, about 5% of the people in Namibia are people...with disabilities. Apart from the UN Convention on the Rights of Persons with Disabilities (CRPWD) which Namibia ratified in 2006. Prior to ratification of the Convention Namibia adopted the National Policy on Disability of 1997, the Affirmative Action (Employment) Act, Act No. 29 of 1998, and the National Disability Council Act, Act No. 26 of 2004 as well as the Labour Act, Act No. 11 of 2007 which are most exemplary in terms of protection of the rights of persons with disabilities.<sup>95</sup>

On the other hand, the OAU also had created the African Court of Human and Peoples’ Rights (ACtHPR).<sup>96</sup> The ACtHPR has jurisdiction over cases and disputes regarding the interpretation and application of the ACHPR, and any other relevant human rights instrument that the concerned state has ratified.

A yet third institution, the African Committee of Experts on the Rights and Welfare of the Child (ACE) completes the triad of organs of the African Human Rights System that function to enforce norms and standards that states parties have agreed to implement in their jurisdiction by virtue of ratifying

<sup>88</sup> Appiagyei-Atua (2017) 167.

<sup>89</sup> Article 11 (1) AfDP.

<sup>90</sup> Article 11(2) AfDP.

<sup>91</sup> Appiagyei-Atua (note 49 above) 170.

<sup>92</sup> Article 31(2) AfDP.

<sup>93</sup> Interights (on behalf of Jose Domingos Sikunda) v Namibia (239/01, 16 May 2002) (the communication was declared inadmissible because the applicant had not exhausted domestic remedies).

<sup>94</sup> 3rd Periodic Report of Namibia, 2002-2009 (12 May 2011) pp.39 and 42; 6th Periodic Report of Namibia, 2011-2014 (20 April 2016) pp. 3, 10, 34, 35, 56, 57, 60, and 63.

<sup>95</sup> 6th Periodic Report of Namibia, 2011-2014 (20 April 2016), p.11.

<sup>96</sup> The Court was established by Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, adopted by Member States of the OAU in June 1998 which came into force on 25 January 2004. Namibia signed this Protocol in June 1998.



various legal instruments. In its initial report to the ACE, the Namibian government explained in detail the measures it has taken to promote and protect the rights of children with disabilities and the challenges it has faced in the implementation of such measures.<sup>97</sup>

As compared to the other regional systems discussed in this report, namely the Inter- American human rights and the European systems, the African system has made the least number of determinations involving disability rights. In fact, there is only one celebrated case determined by the African Commission, the case of *Purohit and Moore v Gambia* decided in 2003.<sup>98</sup> Owing to its celebrated status, this decision has been discussed and analysed widely, therefore, this report does not aim to enter into a full analysis of the decision as this has been done countless times.<sup>99</sup>

The case was brought on behalf of patients who, in accordance of the Mental Health Acts (Republic of Gambia), were detained at a psychiatric institution. The applicants alleged amongst others that the Lunatics Detention Act (LDA) violated various rights of the ACtHPR including Article 2 (non-discrimination), Article 3 (equal protection before the law), Article 5 (the right of human dignity and recognition of legal status), and Article 6 (the right of liberty and security of the person, and prohibition of arbitrary arrest or detention).

One reason this case is lauded is that while in the non-discrimination provision of the ACtHPR (Article 2) disability is not explicitly mentioned as a prohibited ground for discrimination, the African Commission read and interpreted the provision to include persons with disabilities. In its view, “Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises.”<sup>100</sup> It also considered Article 3 as being core because “it guarantees fair and just treatment of individuals within a legal system of a given country.”<sup>101</sup> The rest of the Commission’s decision was guided by these two provisions; Articles 2 and 3. The Commission found the Republic of The Gambia in violation of Articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the African Charter.

The Commission, amongst others, urged the Government of Gambia to repeal the LDA and replace it with a mental health law that was compatible with the ACtHPR and prevailing international norms. By 2017, Gambia was still in the process of trying to implement the Commission’s recommendation.<sup>102</sup>

## 5. The Organisation of American States

### 5.1. Overview of the principal organs and instruments relevant to disability rights

The Organisation of American States (OAS) was established by the Charter of the Organisation of American States (OAS Charter) on 30 April 1948. The two fundamental human rights treaties of the OAS are the American Declaration on the Rights and Duties of Man (adopted 2 May 1948) and the American Convention on Human Rights (ACHR) (in force 18 July 1978). Two principal organs of the OAS are entrusted with the role of promoting and protecting human rights. The first is the Inter-American Commission on Human Rights (IACHR) which was established as the principle organ on the OAS Charter whose mandate is to promote the observance and protection of human rights (in force since 14 September 2001).<sup>103</sup> The IACHR performs various duties to fulfil its mandate amongst which is to receive, investigate and determine individual petitions alleging violations of human rights by a Member State of the OAS. Another duty concerns serious and urgent cases, and in such matters the IACHR can request Member States to adopt precautionary measures to prevent irreparable harm to persons.

<sup>97</sup> Namibia’s Initial Report on the African Charter on the Rights and Welfare of the Child 2004-2012 (2014) (considered at the 25th Ordinary Session (21-24 April 2015)). See especially pages 49 – 52. Also see pages 5, 20, 21, 23, 24, 36, 44, 46.

<sup>98</sup> *Purohit and Moore v Gambia* Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII.

<sup>99</sup> M Wachira & D Cassell ‘The interpretation of the right to mental health in the Africa and American systems’ 2 AHRY

<sup>100</sup> *Purohit and Moore v Gambia* (note 71 above) para 49.

<sup>101</sup> *Purohit and Moore v Gambia* (note 71 above) para 49.

<sup>102</sup> World Health Organisation, ‘Stakeholders in the Gambia review draft mental health legislation’, <https://afro.who.int/news/stakeholders-gambia-review-draft-mental-health-legislation> (Accessed 8 August 2019).

<sup>103</sup> Art 106 OAS Charter.

(2018) 225.

The second organ is the Inter-American Court of Human Rights (IACtHR) which was established by the American Convention in 1969 but became operational only after the ACHR had entered into force in 1978. Its function is to issue advisory opinions pertaining to the interpretation of the ACHR and other instruments at the request of an OAS organ or Member State. The Inter American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (CIADDIS) was adopted by OAS in 1999 and it entered into force in 2001.<sup>104</sup> It was the first international treaty of its kind to protect the rights of persons with disabilities.<sup>105</sup>

Indeed, it might be expected that the understanding of disabilities is different between the CRPD and the CIADDIS. Guazimo Peralta identifies several differences. First, the definition of disability in the CIADDIS focuses on impairments that hinder the performance of daily activities. It views the social and economic context as aggravating factors to the effects of disability. On the other hand, CRPD's definition of disability has a stronger social approach. It shifts focus from the medical issue of disability to the social response to it.<sup>106</sup>

Second, the CIADDIS focuses on protection from discrimination and therefore it does not see the need to rearticulate rights to better respond to the broader experience of persons with disabilities. The CRPD, on the other hand, goes beyond recognising discrimination and so reformulates rights that address various aspects of the experience of persons with disabilities. The CRPD therefore establishes a more robust protection of the rights of persons with disabilities.<sup>107</sup>

Another difference Peralta describes is that the CIADDIS has a weak enforcement mechanism as compared to the system created by the CRPD. The CIADDIS does not create a judicial institution to enforce the norms in the CIADDIS. Rather, it relies on the duty of states to cooperate and make efforts to prevent and eliminate discrimination against persons with disabilities.<sup>108</sup> In contrast, the CRPD articulates more comprehensively and concretely the obligations of states to ensure their compliance.<sup>109</sup>

Yet another difference is that the CRPD has more support from OAS Member States than has the CIADDIS.<sup>110</sup> As of 29<sup>th</sup> July 2019, 14 OAS Member States had not yet signed or ratified CIADDIS, but all OAS Members States except US are States Parties to the CRPD.

Due to these differences and especially because the CIADDIS did not provide for a complaints or judicial enforcement mechanism, the IACHR and the IACtHR have tended to refer to the ACHR and other instruments of OAS to protect the rights of persons with disabilities than use the CIADDIS.<sup>111</sup> The arrival of the CRPD has had the positive effect of encouraging the American system to take on more disability cases, but there was still a lag for the IACHR to begin to apply a disability perspective to analysing matters before it.<sup>112</sup>

From 2009, the IACHR started to publish case reports on the right to humane treatment of persons with disabilities. However, the IACHR did not yet apply a disability rights analysis in these cases. It is in 2012 beginning with the case of *Luis Fernando Guevara Diaz v. Costa Rica*<sup>113</sup> that this trend changed, when the IACHR began to engage a deeper disability analysis. In *Diaz*, the petitioners alleged that the state of Costa Rica discriminated against the petitioner because of his disability when the Ministry of Finance failed to employ him when he had in fact scored the highest during an interview for the job. In determining admissibility, the IACHR concluded that the facts revealed potential violation of rights under the ACHR. In its determination, the IACHR stated that:

<sup>104</sup> Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (adopted 6 August 1999, entered into force 14 September 2001) OAS AG/RES 1608 (XXIX-O/99) (1999) (CIADDIS).

<sup>105</sup> D Guarnizo-Peralta 'Disability rights in the Inter-American System of Human Rights: An expansive and evolving protection' (2018) 36 Netherlands Quarterly of Human Rights 44.

<sup>106</sup> Guarnizo-Peralta (2018) 44-45.

<sup>107</sup> Guarnizo-Peralta (2018) 45.

<sup>108</sup> Guarnizo-Peralta (2018) 46.

<sup>109</sup> Guarnizo-Peralta (2018) 46.

<sup>110</sup> Guarnizo-Peralta (2018) 47.

<sup>111</sup> Guarnizo-Peralta (2018) 47.

<sup>112</sup> Guarnizo-Peralta (2018) 49.

<sup>113</sup> Luis Fernando Guevara Diaz v. Costa Rica Report no 13/12 (20 March 2012) Petition 1064-05.

for the purpose of analyzing the merits it [would] rely on the provisions of the Protocol of San Salvador and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, for interpretative purposes.”<sup>114</sup>

## 5.2. Some recent issues in disability jurisprudence

This report highlights issues in disability rights in cases handled by the IACHR and the IACtHR especially in which the two bodies reference the CRPD or where the CRPD and the Committee on CRPD have influenced interpretation of disability rights norms.

### 5.1.1 The Inter-American Commission on Human Rights

#### **Inclusive education for students with disabilities – *Irene v Argentina* (2016) Resolution 38/2016, Precautionary Measure No. 376-15.**

The applicants requested a precautionary measure to protect the life, personal integrity and integral health of Irene, a 12-year-old girl, who had a severe neurological disability, to enable her to access the necessary support and services to allow her to attend school. The parents had requested the social services authorities to provide comprehensive care that would enable her to lead a life that was as normal as possible. They engaged a therapeutic. The state had initially provided this support but stopped without any warning, forcing the parents to use their own resources. Ultimately, they could not afford to cater for all her needs.

The IACHR applied a social model of disability when it expressed the opinion that an important measure toward achieving non-discrimination for children and adolescents with disabilities is to overcome socially constructed barriers that exclude persons with disabilities from social integration. To highlight the social model of disability, it referenced the concern of the Committee on RPD about obstacles to in the health system that made it impossible for persons with disabilities to access services, just like the obstacles that were placed in Irene’s way constituted a barrier to her social integration and psychosocial development.<sup>115</sup>

The IACHR used UNESCO’s definition of inclusive education understood as a “process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education”<sup>116</sup> It therefore urged, using the language of the Committee on RPD in its concluding observations on the report of Argentina, that it must incorporate the principle of inclusive education including to take measures to reform programs and the curriculum to include students with disabilities, and most especially to allocate budgetary resources to realise an inclusive education system.<sup>117</sup>

This case became an important precedent on the right to inclusive education for persons with disabilities.<sup>118</sup> It also showed how the IACHR drew upon international norms and interpretation of norms from the Committee and other UN bodies to achieve an analysis that was richer than if it drew on the instruments in the American human rights system alone.

#### **De-institutionalisation of persons with mental disabilities – *Federico Mora Hospital v. Guatemala* (2012) Precautionary Measure No 370-12; Inter-American Commission on Human Rights *Situation of Human Rights on Guatemala* (2017)**

On 20 November 2012, the IACHR granted a precautionary measure for 334 patients who were institutionalised at the Federico Mora Hospital in Guatemala. The petition alleged that the patients were detained under extremely deplorable conditions that included rampant sexual abuse, physical abuse, inhuman and degrading conditions, medical negligence, and use of prolonged restraints and isolation rooms.

<sup>114</sup> Luis Fernando Guevara Díaz v Costa Rica, para 42.

<sup>115</sup> Irene v Argentina para 24.

<sup>116</sup> UNESCO ‘Guidelines for Inclusion. Ensuring Access to Education for All’ (2005) 13.

<sup>117</sup> Irene v Argentina para 25, citing UN, Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Argentina, approved by the Committee at its eighth session (September 17-28, 2012), UN Doc. CRPD / C / ARG / CO / 1 (19 October of 2012).

<sup>118</sup> Guarnizo-Peralta (2018) 54.

The IACHR requested the Government of Guatemala to take the necessary measures to guarantee the life and personal integrity of the patients at the Federico Mora Hospital, including to provide adequate and appropriate medical treatment, to ensure that children are separated from adults, that inmates that were detained under custodial sentence were separate from those under medical orders, that the premises be guarded by unarmed personnel, the use of isolation rooms be restricted under the conditions established under international standards regarding persons with disabilities, and to ensure that all patients are not subjected to acts of physical, psychological and sexual violence by other patients, security agents or hospital officials. The parties agreed on a timetable of implementation of the measures.

In its report on the visit to the hospital facility 5 years later, the IACHR observed improvements, but there were still some measures to be accomplished.<sup>119</sup> More especially, it observed that the efforts of the government focused on institutionalising arrangements which fostered isolation and segregation of persons with disabilities. There were no initiatives to enable persons with disabilities to live independently and be included in the community. The IACHR reminded the state that persons with (mental) disabilities have the right to independent living and to be included in community.<sup>120</sup> The IACHR referred General Comment 19 of the Committee on CRPD to explain that.

The right of persons with disabilities to independent living and to be included in the community, according to the CRPD Committee means on the one hand that [the] said persons are provided all the necessary means enabling them to exercise choice and control over their lives and make all decision concerning their lives. On the other hand, this right is related to full and effective participation and inclusion of persons with disabilities in society, through the development of inclusive environments.<sup>121</sup>

The IACHR further explained that the implication of this right is that persons with disabilities must be provided with alternative arrangements to enable them to live independently and be included in the community. The IACHR highlighted an important fact also observed by the Committee on RPD that when persons are assessed to require a high degree of supportive services to enable them live independently and in the community, governments tended to defer to institutionalisation as the only solution, rather than take the necessary measures to provide specific support services that persons with disabilities require to realise the right to independent living and to be included in the community.<sup>122</sup> On this aspect, the report found that the lack of support and community services for persons with disabilities created an incentive to institutionalise these persons and led to the violation of their right to live in the community.<sup>123</sup>

The IACHR, therefore, recommended the State to create and establish community-based services for persons with disabilities. More specifically, it recommended the following measures: (a) expeditiously define a strategy, provide sufficient resources, for the de-institutionalization of persons with disabilities, (b) ensure that persons with disabilities participate in the design and implementation of the strategy, (c) allocate sufficient services for the development of sufficient support services.

### 5.2.2 The Inter-American Court of Human Rights

#### **Infertility and assisted reproduction – *Artavia Murillo and Others v Costa Rica* IACtHR Series C 257 (28 November 2012).**

In vitro fertilisation (IVF) was allowed in Costa Rica from 1995 until in 2000 when the Constitutional Court of Costa Rica declared the practice unconstitutional. The applicants, who had diverse experiences of trying to access IVF in Costa Rica and were frustrated, challenged the judgment of the Constitutional Court banning IVF because it interfered with their right to family and private life, the right to marry and raise a family, and equal

<sup>119</sup> Inter-American Commission on Human Rights, The situation of human rights in Guatemala, OEA/Ser.L/V/II. Doc.208/17 (31 December 2017).

<sup>120</sup> Inter-American Commission on Human Rights, The situation of human rights in Guatemala, para 465.

<sup>121</sup> Inter-American Commission on Human Rights, The situation of human rights in Guatemala, para 465.

<sup>122</sup> Inter-American Commission on Human Rights, The situation of human rights in Guatemala, para 465. <sup>123</sup> Inter-American Commission on Human Rights, The situation of human rights in Guatemala, para 465.

Amongst others, the Court analysed the impact of the ban, whether it resulted in indirect discrimination including on the ground of disability. The Court indicated that the rights to equal and effective protection of the law and non-discrimination meant that States ought to refrain from promulgating regulations whose impact has differential and discriminatory effects on groups. It referred to the Committee on CRPD which had expressed the view that “a law that is applied impartially may have a discriminatory effect if it does not take into consideration the particular circumstances of the persons to which it is applied.”<sup>124</sup>

The Court took note of the definition of infertility by the World Health Organisation as a disease of the reproductive system in which a person fails to achieve clinical pregnancy after 12 months of regular unprotected sexual intercourse. Referencing the affidavit of an expert witness who highlighted the evolving concept of disability and the social model of disability, and its impact on restricting participation of persons with disabilities, the Court took the opinion that involuntary infertility is a disability.<sup>125</sup> It also called attention to preamble of the CRPD which describes disability as resulting from the interaction between an individual’s functional limitations and barriers that exist in the environment that impinge on the person’s enjoyments of rights.<sup>126</sup>

In the Court’s view, the right of persons with disabilities to have access to the necessary techniques to resolve reproductive health problems could be inferred from Article 25 of the CRPD on the rights of persons with disabilities to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. The obligation of states is not only to abstain from frustrating rights but to facilitate the inclusion of person with disabilities. States must therefore take the necessary measures to ensure that persons who have impairment in reproductive functions have access to the necessary techniques to resolve reproductive health problems.<sup>127</sup>

#### **Non-discrimination in access to education – *González Lluy et al. v. Ecuador*, IACtHR Series C 298 (1 September 2015)**

Talia Gabriela Gonzales Lluy (Talia) was discovered to have been infected with HIV when she was 3 years old. When Talia was 5, she enrolled in school. However, when the school found out about her HIV status, she was dismissed. When she challenged the school’s decision, the school argued that Talia posed a risk to other students and it was the duty of the authorities to safeguard the rights of other students. The municipal court agreed with the school and expressed the view that Talia could exercise her right to education by individualised and distance education.

In addressing the allegations that the school authorities violated her right to education, the Court engaged in a disability rights analysis which is the aspect of the case on which this report focuses.

The link the Court makes about HIV and disability is derived from the social model of disability. It noted that historically, persons with HIV have been discriminated against because of the social and cultural beliefs about the illness. The mere assumption that a person has HIV/AIDS may create social and attitudinal barriers impacting on the rights of the person. At this point of its analysis, the Court expressed the view that “[t]he relationship between this type of barrier and a person’s health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case.”<sup>128</sup> Referring to the CRPD’s definition of disability as an evolving concept, the Court was of the opinion that even if HIV was not *per se* a disability “in some circumstances, the attitudinal barriers faced by those living with HIV mean that the circumstances around them place them in a situation of disability.”<sup>129</sup> The Court went ahead to clarify some elements of the right to education for persons living with medical conditions that could result in disability, as understood from the social model of disability. The obligations inherent in the right to education included that the State undertake measures to promote inclusion and non- discrimination.

<sup>124</sup> Artavia Murillo and Others v Costa Rica para 286; see also Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, Case of H. M. v. Sweden, CRPD/C/7/D/3/2011, 19 April 2012, para. 8.3.

<sup>125</sup> Artavia Murillo and Others v Costa Rica para 289.

<sup>126</sup> Artavia Murillo and Others v Costa Rica para 290.

<sup>127</sup> Artavia Murillo and Others v Costa Rica para 293.

<sup>128</sup> González Lluy and Others v Ecuador para 236.

<sup>129</sup> González Lluy and Others v Ecuador para 237 – 238.



The Court observed that due to her condition, Talia and her family faced a hostile environment. The Court recalled that under the CRPD, persons with disabilities are part of human diversity and humanity, so that the educational establishment was bound to provide an educational environment that accepts and celebrates this diversity. The educational system therefore should have aimed at creating a conducive environment in which Talia could feel valued as everybody else. The state had the obligation to educate other students about the meaning of diversity and to safeguard the principle of non-discrimination.<sup>130</sup>

The Court also took cognisance of the fact that Talia experienced intersecting forms of discrimination because of her gender, her HIV status, a person with disability, a minor and also her socioeconomic status, all of which compounded the violation of her right to education.

Peralta comments that this case is important as it provides the basis for analysis of the right to education in a case where a person experiences attitudinal barriers because of a medical condition or disability.<sup>131</sup> The state has duty to ensure that persons with disabilities have access to education on equal basis with others.

**Conditions of detention, reasonable accommodation – *Sandoval Chinchilla v Guatemala*  
Judgment of February 29, 2016. Series C No. 312 (Spanish only).**

This case concerned Ms Sandoval Chinchilla, a diabetic woman who died while serving a prison sentence.<sup>132</sup> The allegations were that the state failed to adequately provide for her specific needs arising from her diabetic condition and other ailments, such as periodic testing and appropriate medical treatment. Due to this neglect, her medical condition worsened, and to the point that she had to have one of her legs amputated. Despite that she had been confined to a wheelchair and required treatment and assistance, the state failed to provide these. The manner of her death was that as she was trying to get around, and without proper assistance, she fell down stairs from her wheelchair. Even in this emergency situation, the state authorities failed to provide her with necessary treatment and to refer her to hospital promptly. Ms Chinchilla had on several occasions applied to court for early release on grounds of terminal illness, and because that the prison did not have the specialised staff or facilities to cater for her needs, but this was denied.

The IACHR asked the Court to find that the state of Guatemala had violated Ms Chinchilla's rights to life, personal integrity, and judicial protection, for failing to provide her with the necessary care she required with regard to her condition, for failing to provide appropriate judicial remedies despite that the courts had information regarding her conditions of incarceration.

In analysing the obligations of the State and in reference to both the CIADDIS and the CRPD, the Court observed that both instruments take into account the social model of disability, which implies that disability is not exclusively defined by the presence of a physical, mental, intellectual or sensory impairments, but also their interaction with social barriers that hinder the full and effective participation of persons with disabilities. The Court indicated that the types of limits that persons with disabilities encounter include physical and architectural, communicative, attitudinal, and socioeconomic barriers.<sup>133</sup> The state's obligations therefore entailed removing such barriers to facilitate inclusion, and where necessary provide reasonable accommodation.<sup>134</sup> It also referenced Article 25 of the CRPD which recognises the right to enjoy the highest attainable standard of health without discrimination. The Court also highlighted the obligation of the state to adopt measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.<sup>135</sup> The Court therefore affirmed that the State had an obligation to make reasonable accommodation for Ms Chinchilla to allow her to live in the facility as independently as possible and on equal terms with other persons deprived of liberty, including to make available staff that would assist her, and make necessary modifications to allow her access amenities easily.<sup>136</sup>

<sup>130</sup> Gonzales Lluay and Others v Ecuador para 84.

<sup>131</sup> Guarnizo-Peralta (2018) 61.

<sup>132</sup> See the communication of the Inter-American Commission on Human Rights submitting the matter to the Inter-American Court, <http://www.oas.org/en/iachr/decisions/court/12739NdeREn.pdf> (Accessed 2 September 2019).

<sup>133</sup> Sandoval Chinchilla v Guatemala para 207. <sup>134</sup> Sandoval Chinchilla v Guatemala para 209. <sup>135</sup> Sandoval Chinchilla v Guatemala para 210.

<sup>136</sup> Sandoval Chinchilla v Guatemala paras 215 – 217.

The Court found the State in violation of the obligation to guarantee the right to personal integrity and life of the victim, because of the many failures and omissions, including failure to take reasonable accommodation measures because of the medical condition and disability of the victim. These failures contributed to Ms. Chinchilla's untimely demise.

## **6. Council of Europe and the European Union**

### **6.1. Overview of principle organs and instruments relevant to disability rights**

The Council of Europe (CoE), established by the Statute of the Council of Europe in 1949, is a regional intergovernmental organization comprised of 47 countries in Europe. Its main role is to strengthen democracy, human rights and the rule of law throughout its Member States.<sup>137</sup> Amongst these is the promotion and protection of the rights of persons with disabilities. The CoE established the European Convention on Human Rights and Fundamental Freedoms (ECHR) which entered into force in 1953.<sup>138</sup>

The CoE has since adopted numerous other conventions and protocols pertaining to human rights. Of mention in this report is the European Social Charter which protects social and economic rights.<sup>139</sup> A revised European Social Charter entered into force in 1999 and amongst others, introduced amendments that would ensure "better protection of handicapped people."<sup>140</sup> Apart from the legally binding normative frameworks, the CoE has also adopted several other instruments relating to rights of persons with disabilities.<sup>141</sup>

The European Court of Human Rights is the organ that oversees the implementation of the ECHR, and its work is complementary to the role of the European Committee on Social Rights which oversees the implementation of the European Social Charter.

Europe also has another organisation, the European Union (EU), comprising of 28 Member States who must first belong to the CoE in order to be a member of the EU.<sup>142</sup> EU was established to promote cooperation amongst members in economic, monetary and political issues. The EU has taken various steps to ensure the protection of the human rights of persons with disabilities, through its institutional and normative frameworks. One of the significant events for disability rights was the proclamation of the Charter of Fundamental Rights of the European Union of 7 December 2000 (CFR), which became legally binding in 2009 by virtue of the Lisbon Treaty.

Another significant event was the accession by the EU to the CRPD in December 2010 by virtue of a resolution of the Council of the European Union adopted in November 2009.<sup>143</sup>

According to Article 216(2) of the Lisbon Treaty, "Agreements concluded by the Union are binding on the institutions of the Union and on its Member States." This means that the CRPD is effectively an integral part of EU law.

The judicial institution of the EU is the Court of Justice of the European Union (CJEU) established in 1952. It consists of two entities, the Court of Justice, also known as the European Court of Justice (ECJ) which deals with rulings from national courts, and the General Court which deals with actions for annulments brought by individuals, companies or governments.

<sup>137</sup> Council of Europe, Council of Europe in brief, <https://www.coe.int/en/web/about-us/do-not-get-confused> (Accessed 31 July 2019).

<sup>138</sup> Formerly known as the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>139</sup> The European Social Charter entered into force in 1965. It is described as a counterpart of the ECHR because it guarantees social and economic rights while the ECHR guarantees civil and political rights. Council of Europe, European Social Charter and European Convention on Human Rights <https://www.coe.int/en/web/european-social-charter/-european-social-charter-and-european-convention-on-human-rights> (Accessed 31 July 2019).

<sup>140</sup> European Social Charter (Revised) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163> (Accessed 31 July 2019).

<sup>141</sup> See United Nations Enable, International norms and standards relating to disability <https://static.un.org/esa/socdev/enable/comp301.htm> (Accessed 31 July 2019).

<sup>142</sup> The two treaties that establish the EU are the Treaty of the European Union also known as the Treaty of Maastricht (entered into force in 1993) and the Treaty of the Functioning of the European Union also known as the Treaty of Lisbon (entered into force in 2009).

<sup>143</sup> European Union, Council Decision 2010/48/EC.

## 6.2. Disability rights jurisprudence

### 6.2.1. European Court of Human Rights

The ECtHR is said to have set an example in the European region in taking up the standards in the CRPD in determining cases before it.<sup>144</sup> *Glor v Switzerland*<sup>145</sup> was the first case in which the ECtHR acknowledged the standards advanced by the CRPD as supplementing regional instruments.

Though the non-discrimination provision in the European Convention (Article 14) does not expressly recognise disability as a prohibited ground, the Court recognised that Article 14 protected against discrimination based on disability.

In recognising that the matter raised possible discrimination against a person with disabilities, the Court expressed the view that there was now worldwide consensus on the need to protect people with disabilities from discriminatory treatment and promote their full inclusion in accordance with the CRPD.<sup>146</sup> The Court has since applied the CRPD standards in its jurisprudence. Below are reviews of some of these cases to highlight some of the issues that the Court has dealt with.

#### **Inclusive education, reasonable accommodation - *Çam v Turkey* Application no. 51500/08 (2016); *Enver Şahin v Turkey* Application no. 23065/12 (2018)**

The applicant in *Çam v Turkey* took an entrance examination to join the Turkish National Music Academy (Music Academy, Academy) and was successful. A medical report which she obtained for purposes of enrolment in the Academy stated that she had a visual impairment which rendered her blind but certified her as fit to receive education and instruction in the sections of the Music Academy where eyesight was not necessary.

The Academy rejected her required for enrolment in the music course infringed on her right to education as a person with disabilities (Article 14 of the Convention as read with Article 2 of the Protocol No. 1 which provide that no person should be denied of the right to education).

In interpreting and applying Article 2 of Protocol No. 1, the Court considered relevant rules of international law as set out in international treaties including the CRPD.<sup>147</sup> The Court took cognisance of its decision in *Glor v Switzerland* in which it affirmed that Article 14 of the European Convention covers discrimination based on disability. It also referenced established case law that defined discrimination as treating people differently without any objective and reasonable justification, where there is no legitimate aim nor a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Court found that the applicant was denied admission for the sole reason that she was blind. It then interpreted Article 14 in line with international law on the fundamental principles of universality and non-discrimination in the exercise of the right to education. It also highlighted that international law recognised inclusive education as the most appropriate means for guaranteeing universality and non-discrimination.<sup>148</sup> The Court stated that to realise inclusive education requires reasonable accommodation to correct factual inequalities which are unjustified and amount to discrimination. It understood reasonable accommodation as defined in Article 2 of the CRPD.<sup>149</sup>

The Court observed that the authorities had made no attempt to understand the applicant's needs, nor consider what they could do to reasonably accommodate her, but only focused on excluding her. It therefore found the refusal to enrol the applicant had no objective basis and no reasonable justification. It concluded that the state violated Article 14 of the ECHR as read with Article 2 of Protocol No. 1.<sup>150</sup>

<sup>144</sup> J Clifford 'The UN Disability Convention and its Impact on European Equality Law' (2011) 6 Equal Rights Review 19.

<sup>145</sup> ECtHR, *Glor v Switzerland*, No. 13444/04, 30 April 2009.

<sup>146</sup> *Glor v. Switzerland* para 53.

<sup>148</sup> *Glor v. Switzerland* para 64.

<sup>149</sup> *Glor v. Switzerland* para 65.

<sup>150</sup> *Glor v. Switzerland* para 69.

In *Enver Şahin v Turkey*, the applicant, while a student in mechanics at Firat University, suffered a serious injury that left his lower limbs paralysed. He requested the faculty to adapt the premises to allow him to resume studies. The University responded that it would not be possible to adapt the existing architecture. Further, the work on those structures that could be modified could not be accomplished in the short term. It also was of the view that his course required practical workshops and it foresaw that he would have difficulties in participating. However, it eventually agreed to implement some of the requests, but it pointed out that there would be budgetary and time constraints.

The University eventually terminated his contract on the grounds that he had not re-registered as per its rules. His complaint was based on the right to education guaranteed by Article 2 of Protocol No. 1 of the ECHR.

On citing the applicable law, the Court referenced its decision in *Çam v Turkey*. It also cited various international law instruments. In the CRPD, it cited following Articles: Article 2 (definitions – discrimination because of disability, reasonable accommodation);

Article 3 (general principles); Article 9 (Accessibility); Article 20 (Personal mobility); and Article 24 (Education). In its analysis, the Court reiterated the meaning of discrimination as established by case law in the region. It also reiterated the importance of the principles of universality and non-discrimination in the exercise of the right to education, and restated that inclusive education is the most appropriate means of guaranteeing the fundamental principles.

Though the Court accepted that the State was best placed to assess how best to provide for the education of persons with disabilities depending on the available budget, it nevertheless did not agree with the fact that the State shelved the applicant's requests pending availability of all funds to complete all work as laid down by legislation. The Court expressed the view that the State should take positive steps towards meeting its obligations rather than lie back to wait for funds to become available.<sup>151</sup>

The Court drew the attention of the State to the principle of reasonable accommodation in Article 2 of the CRPD, to facilitate the correction of factual inequalities and discrimination based on disability. The Court stated that while it was not for it to define what form this reasonable accommodation should take, the State should make its choices very carefully because of the impact of those choices on persons with disabilities.<sup>152</sup>

The Court also reminded the State that persons with disabilities have the right to live independently with a fully developed sense of dignity and self-respect as stipulated in the CRPD (Articles 3, 9, 20 and 24). The Court examined what means of support the State would offer to the applicant to enable him to realise those rights. It found that the State had not made any genuine assessment of the applicant's needs and its potential effects on his security, dignity and autonomy, and therefore any promise of assistance to the applicant was an empty one without an assessment of the needs of the applicant to live as independently and as autonomously as possible. Ultimately, the Court found that the State had violated the rights of Article 14 (and 8) of the ECHR.

### **Liberty and security of persons with mental disabilities, involuntary hospitalisation - *D.R. v Lithuania* Application no. 691/15**

One of the implications of the shift of mindset the CRPD promotes is how society views persons with mental disabilities (psychosocial disabilities). In *D.R. v Lithuania* a lady in her 60s was ordered by a court to be subjected to a psychiatric assessment to consider her criminal responsibility for an alleged offence. On the day she was taken for assessment, the police, without warning, handcuffed her and drove her to an institution for psychiatric assessment. The psychiatric report concluded that she had a chronic mental disability.

<sup>151</sup> *Enver Şahin v Turkey* para 58.

<sup>152</sup> *D.R. v Lithuania* para 93.

The prosecutor then applied to court for an order for compulsory treatment. The applicant alleged she was never informed of the court proceedings, so that she was not personally present when the court heard and granted the prosecutor's application. She filed an appeal, which was again heard in her absence, and was denied.

The applicant alleged that she was unlawfully deprived of her liberty when she was forcibly taken to be assessed, and when she was involuntarily hospitalised for treatment, and that these infringed her rights under Article 5 (1) of the ECHR.

The Court examined the domestic law on the lawfulness of deprivation of individual liberty. It also took cognisance of the fact that Lithuania had ratified the CRPD on 27 May 2010 which entered into force for Lithuania on 17 September.

The Court cited Article 14 of the CRPD which recognised the right to liberty and security of the person on equal basis with others. It did not make any further reference to it or the jurisprudence developed out of the provision by the Committee on the CRPD.

However, noteworthy is the position in the CoE on the conditions under which a person with mental disabilities could be deprived of liberty. In its analysis, the Court reiterated that:

An individual cannot be deprived of his or her liberty on the basis of being of “unsound mind” unless the following three minimum conditions are fulfilled: firstly, he or she must reliably be shown to be of unsound mind, that is to say a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

While the CRPD completely prohibits any restrictions on legal capacity, in the EU, legal capacity could be deprived under certain conditions. In any case, in its analysis, the Court observed how the State dealt with the applicant. She was effectively excluded from being present at the hearings where her deprivation of her liberty was being determined. Also, when the courts decided to deprive her liberty, it could not be demonstrated that the court took the opportunity to ascertain whether her condition necessitated compulsory treatment.<sup>153</sup>

When the municipal courts determined her case, they were biased towards accepting the conclusions of the psychiatrists and paid no attention to the applicant's or her lawyer's arguments, so that it could not be said that the court had acted as to ensure that the applicant had adequate safeguards against arbitrary psychiatric hospitalisation. The Court finally concluded that the State had violated the applicant's rights under Article 5 (1) of the ECHR when it forcibly took her for assessment and when the courts ordered her involuntary hospitalisation.

**Conditions of detention, reasonable accommodation, right to life – *Jasinskis v Latvia*, application No. 45744/08 (2010)**

The applicant brought this case on behalf of his son Valdis (deceased). The facts were that Valdis fell down stairs at a student party and sustained serious injuries and was unconscious. When the police came, they were told that an ambulance had been called and was on its way. They were also informed that Valdis was deaf and mute. Without waiting for the ambulance to arrive, they took him to local police station. Believing him to have been drunk, they placed him in a sobering cell. He was not offered any medical attention nor given any chance to communicate until more than a day and half later when he was taken to hospital and died there.

The applicant alleged the violation of the right to life under article 2 of the ECHR. In its interpretation, the Court reiterated that the state's obligation under Article 2 was not just to refrain from intentionally taking life, but also to take appropriate steps to safeguard life. It also recognised that this concerned



a person with a disability and referenced the CRPD to which Latvia was a party, to confirm that the state had an obligation to ensure that the conditions of the detention of a person with a disability corresponded to their special needs.

The Court drew the state's attention to Article 14 (2) of the CRPD which requires states to ensure that if persons with disabilities are deprived of their liberty, it must be on equal basis with others, and compliance with these obligations included provision of reasonable accommodation.<sup>154</sup>

In its analysis, the Court ultimately concluded that the State had violated the right to life of the deceased. For the purposes of this report, only the analysis on reasonable accommodation is highlighted. The Court found that the authorities did not make any provisions for reasonable accommodation for the deceased.

The Court stated that considering the vulnerable position of the deceased, the authorities had the obligation to provide special care in guaranteeing him conditions corresponding to his needs because of his disability.<sup>155</sup> However, the police made no attempt to communicate with or consult the deceased. None of the police understood sign language, and worse still, the notepad which was the only means that the deceased would have used to communicate had been taken away from him.

Even when the deceased attempted to communicate by knocking on the doors and walls of the cell, the police ignored him.

#### **Discrimination by association – *Guberina v Croatia* Application No. 23682/13**

The case of *Guberina* raised several issues, but the one that is discussed here is the question of whether a person who himself or herself does not have a disability could nevertheless be discriminated against on the ground of disability by association with a person who has a disability.

The applicant's son was born with multiple physical and mental disabilities. Three years prior to the birth of his son he had bought a flat, but it was on a third storey of a building that had no lift. After the birth of his son he bought a house in another area in order to meet the needs of his disabled child and family. He then submitted a tax exemption request relying on a provision of the Real Property Transfer Tax Act which exempted a person from tax if he was buying a house or flat to meet the needs of his or her family members.

He argued that the flat he had owned had not met the housing needs of his family because accessibility to the building was difficult for his disabled child. His application was rejected. When he lodged a constitutional complaint, the Constitutional Court decided against him.

Before the ECtHR, the applicant alleged that his right to equality had been violated contrary to Article 14 of the ECHR. The Court observed that the applicant himself was not the person with disability but his child. Owing to the latter, the one question before the Court was "to what extent the applicant, who does not himself belong to a disadvantaged group, nevertheless suffers less favourable treatment on grounds relating to the disability of his child"<sup>156</sup>.

The Court resolved the question by construing the words "other status" widely to include circumstances where the characteristics which give rise to the discrimination do not inhere in the person alleging discrimination. It concluded that the equality provision of the ECHR covered instances in which an individual is treated less favourably than others on the basis of another person's status or protected characteristics. It therefore, found that the applicant had been discriminated against on the account of the disability of his child, and not just because of the parent-child relationship but because he had close personal links with his child for whom he provided care.

<sup>154</sup> D.R. v Lithuania para 40.

<sup>155</sup> D.R. v Lithuania para 59.

<sup>156</sup> *Guberina v Croatia* para 77.

### 6.2.2. The European Court of Justice

Originally, the EU treaties did not envisage human rights as one of its major preoccupation. However, as the CJEU stated to handle matters alleging human rights violations, it developed a body of judge-made laws called ‘general principles’ of Community Law which reflected the content of human rights protections found in national constitutions and human rights treaties especially the ECHR.<sup>157</sup> The ECJ’s engagement with disability rights was bolstered by the EUs conclusion of the CRPD.

The EU first introduced anti-discrimination law relating to disability through the Council Directive 2000/78/EC of 27 November 2000 (Directive 2000/78) which established a general framework for equal treatment in employment and occupation.<sup>158</sup> Some of the ECJ’s jurisprudence has developed out of interpreting Council Directive 2000/78 in the light of the CRPD.

#### **Reasonable accommodation in employment – *HK Danmark on behalf of Ring v Dansk almennyttigt Boligselskab; HK Danmark on behalf of Werge v Dansk Arbejdsgiverforening C-335/11 and C-337/11 (2013)***

These were two joined cases referred to the ECJ by the Danish Court in which the two claimants were employees and suing their respective employers.

Both had back problems that rendered them unable to work full hours, and so were dismissed. They were later allowed to re-start work but on part-time basis. They took their matters to court alleging that their dismissals were discriminatory on the grounds of disability. The three questions that were referred to the ECJ for preliminary ruling were (1) whether the concept of disability includes “the state of health of a person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work, for a period that will probably last for a long time, or permanently;”<sup>159</sup> (2) whether a permanent reduction in functional capacity which cannot be treated, but essentially means that the person cannot work full hours, should be regarded as a disability, and (3) whether the reduction of working hours could constitute reasonable accommodation. The fourth question the Danish Court submitted will not be considered here.

In interpreting the concept of disability under the provisions of Directive 2000/78, the Court recognised the legal status of the CRPD in the European Community, and hence in defining disability, the Court drew on the definition in the CRPD preamble.<sup>160</sup> It also referred to the concept of reasonable accommodation in Article 2 of the CRPD.<sup>161</sup> In responding to the first two questions, the Court was of the view that:

the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.<sup>162</sup>

It also understood that the impairment must be long-term. The Court therefore concluded that the concept of disability includes a curable or incurable illness as long as it results in impairments that in interaction with barriers in the environment hinder the effective participation of the person, and that the limitation is a long-term one.

In responding to the 3rd question, the Court was of the view that States should take the necessary measures to eliminate the barriers that hinder full and effective participation of

<sup>157</sup> European Union Agency for Fundamental Rights and Council of Europe Handbook on European non-discrimination law (2018) 20-21.

<sup>158</sup> Clifford (2011) 17.

<sup>159</sup> HK Danmark para 34.

<sup>160</sup> HK Danmark para 3.

<sup>161</sup> HK Danmark para 5.

<sup>162</sup> HK Danmark para 38.

## 7. *Domesticating international standards*

### 7.1. National disability laws

Before the adoption of the CRPD, some jurisdictions already had disability laws or laws that addressed some aspect of disability. Some countries developed their disability laws by drawing upon the evolving standards in the international legal framework. In some instances, there was a cross influence between the disability standards developed in the national systems, and the international legal standards. This could be said of the relationship between the Americans with Disabilities Act (ADA) and the UN legal standards on disability rights. Arguably, when the ADA was enacted in 1990, it set the standard on how a national law could comprehensively address disabilities from a human rights perspective. Charles Szymanski believes the ADA spurred the global development of disabilities laws because of its two important attributes. First, it reflected the shift from welfare and medical models of disability to the social and civil (human) rights models. Second, it was an innovative model and a flexible legal methodology of protecting the rights of persons with disabilities.<sup>164</sup>

Indeed, in the 1990s, following America and Canada, a number of countries adopted new laws on disabilities that, to various extents, drew upon international and national human rights standards especially equality and non-discrimination.<sup>165</sup> Degener and Quinn claim that the two documents that were especially influential in the development of domestic legislation were the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) adopted by the UN General Assembly in 1993 and the ADA.<sup>166</sup> Degener and Quinn identified four different legal approaches countries have taken to enact legislation to protect the rights of persons with disabilities.<sup>167</sup>

First, countries prohibit discrimination against persons with disabilities through criminal law. An example is France which prohibits discrimination in employment.

Second, they include equality and non-discrimination clauses in constitutional provisions which explicitly mention disability. An example is the Constitution of Malawi which recognises the right to freedom from discrimination on grounds including disability.<sup>168</sup>

A third approach is enactment of civil legislation, and an example is Zambia's Persons with Disabilities Act (1996). It would appear that this is the approach applicable in Namibia. While there is no disability-right specific legislation, the rights of person with disabilities are addressed in various pieces of legislation and policies such as the National Disability Council Act,<sup>169</sup> Child Care and Protection Act,<sup>170</sup> the Affirmative Action (Employment) Act<sup>171</sup>, the National Policy on Disability and the Sector Policy on Inclusive Education. The fourth way is enacting social welfare laws for persons with disabilities, for example Spain's Act on the Social Integration of the Disabled (1982).

Some countries also have or still have laws that, strictly speaking, should not be placed in the same category as the disability laws described above such as the ADA, because they specifically focused on how to deal with the problem of mental illnesses and in a manner that has nothing to do with the rights of persons with mental disabilities. Such laws emerged from a different historical basis, for instance Ghana's 1972 Mental Health Decree was a revision of the 1888 Lunatic Asylum Ordinance. African countries inherited such laws from their colonial masters, for instance the Zambia's Mental Disorders Act of 1951.<sup>172</sup> In some countries the two kinds of laws have co-existed, for as has been the case in Zambia between 1996 and 2017

<sup>163</sup> HK Danmark para 54.

<sup>164</sup> C Szymanski 'The globalization of disability rights law - From The Americans with Disabilities Act to the UN Convention on The Rights of Persons with Disabilities' (2009) 2 Baltic Journal of Law & Politics 20.

<sup>165</sup> T Degener & G Quinn 'A survey of international, comparative and regional disability law reform' in Disability rights law and policy: International and national perspectives, ed. Breslin ML & Yee S (2002) 10.

<sup>166</sup> Degener and Quinn (2002) 20.

<sup>167</sup> Degener and Quinn (2002) 27.

<sup>168</sup> Sec 20 Constitution of the Republic of Malawi.

<sup>169</sup> National Disability Council Act, 2004.

<sup>170</sup> Child Care and Protection Act, 2015. For example, section 9 of the Act provides that '(1) Every person, authority, institution or body must treat a child with disabilities in a manner which respects the child's dignity. (2) A child with disabilities is entitled to appropriate care and protection and must have effective access, insofar as reasonably possible and in the best interests of the child, to inclusive and non-discriminatory education, training, health care services, support services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to enabling the child to achieve the fullest possible social integration and individual development, ensuring his or her dignity and promoting his or her self-reliance and active participation in the community.'

<sup>171</sup> Affirmative Action (Employment) Act 29 of 1998. For a discussion of disability as one of the grounds under the Act, see Eilo and Another v Permanent Secretary of Education and Others (LC28/2006) [2007] NALC 4 (13 November 2007) para 28.

<sup>172</sup> See, Developing and adopting mental health laws in Africa: Lessons from Ghana, Zambia and Uganda, [https://www.who.int/mental\\_health/policy/development/n\\_11\\_lessons\\_learned\\_legislation.pdf](https://www.who.int/mental_health/policy/development/n_11_lessons_learned_legislation.pdf) (Accessed 11 August 2019).

## 7.2 The influence of the CRPD in domestic jurisdictions: Focus on Africa

In the preceding sections on the jurisprudence from the regions, almost all the legal action has come from the Americas and Europe. Because persons with disabilities are bringing cases before the regional tribunals, they have an opportunity to interpret both domestic and regional legal standards using the standards set by the CRPD. The African region has not been as active. Not many complaints or matters on disability have been referred to the regional organs, namely the African Commission, the African Court or the ACE, so that the impact of the CRPD at the African regional level cannot be demonstrated. The adoption of the AfRPD, however, is expected to spur African states into action to domesticate international standards on disability.

### 7.2.1 Legislative reforms

Following their ratification of the CRPD, one of the expectations is that States parties would domesticate the treaty by creating or reforming legislation to incorporate the standards in the CRPD. This is a crucial step in ensuring the protection of the rights of persons with disabilities because legislation enables standards to be enforced in the courts, and for duty-bearers to be held accountable.

Chilemba did a review of conformity of legislation with CRPD standards of selected African countries (Malawi, Zambia, Tanzania, Ghana and Uganda) on selected themes, namely; a human rights approach to disability, equality and non-discrimination, coordination and implementation, and provision of remedies for threats and violations.<sup>173</sup> The tabulated findings are reproduced in table 1.

As the table reveals, there are still some gaps in the legislation of some countries. For instance, the disability law in Ghana does not have a definition of disability; Malawi, Zambia, Ghana and Uganda do not include in their equality and non-discrimination provisions, the requirement to provide reasonable accommodation; and, Zambia, Tanzania, Ghana and Uganda do not comprehensively provide for remedies or mechanism of redress in case of human rights violations.

An annex to this report describes what provisions national legislation should contain to ensure compliance with the CRPD.

**Table 2 Assessment of compliance with CRPD standards by selected disability laws<sup>174</sup>**

| <b>Malawi<br/>Disability Act</b>                                                                              |                                                                                                                                                | <b>Zambia –<br/>Persons with<br/>Disabilities Act</b>                                                                                                              | <b>Tanzania –<br/>Persons with<br/>Disabilities</b>                                                                             | <b>Ghana –<br/>Persons with<br/>Disabilities Act</b>                                                                                                                          | <b>Uganda –<br/>Persons with<br/>Disabilities Act</b>                                                                                                                         |
|---------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Provision<br/>for substantive<br/>rights</b>                                                               | Compliant<br>(Education,<br>employment, health,<br>accessibility and<br>social protection)                                                     | Compliant<br>(Education,<br>employment,<br>health, accessibility;<br>social protection<br>recognised and<br>equal legal capacity)                                  | Compliant<br>(Education,<br>employment,<br>health, accessibility<br>and social protection)                                      | Largely compliant<br>(Education,<br>employment,<br>health, and<br>accessibility)                                                                                              | Largely<br>compliant<br>(Education,<br>employment,<br>health, and<br>accessibility)                                                                                           |
| <b>Definition of<br/>disability and<br/>persons with<br/>disabilities<br/>Equality and<br/>discrimination</b> | Compliant<br>(social and human<br>rights models) Not<br>compliant<br><b>Non-</b> (No reasonable<br>accommodation;<br>no affirmative<br>action) | Compliant<br>(social and<br>human rights<br>models) ‘Moderately’<br>not compliant<br>(Reasonable<br>accommodation<br>recognised; but<br>not affirmative<br>action) | Compliant (social and<br>human rights<br>models) Fully<br>compliant (Reasonable<br>accommodation;<br>and affirmative<br>action) | Position not<br>certain<br>(No definition<br>of disability or<br>person with<br>disability)<br>Not compliant<br>(No reasonable<br>accommodation;<br>no affirmative<br>action) | Compliant<br>(social and<br>human rights<br>models in the<br>definition of<br>disability)<br>Not compliant<br>(affirmative<br>action; but not<br>reasonable<br>accommodation) |

| <b>National coordinating body</b>                                           | Compliant (Body to be established under Act)                      | Compliant (Body continued under Act)                                                                                    | Compliant (Body established under Act)                            | Compliant (Body established under Act)                                                            | Compliant (Body established by separate Act recognised under Act)                                                  |
|-----------------------------------------------------------------------------|-------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|
| <b>Provision for civil remedies; mechanism for redress; &amp; penalties</b> | ‘Fully’ Compliant (Redress mechanism; penalties & civil remedies) | ‘Moderately’ Compliant (Indirect redress mechanism for discrimination only; remedies not listed; but penalties imposed) | ‘Moderately’ compliant (No civil remedies; but penalties imposed) | ‘Moderately’ compliant (No remedies; but penalties imposed for contravention of a few provisions) | ‘Moderately’ compliant (Indirect redress mechanism for prohibited acts; remedies not listed and penalties imposed) |

### 7.2.2 Disability jurisprudence in domestic courts

Having standards in legislation is one thing but to enjoy the protections of these standards is another. It is therefore important for the intended beneficiaries of these rights to enforce them in a national court or tribunals. As has already been said above, the regional tribunals in the Americas and Europe have taken on disability issues through individual complaints or referrals by a domestic court or treaty body. It is therefore important for beneficiaries to have access to legal mechanisms to hold duty-bearers accountable at the national level and to escalate to the regional level if need be. Such actions are important for clarifying standards and enforcing rights. This report describes some examples of action at the domestic level on disability rights.

#### **Unlawful institutionalisation, conditions of detention, psychosocial disabilities – *Gordon Maddox Mwewa & Others v Attorney-General & Another* 2017/HP/204 (unreported) (2017).**

Zambia has a relatively robust legislative framework on the protection of the rights of persons with disabilities. Zambia ratified the CRPD on 1 February 2010. It enacted the Persons with Disabilities Act (PDA) in 2012. Zambia also amended its Constitution in 2016.<sup>175</sup> Amongst others, the amendment introduced two provisions that enhance the Constitution’s protective power of disability rights. First, disability was included in the list of defined terms in Article 266. Second, Article 8 which articulates the national values, principles and economic policies included “human dignity, equity, social justice, equality and non-discrimination.”<sup>176</sup> Despite these progressive measures, however, there was still in existence a colonial legislation, the Mental Disorders Act (MDA)<sup>177</sup>, which embodies a non-human rights value system contrary to what the CRPD advances. Most importantly, it was still operational in coexistence with the PDA. This was the bone of contention in the *Mwewa* case.<sup>178</sup>

The petitioners challenged the MDA for violating various rights protected by the Constitution of Zambia, and that it interfered with the implementation of the PDA. The petitioners claimed that they had at different times been detained against their will and institutionalised. Further, the conditions of the institution were like a jail, and very poor, for instance inmates would sleep on the floor, wards were very dirty, toilets were overflowing and broken. The involuntary institutionalisation was authorised by the MDA. For this reason, they petitioned the Court to declare the MDA unconstitutional, and to protect the rights of persons with mental disabilities from unlawful detention and violations of their rights, including the right to dignity, the right to liberty, protection from torture and inhuman or degrading treatment, and freedom from discrimination.

It is beyond the scope of this report to provide a systematic analysis or critique of the judgement of the Court<sup>179</sup>, suffice to say that the Court did not declare the MDA unconstitutional. It did find, though, that Section 5 of the MDA was discriminatory because it used derogatory language when referring to persons with disabilities, and it declared the relevant section invalid.

<sup>173</sup> EM Chilemba ‘Disability rights and emerging disability legislation in selected African jurisdictions: A diagnostic commentary’ (2015) 3 African Disability Rights Yearbook 291.

<sup>174</sup> Chilemba (2015) 307.

<sup>175</sup> Constitution of Zambia (Amendment) Act 2 of 2016; See F Kalunga & C Nkhata ‘Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & Others v Attorney-General & Another*’ (2018) 6 ADHY 61-62.

<sup>176</sup> Article 8 (d) Constitution of Zambia.

<sup>177</sup> CAP 305 of the Laws of Zambia.

<sup>178</sup> See judgment at Zambia Legal Information Institute <https://zambialii.org/node/13179/revisions/13470/view> (Accessed 9 September 2019).



The Court did also mention in passing that persons with mental disabilities be treated humanely and that any cruel or inhumane treatment would violate the right their constitutional rights. The Court recommended to the relevant authorities to seriously consider reviewing the MDA. The Court, however, effectively avoided deciding on the issue of involuntary institutionalisation and its implications on constitutional rights.

What is also of interest for this report is what happened after the court case. Using the opportunity opened by the judgement, for advocacy, the disability rights movement in Zambia pushed for reform of the outdated MDA. The disability rights movement had considerable international support, including the backing of the special rapporteur on persons with disabilities.<sup>180</sup>

Their efforts paid off, because on 13th February 2019, the Solicitor General gazetted the Mental Health Bill. However, as reported by Southern Africa Litigation Centre (SALC), the disability rights movement in Zambia and international observers were shocked when they discovered that the framing of the Bill did not fully adopt the CRDP standards. For instance, contrary to the CRPD, it denied legal capacity to persons with psychosocial disabilities.<sup>181</sup> The disability rights movement engaged in further advocacy with Parliament to improve the Bill, and when the draft Bill was referred for redrafting, there was expectation that Parliament would ensure compliance with the CRPD. However, the final version showed that the concerns of the disability rights movement were ignored.

**Employment, affirmative action – *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) v Association for The Physically Disabled of Kenya Cause No. 348/2013 (unreported) (Kenya, 2013)***

This case came before a Kenyan court.<sup>182</sup> The applicants represented 24 persons with disabilities who lost their employment with the respondent organisation because it could not afford to maintain their employment because of financial difficulties. The applicants alleged that the decision of the respondent to terminate employment of the 24 persons with disabilities contravened various laws including section 15(6) of the Persons with Disabilities Act of 2003 (PDA 2003), and Article 54(a) of the Constitution of Kenya.

The Court found that the respondent organisation indeed had experienced financial distress. In fact, the respondent organisation had tried to seek financial assistance from the government through the Minister of Gender, Children and Social Development, but to no avail.

In its analysis, the Court referred to Section 11 of the PDA 2003 which requires the government to take steps to realise the rights of persons with disabilities, and amongst others, created institutions such as the National Council for Persons with Disabilities, and the National Development Fund for Persons with Disabilities to facilitate realisation of the rights of persons with disabilities.<sup>183</sup> Also, Section 13 of the PDA 2003 required that 5% of all positions of employment in public and private sectors be taken up by persons with disabilities. It also referred to Article 54(2) of the Constitution of Kenya which requires the

State to ensure progressive implementation of the requirement that 5% of the members of elective and appointive bodies be persons with disabilities.

The Court referred to the CRPD ratified by Kenya on 19 May 2008, and highlighted Article 27 of the CRPD which requires the State to promote employment opportunities for persons with disabilities, and assist them in finding, obtaining, maintaining and returning to employment. It noted that Article 27 of the CRPD like Article 54 (2) of the Constitution required States amongst others to employ affirmative action programs.<sup>184</sup>

<sup>179</sup> See F Kalunga & C Nkhata (2018). The authors were the legal counsel that represented the petitioners and their article describes the case.

<sup>180</sup> Southern Africa Litigation Centre, News release: Statement in solidarity with Zambian activists calling for amendment of the mental health bill, 8 March 2019, <https://www.southernafricalitigationcentre.org/2019/03/08/news-release-statement-in-solidarity-with-zambian-activists-calling-for-amendment-of-the-mental-health-bill/> (Accessed 2 September 2019); United Nations, End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Zambia (28 April 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19890&LangID=E> (Accessed 2 September 2019).

<sup>181</sup> Anabel Raw, You only have rights if you are a person: How Zambia is legislating away the rights of persons with psychosocial disabilities, 20 June 2019, <https://africanlii.org/node/2952> (Accessed 2 September 2019).

<sup>182</sup> See judgment at Kenya Law, <http://kenyalaw.org/caselaw/cases/view/107143/> (Accessed 9 September 2019).

<sup>183</sup> *KUDHEIHA case* para 25.

<sup>184</sup> *KUDHEIHA case* paras 30 & 31.

The Court concluded that it was the obligation of the Government to support the respondent organisation when if required financial assistance in order to avoid the redundancy that impacted on persons with disabilities.

Apart from other reliefs ordered, the Court recommended that the Government of Kenya releases a subsidy of Kshs.5 million annually to the respondent, to come from the National Development Fund for Persons with Disabilities.<sup>185</sup>

Arguably, this is a bold decision in which a Court recommended a specific sum of money to be made available to an institution responsible for the employment welfare of persons with disabilities. The tenor of the Court's recommendation was that this was an immediate obligation rather than an action the government would undertake progressively.<sup>186</sup>

## 8. Measures taken by Namibia to protect the rights of people with disabilities

The Namibian government has put in place different strategies to promote and protect the rights of people with disabilities. For example, there is Deputy Minister for Disability Affairs,<sup>187</sup> and has established the National Disability Council of Namibia. Although the 5th National Development Plan (NDP5) for the years 2017/18 – 2021/22<sup>188</sup> does not specifically mention people with disabilities, the activities that the government has implemented and will 'continue to implement benefit all Namibians including those with disabilities. Namibia has many non-governmental organisations that advocate for the rights of persons with disabilities.<sup>189</sup> Statistics from Namibia show that many people have different forms of disabilities. The Namibia 2011 Population and Housing Census Report shows, for example, that:

4.7% of the total population lived with disabilities. The proportion of people...with disabilities was higher in rural (5.7%) than in urban areas (3.3%). Regional figures show that Oshikoto and Omusati had the highest proportion of disabled people, with about 7% and 6%, respectively. Erongo had the lowest: 2.5%.<sup>190</sup>

The Report added that “physical Impairment - Lower Limbs was the most common type of disability, affecting 22.6% of all people with disabilities. The second most frequent disability was Visual Impairment which affected 17.4% of the population with disabilities.”<sup>191</sup> The report also mentioned, amongst other things, the percentage of men and women with disabilities, the percentage of people with disabilities in rural and urban areas, the percentage of people with different forms of disabilities, the percentage population with multiple disabilities by area and the economic activities engaged in by people with disabilities.<sup>192</sup> A recent survey by the Namibia Statistics Agency showed that over 10 per cent of the Namibian population mentioned disability as the reason for being inactive in the labour sector.<sup>193</sup> As a result, the government has introduced the disability grants and one of the ways to improve the living conditions of people with disabilities.<sup>194</sup> In 2011, “Orphan and disability grants were the main source of income for only 0.7% of households.”<sup>195</sup>

<sup>185</sup> KUDHEIHA case para 36.

<sup>186</sup> The High Court of Uganda has also ordered the government to ensure that court buildings accessible to persons with disabilities. The Court relied on, inter alia, the CRPD. See *Candia v Attorney General* (Miscellaneous Cause 158 of 2018) [2024] UGHCCD 40 (18 January 2024).

<sup>187</sup> The Incumbent Deputy Minister of Disability Affairs is Hon. Alexia P.T. Manombe-Ncube. See <https://www.parliament.na/index.php/national-assembly/members/all-members/1067-m-alexia>.

<sup>188</sup> See Namibia's 5th National Development Plan (NDP5) for the years 2017/18 – 2021/22. Available at [https://www.npc.gov.na/?wpfb\\_dl=294](https://www.npc.gov.na/?wpfb_dl=294)

<sup>189</sup> Ruusa Ntinda, 'Namibia' (2013) 1 African Disability Rights Yearbook 261 – 275.

<sup>190</sup> Namibia Statistics Agency, Namibia 2011 Population and Housing Census Report p. 53. Available at <https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/p19dmn58guram30ttun89rdrl.pdf>.

<sup>191</sup> Namibia 2011 Population and Housing Census Report p.54.

<sup>192</sup> Namibia 2011 Population and Housing Census Report p. 54 – 55.

<sup>193</sup> Disability/illness are mentioned (10.5%). Namibia Statistics Agency, The Namibian Labour Force Survey (2018) p. 40. Available at [https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/Labour\\_Force\\_Survey\\_final\\_-\\_2018.pdf](https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/Labour_Force_Survey_final_-_2018.pdf).

<sup>194</sup> For the different types of disability grants and the percentage of the national budget that the government has allocated to these grants, see generally, Namibia Statistics Agency and the World Bank, *Does Fiscal Policy Benefit the Poor and Reduce Inequality in Namibia?* (2017). Available at [https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/Namibia\\_CEQ\\_Report1.pdf](https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/Namibia_CEQ_Report1.pdf).

<sup>195</sup> Namibia 2011 Population and Housing Census Report p. 66. <sup>196</sup> See for example, Article 23(2) of the Constitution of Angola (2010) which provides that 'No-one may be discriminated against, privileged, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, ethnicity, colour,

<sup>197</sup> Case law from Namibia shows that a person could be born with a disability or he/she could become disabled later in life. In *Otto v Channel Life Namibia Ltd and Another* (1 1818/2003) [2007] NAHC 205 (28 May 2007) (the plaintiff became disabled at work and had to claim her disability insurance policy); *Rall v Professional Provident Society Insurance Company (Namibia) Ltd* (A 224/2013) [2014] NAHCMD 249 (22 August 2014) (claim disability benefit).

Unlike the constitutions of some African countries which expressly prohibit discrimination on the ground of disability,<sup>196</sup> the Namibian constitution is silent on this right inter alia, ratifying international and regional human rights instruments. In order to give effect to its international and regional obligations, Namibia has enacted domestic legislation dealing with the rights of people with disabilities.<sup>198</sup>

However, that does not mean that the Namibian government has not taken initiatives to promote and protect the rights of people with disabilities.<sup>197</sup> As mentioned above, this has been done through, These pieces of legislation include, National Disability Council Act, 199 Child Care and Protection Act, 200 and the Affirmative Action (Employment) Act.<sup>201</sup> The table below shows some of the other pieces of legislation relevant to the issue of disability:

| Legislation                                                  | Relevant section(s)                          | Comment                                                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------------|----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Military Pensions Act, 1976 (Act No. 84 of 1976)             | 1, 2, 3, 4, 5, 7, 10, 11, 13, 13A and 15     | Generally deals with pensionable disability; disability caused or aggravated by liminary service                                                                                                                                                                                                                                                                       |
| Employees' Compensation Act, 1941 (Act No. 30 of 1941)       | 3(1)(c), 36(b)(ii) and 40(c)(ii)             | Compensating an employee with a disability                                                                                                                                                                                                                                                                                                                             |
| National Pensions Act, 1992 (Act No. 10 of 1992)             | 1(1), 2 and 4(3)                             | Disability pension                                                                                                                                                                                                                                                                                                                                                     |
| Road Traffic and Transport Act, 1999 (Act No. 22 of 1999)    | 34                                           | Provides for circumstances in which a person with a disability may be disqualified from obtaining or holding learner's or driving licence                                                                                                                                                                                                                              |
| Conferment of National Honours Act, 2012 (Act No. 1 of 2012) | 5                                            | Providing that National Honours Advisory Committee will be composed of different people including one member appointed from nominations received from the National Disability Council                                                                                                                                                                                  |
| Employment Services Act, 2011 (Act No. 8 of 2011)            | 3(1) and (3) and 26                          | Providing that the Employment Services Board will consist of, inter alia, one member representing the interests of persons with disabilities and an organisation which represents the interests of disabled persons. The Act also prohibits a private employment agency from discriminating against people on the basis of the degree of physical or mental disability |
| Civil Proceedings Evidence Act, 1965 (Act No. 25 of 1965)    | 9                                            | The circumstances in which a person with a mental disability can be a witness in civil matters                                                                                                                                                                                                                                                                         |
| Electronic Transactions Act, 2019 (Act No. 4 of 2019)        | 2(g)                                         | One of the purposes of the Act is to ensure that, in relation to the provision of electronic transactions and services, the special needs of vulnerable groups and communities and persons with disabilities are duly taken into account;                                                                                                                              |
| Social Security Act, 1994 (Act No. 34 of 1994)               | 30(4); 35 and 43(1)(b)(ii)                   | Provides, inter alia, that the pension benefits payable in respect of permanent disability shall be prescribed and how disability pension may be considered in determining the amount of sick leave                                                                                                                                                                    |
| Maintenance Act, 2003 (Act No. 9 of 2003)                    | 16                                           | A court has to consider the beneficiary's disability as one of the factors when making maintenance orders                                                                                                                                                                                                                                                              |
| Immigration Control Act, 1993 (Act No. 7 of 1993)            | 15                                           | The Master of ship has to inform immigration authorities of the presence of any person with a disability on the ship                                                                                                                                                                                                                                                   |
| Basic Education Act, 2020 (Act No. 3 of 2020)                | 1, 6, 12, 14, 29, 30, 31, 45, 48, 78, 87, 99 | The right to education for persons with disabilities (in public and private schools); quality inclusive education; representation of persons with disabilities on school boards and on the National Advisory Council on Education, on the Establishment of National Examination, Assessment and Certification Board; and quality assurance.                            |

|                                                          |                               |                                                                                                                                                                      |
|----------------------------------------------------------|-------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Tobacco Products Control Act, 2010 (Act No. 1 of 2010)   | 1                             | Stipulates that a person with a disability may own a place where tobacco products are used.                                                                          |
| Veterans Act, 2008 (Act No. 2 of 2008)                   | 27                            | Classifying some victims of torture as veterans (people who became disabled as a result of torture by colonial forces)                                               |
| Labour Act, 2007 (Act No. 11 of 2007)                    | 5                             | Prohibits the discrimination against persons with disabilities in employment decisions.                                                                              |
| Mental Health Act, 1973 (Act No. 18 of 1973)             | 1                             | Defining 'mental illness' and 'psychopathic disorder'                                                                                                                |
| Higher Education Act, 2003 (Act No. 26 of 2003)          | 7(2)(b)(ii)                   | Requires the Minister to ensure that organisations representing persons with disabilities form part of the National Council for Higher Education                     |
| Namibia Sports Act, 2003 (Act No. 12 of 2003)            | 4(1)(d)                       | Provides that the Namibia Sports Commission shall consist of, inter alia, one person is nominated by the national umbrella sports body for people with disabilities; |
| Electoral Act, 2014 (Act No. 5 of 2014)                  | 89(2)(g), 91(1)(b), 103(1)(a) | Provides for measures which have to be taken by the government to ensure that people with disabilities cast their votes.                                             |
| Abortion and Sterilization Act, 1975 (Act No. 2 of 1975) | 2, 3 and 4                    | The Act authorises compulsory sterilisation on eugenic grounds or on the ground of lack of fitness to discharge parenthood.                                          |

The above pieces of legislation show, amongst other things, the rights of persons with disabilities and the obligations imposed on different public and private institutions to ensure that persons with disabilities are not discriminated against and they take part in as many activities as possible. Apart from legislation, some professional codes of conduct also require members not to discriminate against people on the ground of disability. This is the case, for example, with regards to the Code of Ethics of the Society of Professional Journalists.<sup>202</sup> Legislation provides that different government bodies must have a person to represent the interests of people with disabilities.<sup>203</sup> The government has implemented programmes to give effect to the rights to health, education, employment and access to social grants. These programmes have been recently discussed and will not be repeated.<sup>204</sup> This then requires one to understand the way in which Namibian courts have understood and interpreted the right not to be discriminated against on the ground of disability.

### 18.1. The right not to be discriminated against on the ground of disability

As mentioned above, unlike the constitutions of other African countries which expressly prohibit discrimination on the ground of disability, the Namibian constitution is silent on this right. Article 10 of the Constitution provides that '(1)

All persons shall be equal before the law. (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.' In *Muller v President of the Republic of Namibia*<sup>205</sup> the Supreme Court referred to section 15 of the Canadian Charter of Human Rights which prohibits discrimination on disability, amongst other grounds,<sup>206</sup> to hold that:

<sup>198</sup> Section 5(1)(e) of the Labour Act, 2007 (Act 11 of 2007) defines 'person with disability' to mean 'an individual who suffers from any persistent physical or mental limitation that restricts that individual's preparation for, entry into or participation or advancement in, employment or an occupation'.

<sup>199</sup> National Disability Council Act, 2004.

<sup>200</sup> Child Care and Protection Act, 2015. For example, section 9 of the Act provides that '(1) Every person, authority, institution or body must treat a child with disabilities in a manner which respects the child's dignity. (2) A child with disabilities is entitled to appropriate care and protection and must have effective access, insofar as reasonably possible and in the best interests of the child, to inclusive and non-discriminatory education, training, health care services, support services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to enabling the child to achieve the fullest possible social integration and individual development, ensuring his or her dignity and promoting his or her self-reliance and active participation in the community.'

<sup>201</sup> Affirmative Action (Employment) Act 29 of 1998. For a discussion of disability as one of the grounds under the Act, see *Eilo and Another v Permanent Secretary of Education and Others* (LC28/2006) [2007] NALC 4 (13 November 2007) para 28.

<sup>202</sup> This Code provides, inter alia, that 'Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should: avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.' As cited in *Hangula v Trustco Newspapers (Pty) Ltd and Another* (1 4081/2011) [2012] NAHC 315 (26 November 2012) para 76. Article 21(1)(a) of the Constitution provides for the rights to 'freedom of speech and expression, which shall include freedom of the press and other media.' However, these rights are not absolute. For example, in exercising these rights, hate speech against people with disabilities should not be used. See for example, 7 of the Broadcasting Code for Broadcasting Licensees Issued in Terms of Section 89 of the Communications Act, 2009, Communications Regulatory Authority of Namibia, No. 602 of 2018.

<sup>203</sup> For example, the Namibia Sports Commission. Section 4 of the Namibia Sports Act, Act 12 of 2003 provides that '[t]he Commission consists of nine members appointed by the Minister of whom - (d) one person is nominated by the national umbrella sports body for people with disabilities.

<sup>204</sup> TW Shumba and I Moodley, 'Implementation of disability policy framework in Namibia: A qualitative study' (2018) 74(1) *South African Journal of Physiotherapy*. Available at <https://sajp.co.za/index.php/sajp/article/view/399>.

<sup>205</sup> *Muller v President of the Republic of Namibia* (SA 2/98) [1999] NASC 2 (21 May 1999).

<sup>206</sup> Section 15 of the Canadian Charter of Human Rights provides that 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental-or physical disability.'



the tenor of section 15, and allowing for differences in wording and punctuation, closely resembles our Articles 10(1) and (2) as long as one remembers that sec. 15 of the Charter may be limited by sec. 1 of the Charter whereas no such limitation exists in regard to Article 10 of our Constitution.<sup>207</sup>

In this case the Court expressly recognised the fact that the wording of section 15 of the Canadian Charter was different from Article 10(2) of the Namibian constitution. This implies that the Court did not read disability into Article 10(2) as one of the grounds against which a person may not be discriminated against. In *Visser v Minister of Finance and Others*<sup>208</sup> one of the issues for the court to decide was whether disability was one of the grounds that a person could not be discriminated against under Article 10(2) of the Constitution on the basis of the words ‘social status.’ In its attempt to resolve this issue, the Court asked the plaintiff’s lawyer ‘whether they were able to cite any authority to support the contention that being disabled amounted to a social status.’<sup>209</sup> The Court added that the plaintiff’s lawyer ‘was not able to point to any authority but merely reiterated the contention that being disabled did amount to a social status as contemplated by art 10(2).’<sup>210</sup> Against that background, the Court found that disability was not one of the grounds against which a person may not be discriminated against. On Appeal in *Visser v Minister of Finance and Others*,<sup>211</sup> the Supreme Court dealt with the issue of whether disability is one the grounds against which a person may not be discriminated against. This issue arose, as indicated above, because the High Court had held that disability was not one of the grounds that could be read in the phrase ‘social status’ under Article 10(2) of the Constitution.<sup>212</sup> However, on the facts before it, the Court found it unnecessary to address the issue of whether or not disability was one of the grounds against which a person may not be discriminated against under Article 10(2) of the Constitution.<sup>213</sup>

Owing to the fact that the Constitution does not expressly provide for the right not to be discriminated against on the ground of disability, international human rights bodies have called upon Namibia to address this loophole. For example, the Committee on Economic, Social and Cultural Rights has called upon Namibia to ‘[e]xpand the grounds for discrimination prohibited in the Constitution to include, among others, marital status, political or other opinion, HIV status, disability, sexual orientation, language, property and birth.’<sup>214</sup> Although the Namibian Supreme Court is yet to rule on whether or not Article 10(2) of the Constitution prohibits discrimination on the ground of disability, the government, as mentioned above, has taken different measures to promote and protect the rights of people with disabilities. Some of these measures have been commented by international human rights bodies. For example, the Committee on the Rights of the Child has commended Namibia for providing disability grants.<sup>215</sup> However, the Committee was critical of the fact that a small percentage of children had access to those grants.<sup>216</sup> There is a need for Namibia to ensure that the institutions established to promote and protect the rights of people with disabilities coordinate their activities. In this regard, the Committee on the Rights of the Child had the following to recommend to the Namibian government:

The establishment of different structures and policies, in particular the National Disability Council and the National Policy on Disability of 1997, have not resulted in sufficient coordinated and concerted actions for children with disabilities. While noting that the National Disability Council is tasked with monitoring the implementation of the National Policy on Disability, the Committee regrets the lack of information on the Council’s monitoring activities in the State party’s report.<sup>217</sup>

The Human Rights Committee is ‘concerned about [t]he continuing discrimination against persons with disabilities.’<sup>218</sup> One of the issues that need closer attention in Namibia is the protection of the rights of persons with disabilities in the criminal justice system. Below is an illustration of how these rights have been protected.

<sup>207</sup> Page, 10.

<sup>208</sup> *Visser v Minister of Finance and Others* (I 3178/2007) [2014] NAHCMD 321 (29 October 2014).

<sup>209</sup> *Visser v Minister of Finance and Others* (2014), para 67.

<sup>210</sup> *Visser v Minister of Finance and Others* (2014), para 67.

<sup>211</sup> *Visser v Minister of Finance and Others* (SA 89/2014) [2017] NASC 10 (06 April 2017).

<sup>212</sup> *Visser v Minister of Finance and Others* (2017), para 25.

<sup>213</sup> *Visser v Minister of Finance and Others* (2017), para 28.

<sup>214</sup> E/C.12/NAM/CO/1 (CESCR, 2016) para 22(a).

<sup>215</sup> CRC/C/NAM/CO/2-3 (CRC, 2012) para 47.

<sup>216</sup> CRC/C/NAM/CO/2-3 (CRC, 2012) para 51, ‘The Committee reiterates its previous concern regarding the discrimination against children with disabilities (CRC/C/15/Add.14, paras. 7 and 15) and that the State party continues to adopt a social welfare approach to disability. The Committee notes that the State party provides grants for children with disabilities; however, it notes with concern that only 10 per cent of them are receiving the disability grant.’

<sup>217</sup> CRC/C/NAM/CO/2-3 (CRC, 2012) para 51 (b)



## 8.2. Persons with disabilities and the criminal justice system

There are different ways in which persons with disabilities come into contact with the criminal justice system. These includes as victims of crime, witnesses, accused and offenders.

### 8.2.1 Offenders

Namibian courts have considered the *Zinn* triad in determining which sentence to impose on the offender. In terms of this triad, courts have to consider the following factors in imposing the sentence: the nature of the crime, the personal circumstances of the accused and the interests of society.<sup>219</sup> However, the court may give more weight to one of the above three factors.<sup>220</sup> Namibian legislation does not require courts to consider disability as a mitigating factor in determining the sentence to impose on the offender. Notwithstanding this silence, the High Court has held that disability should be considered as a mitigating factor in determining the appropriate sentence.

<sup>221</sup> In *S v Jacob*<sup>222</sup> the accused was convicted of, inter alia, murder and in sentencing him to 25 years' imprisonment, the court held that 'the accused's disability is a factor which the court ought to take into account'<sup>223</sup> and that '[i]t is to his credit that he has earned himself a reputation of supporting his family despite his disability and that he was a trusted employee as per the pre-sentencing report.'<sup>224</sup> This means, inter alia, that a person with a disability should only be sentenced to imprisonment if a custodial sentence is the only appropriate sentence.

However, the mere fact that a person has a disability does not mean that he/she cannot be sentenced to imprisonment if the custodial sentence is the only appropriate sentence.<sup>225</sup> The fact that one of the accused's dependants is disabled<sup>226</sup> or that the accused is dependent on a person with a disability<sup>227</sup> is also a mitigating factor. A physically disabled offender has a right to 'approach the clerk of court for assistance to write out the notice of appeal if unable to do so.'<sup>228</sup> However, this rule is limited to a person with a physical disability. An accused who has a son with a disability will not be released on bail to take care of the child if there is evidence to prove that the child is being taken care of by other people.<sup>229</sup>

### 8.2.2 Victims

In Namibia, as in other countries, there are instances in which people with disabilities have been victims of crime. The fact that the victim of a crime has a disability is an aggravating factor in sentencing.<sup>230</sup> The use of a disabled person's child to commit an offence is an aggravating factor.<sup>231</sup>

The fact that the victim was disabled by the accused's offence is an aggravating factor in sentencing. For example, in *Benjamin and Others v S*<sup>232</sup> the appellants were convicted of attempted murder and sentenced to 36 months' imprisonment.<sup>233</sup> In dismissing their appeals against sentence, the High Court held that:

<sup>219</sup> CCPR/C/NAM/CO/2 (CCPR, 2016) para 9(d).

<sup>219</sup> *S v Alexander* (SA5/99) [2003] NASC 5 (13 February 2003); *S v De Klerk* (SA18/03) [2006] NASC 5 (08 December 2006); *Schiefer v S* (SA 29/2015) [2017] NASC 37 (12 September 2017); *S v Gaeseb* (CA 11/2007) [2012] NAHC 67 (14 March 2012).

<sup>220</sup> *Schiefer v S* (SA 29/2015) [2017] NASC 37 (12 September 2017) para 31.

<sup>221</sup> *S v Uirab* (CR 30/2009) [2009] NAHC 25 (07 April 2009). In this case the offender was mute and deaf but the magistrate imposed on him a fine he could not pay and was sentenced to imprisonment to 10 months imprisonment. The high court set aside the sentence because, inter alia, the offender was mute and deaf and was unemployed and substituted it with a fine of 'N\$1500 or 3 months' imprisonment, wholly suspended for a period of 12 months, on a condition that the accused is not convicted of the offence of theft committed within the period of suspension.' See also *S v Ilukena* (Sentence) (CC 06/2013) [2018] NAHCNLD 30 (06 April 2018).

<sup>222</sup> *S v Jacob* (CC: 22/2012) NAHCNLD 114 (31 October 2018).

<sup>223</sup> *S v Jacob* (2018), para 25.

<sup>224</sup> *S v Jacob* (2018), para 26.

<sup>225</sup> *Nakakoti v S* (CA 68/2016) NAHCNLD 45 (06 June 2017) (the appellant's appeal against his four year custodial sentence).

<sup>226</sup> *S v Tjikuzu* (CC 31/2008) [2011] NAHC 131 (18 May 2011) para 2 (the accused's mother was disabled); *S v Nampindi* (CC 29/2012) [2016] NAHCMD 211 (31 August 2018) para 3.1; *S v Julius* (CC 63/2007) [2016] NAHCMD 251 (09 August 2016) para 4 (one of the accused's children was disabled); the accused used to take care of a minor, who was not his child, who was disabled; *S v De Klerk* (SA18/03) [2006] NASC 5 (08 December 2006) para 2 (the accused's father was disabled); *S v Lukas* (CC 15/2013) [2015] NAHCMD 186 (08 October 2015) para 23 (the accused's father was disabled).

<sup>227</sup> *Sikwaya v S* (HC-NLD-CRI-APP-CAL-2019/00006) [2019] NAHCNLD 47 (09 May 2019) para 6 (the accused's mother received a disability grant).

<sup>228</sup> *Kornelius v S* (CA103/2009) [2011] NAHC 110 (08 April 2011).

<sup>229</sup> *Tjizu v S* (CA 01/2017) [2017] NAHCMD 131 (08 May 2017) para 12, in dismissing the accused's bail application, the High Court observed, inter alia, that 'The main reason the appellant seeks bail is to take care of his mentally disabled son who suffers from severe autism, and to this end he submitted documentary proof in support thereof. Whereas the child started exhibiting violent behaviour, he was sent to his grandmother in the north where he will remain until the issue of the appellant's incarceration is resolved.' NAHCNLD 48 (09 June 2017) the accused was convicted of murder and in sentencing him to 25 years' imprisonment, the court held that [para 13] 'I find it aggravating that you stabbed the deceased 24 times with 6 of the stab wounds fatal. The doctor who conducted the post mortem report testified that despite the sharpness of the knife you used force to inflict the injuries. The deceased was unarmed and as stated with his right hand disabled at the time.'

<sup>231</sup> *S v Basson and Another* (Case No. CR 177/07) [2007] NAHC 143 (13 December 2007) para 14.

<sup>232</sup> *Benjamin and Others v S* (HC-NLD-CRI-APP-CAL-2019/00007) [2019] NAHCNLD 59 (11 June 2019).

<sup>233</sup> *Benjamin and Others v S*, para 2.

The learned magistrate did properly balance the personal circumstances of the appellants, the interest for housebreaking was dismissed. This was the case although he was disabled and using a wheelchair). of justice as well as the interest of society. It is no doubt that the offence is serious and the appellants brutally assaulted the complainant who was hospitalized for 12 days. As a consequence of the appellants' actions, complainant suffered permanent scars and disabilities.<sup>234</sup>

Likewise, in *Akim v S*<sup>235</sup> the magistrate convicted the appellant of assault with intent to do grievous bodily harm and sentenced him to 18 months' imprisonment. He appealed to the High Court against his sentence and in dismissing the appeal, the court held, inter alia, that:

[T]he learned magistrate properly balanced the personal circumstances of the appellants, the interest of justice as well as the interest of society. It is no doubt that the offence is serious and the appellants brutally assaulted the complainant who was hospitalized for 30 days.

As a consequence of the appellants' actions, [the] complainant suffered permanent scars and disabilities. We are thus unable to find that a sentence of 18 months' imprisonment imposed is so manifestly excessive that no reasonable court sitting as a court of first instance would have imposed it.<sup>236</sup>

The fact that the victim was a disabled is also a factor that the court will consider in deciding whether the rape victim's failure to report the offence in time. In *S v Nambuli*<sup>237</sup> the accused argued, inter alia, that had the complainant been rape, 'she could have reported the matter to her brother who is a police officer.'<sup>238</sup> The Court held that:

Section 7 of the Combating of Rape Act states that 'in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual offence or indecent act and the laying of a complaint'. Complainant in this matter is a physically disabled person and a vulnerable witness. She explained to the court that she did not report the rape because accused threatened her and she was scared of him. The fact that the complainant delayed reporting the matter cannot be used as a weapon to draw adverse inferences against the complainant.<sup>239</sup> Rape is criminalised under the Combating of Rape Act<sup>240</sup> and the Act specifically addresses the question of complainants with disabilities. Section 2(1) of the Act provides that:

Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances - (a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape. Section 2(2)(f)(i) of the same Act provides that 'For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to - circumstances where the complainant is affected by - (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary).' Apart from the issue of rape, the fact that the victim was disabled in the process of the commission of an offence will be considered in determining whether the accused committed murder or culpable homicide.<sup>241</sup> Some pieces of legislation require courts to consider, as one of the aggravating factors in determining the appropriate sentence to impose on the offender, the fact that the victim had a disability.

<sup>234</sup> Ibid, para 12.

<sup>235</sup> *Eixab v S* (CA 28/2017) NAHCMD 192 (17 July 2017) (the appellant's sentence was 10 years' imprisonment for raping the victim who was disabled); *S v Michael* (03/2015)

<sup>236</sup> *Akim v S* (HC-NLD-CRI-APP-CAL-2019/00017) [2019] NAHCNLD 79 (08 August 2019).

<sup>237</sup> *Akim v S*, para 42.

<sup>238</sup> *S v Nambuli* (CC 20/2012) [2019] NAHCNLD 69 (25 July 2019).

<sup>239</sup> *S v Nambuli*, para 38.

<sup>240</sup> *S v Nambuli*, para 38.

<sup>241</sup> Combating of Rape Act, Act 8 of 2000.

<sup>41</sup> *S v Michael* (CC 03/2015) [2017] NAHCNLD 15 (03 March 2017) para 32, the Court held that 'The accused had injuries on his body and I find in his favour that there was a fight. The injuries are in my view of such a nature that I cannot find any justification for the 24 stab wounds inflicted. The doctor who did the post mortem examination testified that force was used to inflict the stab wounds. Considering the type of knife used the excessive brutality, the fact that the deceased was disabled in the right hand and the minor injuries on the accused I conclude, that even if the accused acted in self-defence initially, he had excessively exceeded the bounds of self-defence.' See also *S v Hitumata* (CC 09 /2015) [2017] NAHCMD 45 (24 February 2017) para 39 where the court held that 'When he was shooting at the deceased, the accused aimed at the most vulnerable parts of the body namely: the head and chest and these were fatal shots. Although the accused wants to paint a picture that some of the shots went off whilst he was struggling for a gun with the deceased's alleged friend, the accused intentionally directed his shots to the deceased's head and chest when he moved towards the deceased and shot at him after he already disabled him. This is a clear indication that the accused intended to kill the deceased.'

<sup>242</sup> For example, section 25(l) of the Combating of Trafficking in Persons Act, provides that '[i]f a person is convicted of any offence under this Act, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors - whether the victim of trafficking had any physical disability.' It is not clear why this provision is limited to physical disability. One would have expected the legislation to require courts to consider both mental and physical disabilities.

### 8.2.3 Witnesses

People with disabilities can also appear as witnesses in criminal matters. The Namibian government has put in place measures to ensure their protection. Against that background, section 189 of the Criminal Procedure Act provides that:

(2) A court before which a vulnerable witness gives evidence in criminal proceedings may, of its own motion or on the application of the prosecutor, the accused or that witness, order that special arrangements be made for the giving of the evidence of that witness. (3) Special arrangements under subsection (2) may consist of one or more of the following steps: (a) The issuing, subject to section 175 and notwithstanding section 180(2), of a direction that the vulnerable witness gives his or her evidence - (i) at any place, whether within or outside the courtroom - (aa) which is informally arranged to set that witness at ease; (bb) which is so situated that any person whose presence may upset that witness, is outside the sight of that witness; and (cc) which enables the court and any person whose presence is necessary at the proceedings in question to see and hear, either directly or through the medium of closed circuit television or similar electronic media or a one-way mirror or otherwise, that witness during his or her testimony and, if the witness is accompanied by a support person, to also see and hear the support person in like manner;

or (ii) behind a screen in the courtroom in the same manner and subject to the same requirements prescribed in item (cc) of subparagraph (i); (b) the rearrangement of the furniture in the courtroom, or the removal from or addition to the courtroom of certain furniture or objects, to set the vulnerable witness at ease, or the issuing of a direction that any person whose presence may upset that witness sits or stands at a certain location in the courtroom; (c) notwithstanding section 175, the granting of permission to a person (in this section referred to as a support person) who is a fit person for that purpose to accompany the vulnerable witness while he or she is giving evidence; (d) the adjournment under section 191 of the proceedings in question to any place other than the one where the court is sitting to hear the evidence of the vulnerable witness; (e) the taking of any other steps that in the opinion of the court are expedient and desirable to facilitate the giving of evidence by the vulnerable witness.

(4) The support person is entitled to - (a) sit or stand near the vulnerable witness and to give such physical comfort to that witness as may be desirable; (b) interrupt the proceedings to alert the presiding judge or magistrate to the fact that the vulnerable witness is experiencing undue distress, but, subject to subsection (5), the support person is not entitled to assist that witness with the answering of a question or to instruct that witness in the giving of evidence. (5) The court may give directions to the support person prohibiting the support person from communicating with the vulnerable witness or from taking certain actions, or may direct the support person to take such actions as the court may consider desirable. (6) When considering whether an order under subsection (2) should be made, the court must take into account the following matters: (a) The interests of the State in adducing the complete and undistorted evidence of the vulnerable witness concerned; (b) the interests and well-being of the vulnerable witness concerned; (c) the availability of necessary equipment and facilities; (d) the interests of justice in general.

<sup>242</sup> For example, section 25(l) of the Combating of Trafficking in Persons Act, Act 1 of 2018 provides that 'If a person is convicted of any offence under this Act, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors - whether the victim of trafficking had any physical disability.'

Section 189(1) defines a vulnerable witness to mean:

a person other than an accused - (a) who is under the age of 18 years; or (b) against whom an offence of a sexual or indecent nature or a domestic violence offence has been committed; or (c) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, possibility or other reason will be unable to give complete and undistorted evidence.

Case law on section 189 shows that although courts have dealt with cases involving vulnerable witnesses,<sup>243</sup> they are yet to invoke the section when dealing with a person with disability as a vulnerable witness. However, in *S v Nambuli*,<sup>244</sup> the complainant had been raped by the accused, the court, without referring to section 189 observed that the complainant was ‘a physically disabled person and a vulnerable witness.’<sup>245</sup>

## 9. Conclusion

The CRPD has been described as an important treaty of the 21st Century. Despite the International Bill of Human Rights using language inclusive terms about the subjects of human rights, prohibiting discrimination and recognising equality for everyone, persons with disabilities had been largely invisible until the adoption of the CRPD. The CRPD has spurred action, especially in the Americas and Europe, to promote respect for the rights of persons with disabilities. Regional tribunals are playing an important role in facilitating the domestication of the standards in the CRPD through hearing individual complaints and referrals from treaty organs. The African region has been slow in taking up the international standards articulated by the CRPD. However, the AfDP has emerged on the African scene. There is some growing expectation that the African region would become more active now that a regional treaty has been adopted, and the standards it advances are more or less the standards that the CRPD encapsulates. It remains to be seen whether Africa would be inspired to robustly protect the rights of persons with disabilities. There is some hope that this would be the case because countries have reviewed old laws or enacted new laws to comply with the CRPD. In some instances, national courts including in Africa, have also applied CRPD standards. However, there is still a great deal to be done in order to respond to the shift of perspective the CRPD is asking, and to reflect its standards in legislation, policy and state practice.

The Namibian government has implemented political, legislative, economic and social programmes to protect and promote the rights of persons with disabilities. However, more needs to be done in this regard and this explains why the government has embarked on the process of amending the policy and legislation to better protect and promote the rights of people with disabilities.

## 10. References

Appiagyei-Atua, K ‘A comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities’ [In No Linguistic Content] (2017) 21 *Law, Democracy & Development* 153-175.

Chilemba, EM ‘Disability rights and emerging disability legislation in selected African jurisdictions: A diagnostic commentary’ (2015) 3 *African Disability Rights Yearbook* 55-56.

Clifford, J ‘The UN Disability Convention and its Impact on European Equality Law’ (2011) 6 *Equal Rights Review* 11-25.

<sup>243</sup> *S v Van Der Westhuizen* (CC 11/2018) [2019] NAHCMD 267 (02 July 2019) (the section was invoked because the witness was a victim of sexual assault and the application was allowed).

<sup>244</sup> *S v Nambuli* (CC 20/2012) [2019] NAHCNLD 69 (25 July 2019).

<sup>245</sup> *S v Nambuli*, para 38.

Degener, T, & G Quinn 'A survey of international, comparative and regional disability law reform'. In *Disability rights law and policy: International and national perspectives*, edited by Breslin, ML & S Yee, 3-125. (New York: Transnational Publishers, 2002).

European Union Agency for Fundamental Rights and Council of Europe *Handbook on European non-discrimination law* [in English] (Luxembourg: European Union Agency for Fundamental Rights and Council of Europe, 2018).

Guarnizo-Peralta, D 'Disability rights in the Inter-American System of Human Rights: An expansive and evolving protection' (2018) 36 *Netherlands Quarterly of Human Rights* 43-63.

Kalunga, F, & C Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & Others v Attorney-General & Another*' (2018) 6 *ADRY* 60-81.

Kanter, A *The development of disability rights under international law: From charity to human rights* [in English] (London: Routledge, 2015).

Kayess, R, & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1-34.

Mégret, F 'The Disabilities Convention: Human rights of persons with disabilities or disabilities rights?' [In English] (2008) 30 *Human rights quarterly* 494-516.

Mgijima-Konopi, I 'The jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for Africa'. In *African Disability Rights Year Book*, edited by Ngwena, CG, I Grobbelaar-du Plessis, H Combrinck & SD Kanga, 269-281. (Pretoria: Pretoria University Law Press, 2016).

Ngwena, CG 'Reproductive autonomy of women and girls under the Convention on the

Rights of Persons with Disabilities' (2018) 140 *International Journal of Gynecology & Obstetrics* 128-133.

Schulze, M. "Understanding The UN Convention On The Rights Of Persons with Disabilities." 2010. Stein, MA, & JE Lord 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities'. In *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, edited by Arnardóttir, OM & G Quinn, 17-40. (Leiden: Martinus Nijhoff, 2009).

Szymanski, C 'The globalization of disability rights law - From The Americans with Disabilities Act to the UN Convention on The Rights of Persons with Disabilities' (2009) 2 *Baltic Journal of Law & Politics* 18-34.

Van Reenen, TP, & H Combrinck 'The UN convention on the rights of persons with disabilities in Africa: Progress after 5 years' [In English] (2011) 8 *Sur* 133-166.

Wachira, M, & D Cassell 'The interpretation of the right to mental health in the Africa and American systems'. In *African Human Rights Yearbook*, 223-242. (Pretoria: Pretoria University Law Press, 2018).



## APPENDIX

**Key elements to include in national legislation on disability rights**

(Adapted from United Nations, Toolkit for disability in Africa).

| Key consideration                         | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Purpose of disability legislation         | Legislation should define its purpose. CRPD defines purpose in Article 1 which is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Definition of disability                  | The definition of disability should clearly bring out the social and human rights approaches to disability in accordance with Article 1 of the CRPD which recognises persons with disabilities as including "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."                                                                                                                                                                                                                                                                                                                                |
| Disability rights principles              | Just as the following principles apply in all the articles of the CRPD, provisions of legislation should aim at incorporating these principles.<br>(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;<br>(b) Non-discrimination;<br>(c) Full and effective participation and inclusion in society;<br>(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;<br>(e) Equality of opportunity;<br>(f) Accessibility;<br>(g) Equality between men and women;<br>(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. |
| Guarantee equality and non-discrimination | The full guaranteeing of equality and non-discrimination as recognised in Article 5 of the CRPD is fundamental to disability rights legislation. Legislation therefore must include language that prohibits all discrimination based on disability. It must also include the language of "reasonable accommodation" which means government should make appropriate modifications and adjustments to accelerate the attainment of substantive equality for persons with disabilities.                                                                                                                                                                                                                                                                               |
| Substantive provisions                    | States should consider including the following substantive provisions in their legislation. Equality before the law (Article 5) Right to life (Article 10) Equal recognition before the law and legal capacity (Article 12) Right to liberty and security of the person (Article 14) Freedom from torture (Article 15) Freedom from exploitation, violence and abuse (Article 16) Right to respect physical and mental integrity (Article 17) Freedom of movement and nationality (Article 18)                                                                                                                                                                                                                                                                     |
|                                           | Right to live in the community (Article 19) Freedom of expression and opinion (Article 21) Respect for privacy (Article 22) Respect for home and the family (Article 23) Right to education (Article 24) Right to health (Article 25) Right to work (Article 27) Right to an adequate standard of living (Article 28) Right to participate in political and public life (Article 29) Right to participate in cultural life (Article 30)                                                                                                                                                                                                                                                                                                                            |
| Multiple discrimination                   | States should consider having provisions that address persons with disabilities that are at risk of multiple discrimination, such as; Women with disabilities Children with disabilities Older persons with disabilities                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

|                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|----------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| National level monitoring and implementation | <p>Article 33 of the CRPD sets out the responsibilities of State parties in establishing frameworks for monitoring and implementation. Article 33 requires that each State:</p> <ol style="list-style-type: none"> <li>1) designate one or more dedicated points of contact within government to deal with matters relating to implementing the Convention;</li> <li>2) consider putting a coordinator or dedicated office in place to link with all levels of government across sectors;</li> <li>3) establish an independent process to promote, protect and monitor implementation of the Convention; <i>and</i></li> <li>4) involve civil society in the national monitoring process.</li> </ol>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Areas states should consider prioritising    | <p>The list below is not exhaustive. However, these are issues that have been neglected, or states find most difficult to address and could be prioritised to accelerate the achievement of substantive equality for persons with disabilities.</p> <p><b>Equal recognition before the law</b></p> <p>One of the pervasive violations against persons with disabilities has been to ignore them as equal before the law, so that for example, electoral laws ensure that every one who is legible should vote, but they simply made no provisions for persons with disabilities. It is therefore important to ensure that all laws, such as electoral law, health laws, civil and criminal laws recognise persons with disabilities on equal basis with others.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|                                              | <p><b>Access to justice</b></p> <p>It is crucially important for protection of rights that when there is infringements, there must be access to justice mechanisms that would ensure effective redress. This would include:</p> <p>damages (for example, compensation); an order for reinstatement;<br/> an order to stop discriminatory acts and prevent them in the future; a requirement to provide reasonable accommodation;<br/> an apology;<br/> an order to take wide-ranging remedial measures; other measures.</p> <p><b>Health law and protections</b></p> <p>Ironically, health laws have also been an important area of violations for persons with disabilities. Persons with mental disabilities have readily been deprived of liberty, forced to be institutionalised and sometimes put on medication without consulting them first. States parties should review health legislation to ensure that it complies with the principles and provisions of the CRPD and provide appropriate remedies where there has infringement.</p> <p><b>Inclusive education</b></p> <p>It has been suggested that education is fundamental to ensuring all other inclusions, independent living and participation of persons with disabilities in the life of the society. It is therefore important for states to ensure that persons with disabilities are not deprived of the opportunity to interact with others and should endeavour to make provisions for reasonable accommodation to enable persons with disabilities to access education to the fullest of their potential.</p> |



## **SITUATIONAL ANALYSIS ON NATIONAL POLICY ON DISABILITY IN NAMIBIA**

### **1. Background**

#### **1.1 Purpose of the analysis**

The purpose of this report is to highlight the current and future measures that Namibia has implemented and should implement in order to protect and recognize the rights of persons with disabilities in compliance with Namibia's Constitutional and international obligations. The analysis aims to inform and complement the Draft Persons with Disability Bill as well as the Draft National Policy on Disability, the two legal instruments will repeal the current outdated National Disability Council (Act, No. 26 of 2004) which has the current National Policy of Disability of 1997 attached to it. The analysis will therefore outline the gaps in terms of disability inclusion in the current and future national processes and programmes and recommend further in-depth responses where needed.

#### **1.2 Introduction**

Namibia has ratified Regional and International human rights Instruments that directly or indirectly provide for the rights of people with disabilities. Such instruments therefore place several obligations to give effect to the statutory provisions, this includes enacting relevant legislation and policies. Such legislation and policies should speak to the current and future circumstances that persons with disabilities may be faced with. In this case, the "Situational analysis" will therefore help develop a basis of understanding of the environment in which such legislation and policies are developed. It provides a common reference point for the planning process and prioritises actions and solutions to problems. Namibia has made significant strides in recognizing and addressing the rights of persons with disabilities. However, a comprehensive situational analysis is essential to understand the current state of disability legislation and policies, identify gaps, and inform future strategic directions.

### **2. Approaches**

#### **2.1 Guiding Principles**

The analyses relies on the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), as the guiding instrument in providing a comprehensive analysis of the Namibian disability situation. The CRPD calls on states parties to re-recognise their obligations to promote,

protect and ensure the full realisation of human rights and fundamental freedoms for persons with disabilities. These include the right to life, recognition before the law, liberty and security of person, respect for physical and mental integrity, liberty of movement, to marry and found a family, education, the highest attainable standard of health, to work, an adequate standard of living, social protection, and to take part in cultural life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom to choose one's residence and to a nationality, freedom of expression and opinion, and freedom from arbitrary or unlawful interference with his or her privacy. In restating the traditional human rights, the CRPD draws attention to persons with disabilities by unambiguously prohibiting discrimination against persons with disabilities.

As indicated in the National Policy on Disability of 2020 and the Disability Report some of the guiding principles will include, regarding disability as a human rights issue and not a health issue, another guiding principle will be regarding disability as a developmental issue, were people with disabilities will be able to contribute towards the economic development of Namibia. Lastly the analysis is driven by the involvement and consultation of persons with disabilities in all decisions especially those affecting their lives.

### **3. Methodology**

The situational analysis is based on data derived from a desk review of various relevant studies, government reports and data on the rights of persons with disabilities as well as relevant laws, policies and their implementation. The analysis also relied heavily on data provided by the Namibian Statistic Agency, in determining the current situation and needs of PWDs as well as the future measures to be taken, the analysis obtained its data from the nationwide consultative meetings on the review of the Persons with Disability Bill and Policy on Disability, conducted by The National Disability Council. During such meeting persons with disabilities and OPDs actively participated and provided inputs on the current situations they faced as well as the relevant changes they expect in terms of legislation and policy development.

The Council also used data obtained from the Disability Annual Monitoring Report that requires government offices, ministries, agencies, the private sector, and local and regional authorities to submit a yearly report on how they have mainstreamed disability issues.

### **4. Scope and limitations**

This report aims to provide sufficient information to allow for the identification of key priorities and issues which require further analysis, investment and action. This information should inform future analysis and programming. The report: Describes and analyzes the functioning of coordination mechanisms and contributions made by stakeholders, obstacles to participation of PWDs and OPDs and capacity gaps of stakeholders. Examines the legislative and policy context regarding PWDs and non-discrimination, including implementation.

## **5. SITUATIONAL ANALYSIS**

### **5.1. Legislative framework**

#### **5.1.1. Current Legal Framework**

During the review of the Namibian legislative framework, disability is not directly addressed in many of the current pieces of legislation, there protections of rights or inclusion of interests of persons with disabilities is mentioned in various pieces of legislation with many of them of general application to all the citizens including those without disabilities. The most relevant legislation are contained in the National Policy on Disability as well as the report on disability in Namibia, below is a list of the various legislation that provide for the recognition and protection of the rights and interests of

persons with disabilities.

- The Constitution of 1990
- National Disability Council Act 26 of 2004
- National Pensions Act 10 of 1992
- Child Care and Protection Act 3 of 2015
- National Welfare Act 79 of 1965 (RSA)
- Affirmative Action (Employment) Act 29 of 1998
- The Labour Act 7 of 2007
- Public Enterprises Act 1 of 2019
- National Policy on Disability of 1997
- Sector Policy on Inclusive Education 2013
- Convention on the Rights of Persons with Disabilities
- The Protocol to the African Charter on the Rights of Persons with Disabilities

### 5.1.2 Proposed Legislation

The National Disability Council of Namibia has propped for the adoption of the Persons with Disabilities Bill as well as the Draft National Policy on Disability, the two legal instruments will repeal the current Disability Council Act, 2004 (Act No. 26 of 2004), which has the current National Policy on Disability Attached to it. The Council has consulted all 14 regions in Namibia and all relevant stakeholders, persons with disabilities and their respective organizations have been engaged and made the relevant comments and contributions.

## 5.2 Disability Statistics

The current available official disability statistics by the Namibia Statistics Agency NSA is from the 2011 Census which is outdated as the number of PWDs has increased in the years that passed. In 2023 Namibia had its national housing and population censuses, and we still await the official report from the NSA for more recent data. But given the fact that it is currently 13 years that the official data was recorded one can estimate the number to have increased significantly. But currently the NSA has published the Namibia Inter-censal Demographic Survey 2016 which is derived from the 2011 census which will be used to illustrate the current disability statistics.

The number of people with disabilities in 2016 was estimated to be 108 992, out of which 54 102 were male and 54 890 were females. About 36 404 were situated in urban areas, while 72 588 were situated in rural areas all over Namibia, meaning they are often far away from healthcare and other relevant services. The Ohangwena region had the highest number of persons with disabilities, totaling 17 497, while Hardap had the lowest at 2 319. This is likely a result of the general population sizes within the respective regions, since Ohangwena region is home to a general population of 255 510 people while Hardap has a population of only 87 186, as illustrated in the table below.

**Table 1 Population with disability by sex and area**

| Area         | With Disabilities |        |        |
|--------------|-------------------|--------|--------|
|              | Total             | Male   | Female |
| Namibia      | 108 992           | 54 102 | 54 890 |
| Urban        | 36 404            | 18 247 | 18 156 |
| Rural        | 72 588            | 35 855 | 36 733 |
| !Karas       | 3 006             | 1 541  | 1 465  |
| Erongo       | 4 955             | 2 769  | 2 186  |
| Hardap       | 2 319             | 1 158  | 1 161  |
| Kavango East | 8 837             | 4 070  | 4 767  |



|              |        |       |       |
|--------------|--------|-------|-------|
| Kavango West | 6 807  | 3 536 | 3 271 |
| Khomas       | 9 670  | 5 638 | 4 032 |
| Kunene       | 4 742  | 2 794 | 1 949 |
| Ohangwena    | 17 497 | 8 274 | 9 222 |
| Omaheke      | 3 287  | 1 912 | 1 375 |
| Omusati      | 14 950 | 6 214 | 8 736 |
| Oshana       | 11 587 | 5 209 | 6 378 |
| Oshikoto     | 10 681 | 5 542 | 5 139 |
| Otjozondjupa | 6 629  | 3 455 | 3 174 |
| Zambezi      | 4 024  | 1 990 | 2 033 |

The statistics by the NSA indicate that visual impairment is the most common type of disability affecting 29.3 percent of persons with disabilities. This is followed by Physical Impairment of Lower Limbs at 26.4% and Upper limbs at 20.6%, as illustrated by Table 2 below.

**Table 2 Population with disability by type and sex**

| Disability type                     | Number |        |        | Percent |      |        |
|-------------------------------------|--------|--------|--------|---------|------|--------|
|                                     | Total  | Male   | Female | Total   | Male | Female |
| Total<br>108 992                    |        | 54 102 | 54 890 |         |      |        |
| Hearing impairment                  | 17 454 | 7 686  | 9 768  | 16.0    | 14.2 | 17.8   |
| Visual impairment                   | 31 968 | 14 047 | 17 920 | 29.3    | 26.0 | 32.6   |
| Speech impairment                   | 7 488  | 4 285  | 3 204  | 6.9     | 7.9  | 5.8    |
| Physical impairment -<br>upper limb | 22 450 | 12 266 | 10 184 | 20.6    | 22.7 | 18.6   |
| Physical impairment -<br>lower limb | 28 745 | 15 232 | 13 513 | 26.4    | 28.2 | 24.6   |
| Mental disability                   | 16 609 | 8 456  | 8 153  | 15.2    | 15.6 | 14.9   |
| Albinism                            | 822    | 419    | 403    | 0.8     | 0.8  | 0.7    |
| Other (2)                           | 820    | 414    | 406    | 0.8     | 0.8  | 0.7    |
| Don't Know                          | 706    | 396    | 310    | 0.6     | 0.7  | 0.6    |

As illustrated in Table 3 below<sup>2</sup>, persons may be affected by one or more types of disabilities, meaning that more diverse care and reasonable accommodation is required to meet the needs of these people. This may require that Namibia adopt a holistic and multi-sectoral approach to ensuring their needs.

**Table 3 Population with multiple disabilities by area**

| Area         | Total   | With one<br>Disability | With two Disability | With three<br>Disability |
|--------------|---------|------------------------|---------------------|--------------------------|
| Namibia      | 108 992 | 86.3                   | 10.8                | 2.9                      |
| Urban        | 36 404  | 87.9                   | 9.9                 | 2.3                      |
| Rural        | 72 588  | 85.5                   | 11.3                | 3.2                      |
| !Karas       | 3 006   | 84.1                   | 12.9                | 2.9                      |
| Erongo       | 4 955   | 85.5                   | 13.7                | 0.8                      |
| Hardap       | 2 319   | 89.9                   | 9.6                 | 0.5                      |
| Kavango East | 8 837   | 90.4                   | 8.1                 | 1.5                      |
| Kavango West | 6 807   | 90.8                   | 7.2                 | 2.0                      |

|              |        |      |      |     |
|--------------|--------|------|------|-----|
| Khomas       | 9 670  | 87.8 | 8.0  | 4.2 |
| Kunene       | 4 742  | 85.5 | 9.2  | 5.4 |
| Ohangwena    | 17 497 | 83.3 | 15.1 | 1.7 |
| Omaheke      | 3 287  | 82.1 | 9.5  | 8.4 |
| Omusati      | 14 950 | 87.7 | 8.2  | 4.1 |
| Oshana       | 11 587 | 84.0 | 13.5 | 2.5 |
| Oshikoto     | 10 681 | 86.7 | 9.5  | 3.8 |
| Otjozondjupa | 6 629  | 82.2 | 14.6 | 3.2 |
| Zambezi      | 4 024  | 91.3 | 8.7  | 0.0 |

It is projected that there is an increase in the disability population, and more persons with disabilities are relocating to more developed parts of the country to search for education and employment opportunities. Another contributing factor is the increase in the disability grant from N\$1 200 to N\$1 400, which is persons with disabilities feel is also not sufficient to cater for their needs therefore an increase is required.

### 5.3 Social and Economic Inclusion

Persons with disabilities do not enjoy social and economic inclusion on an equal basis, this is due to intersectionality, as will be shown in the data bellow regarding employment and education more males with disabilities are employed or and have more opportunities. With the influence of historical believes and traditional practices, woman with disabilities suffer more inequalities than man with disabilities as they fall under various categories in which they may be discriminated against compared to man with disabilities. This is also the same for children with disabilities, therefore more protection and inclusion is required for woman and children with disabilities than to man.

#### Employment

In Namibia the National Policy on Disability of 1997 states that the government shall ensure that persons with disabilities have equal opportunities for a productive and gainful employment in the labor market. Thus, in order to ensure that persons with disability are granted equal opportunity at the work place as those without disability, the state shall ensure that labor related legislation does not discriminate against persons with disabilities and will ensure that obstacles to their employment are removed.

In addition, about 63.6% of persons with disabilities that are 15 years old and above reported difficulties engaging in any economic activities.<sup>3</sup> According to the Affirmative Action Report issued by the Employment Equity Commission of Namibia (EEC) for the review period of 2017/2018, a total of 277 745 persons were hired across all reporting employment sectors during the period under review, representing an increase of 5% in employees recruited from the previous review period. Persons with disabilities accounted for a mere 0.4% of that total. In numerical terms, that amounted to 1 177 people, of which 757 were male and 420 were female.

#### Education

Namibia have adopted the Policy on inclusive Education to ensure that the needs of Learners with disabilities are well taken care of. There is how ever a need for the proper implementation of this Policy, as challenges such as Learners with hearing impairment being taught by Teachers who do not know sign language and Learners with visual impairment not provided with braille materials experienced before the implementation of this Policy are still being experienced.

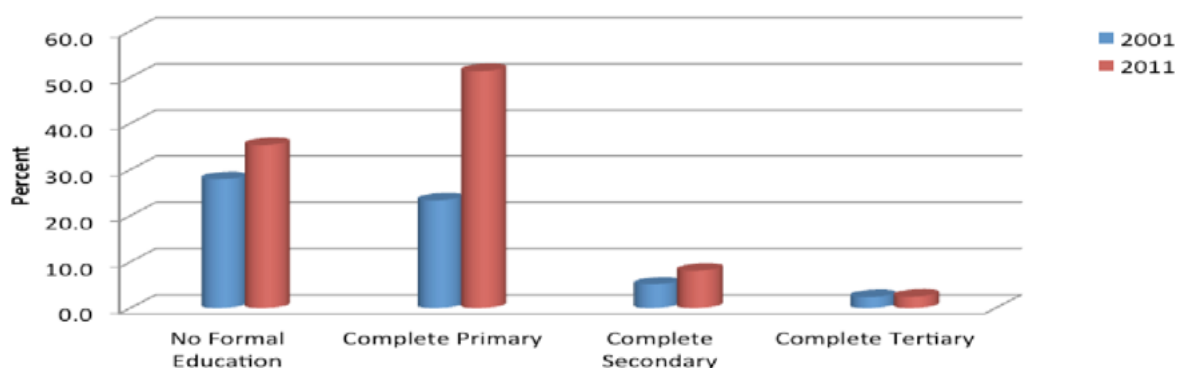
<sup>3</sup> Namibia Inter-censal Demographic Survey 2016 Report p60.

Persons with disabilities in Namibia must have equal rights of access to education. The Equality Acts prohibit discrimination against persons with a disability in the areas of admission, access, and participation. While inclusive education is a stated goal, a situational analysis should evaluate the effectiveness of current policies in ensuring equal educational opportunities for persons with disabilities. Furthermore, about 52.2% of persons with disabilities aged 4 years and above had difficulties engaging in any learning activity. This is reflected in table below, which provides statistics of all learners with disabilities in Namibian schools, and figure that indicates which percentage actually make it to tertiary institutions.<sup>4</sup>

### Learners with disabilities in Namibian schools

| Grade        | Overall Total |        |        | Epileptic |        |      | Behavioural |        |       | Mid Intellectual |        |       | Severe Intellectual |        |      | Learning |        |       | Autism |        |      | Other |
|--------------|---------------|--------|--------|-----------|--------|------|-------------|--------|-------|------------------|--------|-------|---------------------|--------|------|----------|--------|-------|--------|--------|------|-------|
|              | Total         | Female | Male   | Total     | Female | Male | Total       | Female | Male  | Total            | Female | Male  | Total               | Female | Male | Total    | Female | Male  | Total  | Female | Male | Total |
| National     | 16,717        | 6,669  | 10,048 | 1,201     | 718    | 483  | 4,929       | 1,594  | 3,335 | 3,163            | 1,321  | 1,842 | 936                 | 366    | 570  | 5,184    | 2,098  | 3,086 | 270    | 97     | 173  | 1,034 |
| Pre-Primary  | 437           | 172    | 265    | 27        | 7      | 20   | 196         | 77     | 118   | 48               | 20     | 28    | 18                  | 5      | 13   | 89       | 41     | 48    | 15     | 1      | 14   | 45    |
| Grade 1      | 1,884         | 706    | 1,178  | 91        | 46     | 46   | 514         | 179    | 335   | 311              | 126    | 185   | 113                 | 37     | 76   | 709      | 267    | 442   | 46     | 18     | 28   | 100   |
| Grade 2      | 1,699         | 588    | 1,111  | 67        | 26     | 41   | 512         | 162    | 350   | 272              | 96     | 177   | 76                  | 28     | 48   | 677      | 234    | 443   | 30     | 11     | 19   | 65    |
| Grade 3      | 1,447         | 531    | 916    | 76        | 39     | 37   | 397         | 123    | 274   | 240              | 92     | 146   | 130                 | 52     | 78   | 537      | 199    | 338   | 19     | 7      | 12   | 48    |
| Grade 4      | 2,092         | 771    | 1,321  | 142       | 75     | 67   | 565         | 167    | 398   | 374              | 137    | 237   | 179                 | 75     | 104  | 700      | 271    | 429   | 40     | 13     | 27   | 92    |
| Grade 5      | 1,781         | 648    | 1,133  | 127       | 70     | 57   | 412         | 114    | 298   | 441              | 169    | 272   | 88                  | 29     | 59   | 581      | 217    | 364   | 22     | 9      | 13   | 110   |
| Grade 6      | 1,468         | 610    | 858    | 134       | 98     | 36   | 438         | 135    | 303   | 264              | 117    | 147   | 90                  | 30     | 60   | 474      | 203    | 271   | 23     | 7      | 16   | 45    |
| Grade 7      | 1,120         | 449    | 671    | 112       | 66     | 44   | 347         | 90     | 257   | 204              | 89     | 115   | 67                  | 28     | 39   | 264      | 120    | 144   | 15     | 6      | 9    | 111   |
| Grade 8      | 1,673         | 764    | 909    | 159       | 114    | 45   | 500         | 159    | 341   | 405              | 193    | 212   | 34                  | 15     | 19   | 447      | 207    | 240   | 6      | 4      | 2    | 122   |
| Grade 9      | 1,165         | 542    | 623    | 116       | 80     | 36   | 414         | 159    | 255   | 253              | 126    | 127   | 35                  | 17     | 18   | 242      | 103    | 139   | 9      | 2      | 7    | 96    |
| Grade 10     | 654           | 324    | 330    | 78        | 52     | 26   | 250         | 95     | 155   | 109              | 56     | 51    | 9                   | 5      | 4    | 135      | 64     | 71    | 12     | 4      | 8    | 61    |
| Grade 11     | 411           | 204    | 207    | 35        | 21     | 14   | 180         | 73     | 107   | 44               | 23     | 21    | 29                  | 19     | 10   | 53       | 26     | 27    | 17     | 9      | 8    | 53    |
| Grade 12     | 249           | 115    | 134    | 17        | 13     | 4    | 121         | 43     | 78    | 20               | 11     | 9     | -                   | -      | -    | 57       | 31     | 26    | 3      | 2      | 1    | 31    |
| Other grades | 637           | 245    | 392    | 20        | 10     | 10   | 84          | 18     | 66    | 178              | 65     | 113   | 68                  | 26     | 42   | 219      | 115    | 104   | 13     | 4      | 9    | 55    |

Figure below illustrates the number of persons with disabilities that may access tertiary education.<sup>5</sup>



<sup>4</sup> Ibid.

<sup>5</sup> Namibia 2011 census disability report p32. The figure shows persons with disabilities aged 15 years and above by educational attainment and census year (2001 and 2011). Generally, there was a consistent increase over the census years in the proportion of persons with disabilities aged 15 years and above across all categories of educational attainment.

## **5.4 Accessibility**

The National Policy on Disability of 1997 states that the government shall develop mandatory standards and guidelines to make the physical environment accessible to all people with disabilities. This will include all public buildings and facilities, for example, transport telecommunication, sport and recreation facilities. The state shall ensure that architects, construction engineers and others who are professionally involved in the design and construction of the physical environment, have access to the disability policy and the requirements for making places accessible to people with disabilities.

During the Nationwide Consultations on the Persons with Disabilities Bill and The National Policy On Disability, many of the stakeholders raised high concerns with accessibility to facilities, public services, information and transportation. Persons with disabilities are still being left out or denied basic services as they are not accommodated by the design of the structures and in the provision of services.

### **Infrastructure**

Many built environments (including public accommodations), transport systems and information, are not accessible to all. In the context of disability, the principle of accessibility can be described as synonymous with the principles of full inclusion, equality and participation in mainstream society. Lack of access to transportation is a frequent reason for persons with disabilities being discouraged from seeking employment or prevented from accessing health care services.

When it comes to the concept of accessibility in terms of disability, access should be barrier free and universally design. When it comes to infrastructure and technological development the various categories of disabilities should be considered so that they can be equally accommodated. Adaptations to building infrastructure (e.g. Braille print in a lift/elevator) and to information technology (e.g. voice commands on a computer) will facilitate use by people with disabilities without negatively impacting use by people without disabilities.

### **Information**

The National Policy on Disability of 1997 states that, the government shall ensure that persons with disabilities and where necessary their families and/or other persons who may be entrusted, have access to full information on: their rights, diagnosis, medical records, and available services and programs pertaining to their disability as well as those services which are generally available to the general public. The state shall develop strategies to make information services and documentation accessible to all persons with disabilities. This includes information that will enable them to equally participate in political activities, as there is a concern that many persons with disabilities do not take part in political activities due to their disabilities. This can be as a result of lack of disability accessible information.

## **5.5 Healthcare and Social Protection**

Healthcare and social protection should depend on the type of disability as well as its seriousness, the NDCN has noted that not all persons with disabilities require the same needs and that some disabilities require special attention or extra care. As outlined in the National Policy on Disability, these special target groups include woman, children, the elderly, refugees, inmates, persons with mental disabilities and other categories of disabilities.

### **Healthcare Services**

Persons with disabilities in rural areas are affected more when it comes to service provision and delivery. Factors such as poor coordination of services, inadequate staffing, and weak staff

competencies affect the quality, accessibility, and adequacy of services for persons with disabilities. For example, a person who uses a wheelchair needs a ramp and wider door space to gain access to buildings; a person who is Deaf or lives with a hearing impairment needs sign language interpreters and schooling or hearing devices to hear/listen; a quadriplegic would have additional and different needs from a paraplegic although both may use a wheelchair, but all wheelchair users are not necessarily paraplegics or quadriplegics; the needs of a Deaf-Blind person is different from that of a Deaf or a Blind person.

## **Personal Mobility**

### **UNCRPD Article 20 – Personal mobility**

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

- (a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;
- (b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;
- (c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;
- (d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Affordability has been highlighted as one of the main reasons why people with disabilities do not receive needed health care in low-income countries, with higher rates of unemployment and poverty than nondisabled people, many people with disabilities are unable to afford assistive technology and related services.<sup>6</sup> The same can be said for Namibia many people with disabilities cannot afford these devices as they are unemployed and from poor backgrounds.

## **5.6 Disability Mainstreaming and Advocacy**

It is very important for people with disabilities to take part and be involved in decisions that involve them or affect their lives. In situations where they cannot represent themselves, they have the right to choose/nominate a family member to represent them. This is known as the right to self-representation.<sup>7</sup> A lot of laws and decisions are made without really considering the views and expectations of the people who are supposed to be benefiting from these laws and decisions; self-representation should be seen as a key factor before laws and decisions affecting the lives of people with disabilities are enforced or taken. To abolish the limiting

## **5.7 International Cooperation**

The UNCRPD provides the necessary legal and constitutional support to ensure the rights and privileges of persons with disabilities. Article 33 of the UNCRPD suggests that the State Parties should establish legal and administrative frameworks to monitor the implementation of the UNCRPD and to involve civil societies, persons with disabilities and their representative organisations in the implementation and monitoring process.

<sup>6</sup> WHO (2011). World report on disability. Geneva, World Health Organization.

<sup>7</sup> POLICY ON DISABILITY, available at [https://www.westerncape.gov.za/assets/departments/social\\_development/national\\_disability\\_policy.pdf](https://www.westerncape.gov.za/assets/departments/social_development/national_disability_policy.pdf). barriers above, our pieces of legislation must conform with this obligation and to the Convention on the Rights of Persons with Disabilities as ratified.



## UNCRPD Article 32 – International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

- (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
- (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
- (c) Facilitating cooperation in research and access to scientific and technical knowledge;
- (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

## 6. Implementation and Enforcement Capacity Building

It is very for the NDCN to implement and perform its mandate as outline it's the Act and Policy, this can only be done first of all by ensuring that the Council has the relevant and sufficient employment capacity in all its departments. Most importantly in the Legal as well as Research and Development departments. The NDCN also intends on establishing offices in each region as there is currently only on office which is in Windhoek, it was also suggested that to save the NDCN can have staff in the already existing structure of other institutions such as offices of the Ministry of Gender Equality Poverty Eradication and Social Welfare.

The NDCN also understands the important role the OPDs play in disability mainstreaming as in the implementation of policies as they are the ones on the ground, this why the NDCN funds projects conducted by the OPDs as well as monthly salaries of office volunteers to keep offices going. Through the research and development department the NDCN conducts training to our various stakeholders on how to complete the Disability Annual Monitoring Report, which is a tool used to assess the employment and inclusion of persons with disabilities in the different institutions.

## 7. Stakeholder Engagement

The NDCN has noted the importance of engaging our stakeholders, as it is not able to deliver its on its mandate alone but rather with the continuous support of its stakeholders. NDCN has therefore Identified the stakeholders who have a vested interest in disability, which include government offices and Ministries, regional and local and traditional authorities, local and international organizations, non-governmental organizations (NGOs), civil society groups, industry representatives, organizations of and for persons with disabilities and most importantly Persons with Disabilities themselves. The NDCN has invited and engaged all its relevant stakeholders from all 14 Regions of Namibia during its Nationwide consultations on the Bill and Draft Policy.

<sup>8</sup> UN Office for Disaster Risk Reduction [UNISDR], 2013.

<sup>9</sup> Ibid.

## **8. Emerging Trends and Innovations**

### **Disaster risk reduction and emergency responses**

Article 11 of the UNCRPD obligates State Parties to ‘take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.’ According to the United Nations, people with disability are two to four times more likely to die or be injured during natural disasters than the general population.<sup>8</sup> They are also less likely to receive aid and ongoing support to recover over the longer term. Risk for people with disability is further increased when systems are fragmented and the responsibility for people with particular needs and capabilities is unclear.<sup>9</sup> Therefore, persons with disabilities need to be consulted and fully engaged in the development and implementation of national and local strategies

From the experiences of the COVID – 19 pandemics, during the public consultations in the regions, it was highlighted that people with disabilities were affected the most as they were not considered during the emergency response by the Government. Most common emergency situations common in Namibia are drought and floods, and currently there are no measure, or special considerations in place to cater for persons with disabilities. Therefore it is important that on each disaster and risk committee, a representative of persons with disabilities should be involved in their decision making.

### **Innovation and Technology**

With the growing impact of technology and new innovations in the 21st century, it is important that as Namibia advances its technological and other advanced developments a universal design should be adopted to cater for the needs of persons with disabilities. Currently the NDCN and NSI are working on new building standards that will be more accessible to persons with disabilities.

### **UNCRPD Article 4 – General obligations**

- (g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
- (h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

Information and communications technology and assistive technology offer new opportunities to people with disabilities who use assistive technology for their daily activities. It is vital that people are able to benefit on an equal basis from the rapid development of ICT, to enable them to partake in an inclusive and barrier-free information society. It is therefore necessary that these devices are both affordable and accessible to persons with disabilities as it is a great concern that assistive devices and technologies are expensive as they are mostly available in foreign countries.

## **9. Recommendations**

- Adopt legislation that contain the rights and interests of persons with disabilities as they are now contained in various documents.
- Improve and create education and employment opportunities for persons with disabilities.
- Improve and increase accessibility to services, infrastructure and information for people with disabilities.

- Increase and involve persons with disabilities and their organisations in decision making especially in situation that affect them.
- Increase stakeholder engagement and obtain funds to support disability projects.
- Obtain more data and statistics on disability which updated and accurate.

This situational analysis will serve as a foundation for the development of a robust, inclusive, and evidence-based disability policy in Namibia. It should involve collaboration with diverse stakeholders, including government bodies, non-governmental organizations, and persons with disabilities, to ensure a comprehensive and inclusive approach.



## REPORT ON THE VALIDATION WORKSHOP OF THE REVISED NATIONAL POLICY ON DISABILITY

**DATE OF WORKSHOP: 26 JUNE 2024**

**VENUE: CI EST SI BON HOTEL, OTJIWARONGO**

### **1. ATTENDANCE NAME AND ORGANISATION REPRESENTED**

(See annexed attendance register)

### **2. INTRODUCTION**

The National Disability Council of Namibia (“herein after referred to as the NDCN”) is a creature of statute as established by the National Disability Council Act, 2004 (Act No. 26 of 2004). In terms of section 3 of the enabling Act, the Council is mandated to monitor the implementation of the National Policy on Disability; identify provisions in any law, which may hinder the implementation of the National Policy on Disability and make recommendations in that regard; advise any person responsible for the enforcement of existing legislation which provides for equal opportunities for all people in Namibia on the enforcement of that legislation; comment on proposed legislation which may affect persons with disabilities in any manner; initiate amendments to the National Policy on Disability and in general to take all necessary steps to improve the situation of persons with disabilities in Namibia.

The Council has launched a legislative review process which includes the review and the amendment of its enabling Act and the outdated National Policy on Disability of 1997. Namibia as a republic has ratified the United Nations Convention on the rights of Persons with Disability (“UNCRPD”) on 04 December 2007. In terms of Article 144 of the Namibian Constitution, “general rules of public international law and international agreements are binding upon Namibia under this Constitution and shall form part of the law of Namibia.”

<sup>8</sup> UN Office for Disaster Risk Reduction [UNISDR], 2013.

<sup>9</sup> Ibid.

It has been 14 years since Namibia has ratified the UNCRPD and the implementation thereof is thus long overdue. The Council deemed this opportunity fit to consider the domestication of the UNCRPD principles into statutory law. Article 4(a) of the UNCRPD requires Member States to “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized by the Convention.”

In purport of the above, the Council highlights the need to implement legislative measures referred to by the UNCRPD to ensure the rights of persons with disabilities are not only legally acknowledged but comprehensively protected in Namibia. The domestication of the UNCRPD will thus form part of this legislative review process. The legislative review project equally anticipates to establish a disability fund to fund disability initiatives, programs and projects. The Council does this in consistent with other governmental Offices, Ministries and agencies that purport the same values which pertain to persons with disabilities as set out as by the National Planning Commission of Namibia.

### **3. The vision and mission of the National Disability Policy.**

The National Disability Policy is aimed at accelerating the recognition of fundamental rights and freedoms of persons with disabilities as enshrined in the Namibian Constitution and in the international and regional human rights instruments ratified or acceded to by Namibia. The Policy further, aims at ensuring that persons with disabilities live a dignified life in every area of human endeavor on an equal basis with other people in society.

In order to improve the quality of life through enhancing the dignity, well-being and empowerment of persons with disabilities in accordance with the Constitution, UNCRPD and the AU Protocol on the Rights of Persons with Disabilities the policy points out that the latter shall be done by enabling persons with disabilities to achieve the essentials of life including:

- (a) equality;
- (b) full and effective participation;
- (c) independence;
- (d) inclusion in all aspects of community life;
- (e) self-determination through ensuring the following prerequisites;
- (f) equal recognition of rights;
- (g) equalization of opportunities;
- (h) creation of accessible and enabling environment;
- (i) implementation of reasonable accommodation;
- (j) ensuring self-representation.

#### **3.1 Policy objectives and focal areas.**

In implementing the policy, all government ministries, departments, agencies, state owned enterprises (public entities), regional councils, local authorities, the private sector, non-governmental organizations, and international partners operating in Namibia shall be guided by the following principles:

- (a) Respect for and protection of inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities;
- (i) Reasonable accommodation;
- (j) The best interests of the child.

### 3.2 Workshop input towards the Policy objectives and focal areas.

As indicated in the Draft Revised National Disability Policy, the policy is subject to review at any time. Accordingly, the National Planning Commission of Namibia sets out the guidelines which impose key stages of good policy making to design policies around outcomes, making sure policies are inclusive, fair and evidence-based and that they are more forward and outward-looking. Owing to the latter, one of the guidelines set out by the National Planning Commission of Namibia is that there must be a validation workshop which is aimed at discussing the Policy and Implementation Action Plan by all the stakeholders. Upon the completion of the validation workshop the custodian Offices, Ministries and Agencies should incorporate comments into the final draft document and share it with the National Planning Commission of Namibia for scrutiny.

Therefore, National Disability Council of Namibia as one of the Agencies protecting the welfare and the interests of persons with disabilities, consulted a number of government ministries, departments, agencies, public entities, *inter alia*, in the validation of the policy and the implementation action plan. Moreover, the National Disability Council of Namibia in pursuance of our statutory function in terms of section 3 of the National Disability Council Act proposes amendments to the policy currently annexed as a schedule to the Act to better protect and promote the rights of people with disabilities.

Herein after are the comments and inputs of the stakeholders that attended the workshop:

| POLICY AND IAP | COMMENTS                                                                                                                                               | STATUS                                                           |          |
|----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------|----------|
|                |                                                                                                                                                        | INCLUDED                                                         | EXCLUDED |
| 1. Focus area  | <ul style="list-style-type: none"> <li>- Smart objectives to be included</li> <li>- Each policy focal point must read as a smart objective.</li> </ul> | The are 14 key focal areas for discussion included in the policy |          |



|                                                           |                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                   |
|-----------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2. Stakeholders roles                                     | - Indicate each and every role of the stakeholders involved in the implementation of the policy or who were consulted and what their roles are.        | Included for some strategies                                                                                                                                                                                                                                                                                                                                             | Not included for some strategies as all government offices, ministries and agencies that have an overlapping duty within the implementation of the policy must ensure they consult the National Disability Council of Namibia (NDCN) to ensure coordination of national disability programs and avoid duplication |
| 3. Expand Accessibility standards to transport, ICT, etc. | - Add all other infrastructures necessary to promote persons with disabilities accessibilities 000.                                                    | Includes Transports, street lights and inter alia pedestrian crossing and all building be it private or otherwise provided it provides a public service to persons with disabilities.                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                   |
| 4. Sterilization and Abortion Act                         | - What are the rights afforded to person with disabilities?<br>- Who's rights are being infringed?                                                     |                                                                                                                                                                                                                                                                                                                                                                          | Namibia as a country has made provision for the personal autonomy of women when it comes to abortion and the rights afforded or infringed can only be negated by the provisions made in Abortion and Sterilization Act of 1975.                                                                                   |
| 5. Poverty and social welfare.                            | - There is an abuse of grants especially for children with disabilities.                                                                               | The policy is aimed addressing disability grants and social grants to continue being allocated to cater for the needs of persons with disability and thereof ensures that abuse and misuse of such grants is curbed.                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                   |
| 6. Sign language                                          | - Persons with hearing impairment (deaf) lack interpreters<br>- Perhaps their disability can be considered expensive.<br>- Regulation of interpreters. | In order to promote Social integration and the Environment and in reaffirming Namibia's obligation under international human rights law sign language interpretation is included in the policy to ensure that that interpreter-services with qualified sign language interpreters are developed to facilitate appropriate communication between deaf and hearing people. |                                                                                                                                                                                                                                                                                                                   |
| 7. Health care                                            | - Special target groups should be included for patients with disabilities.                                                                             |                                                                                                                                                                                                                                                                                                                                                                          | Not included as there is a need to move away from medical models to social models for persons with disabilities.                                                                                                                                                                                                  |

|                             |                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                     |  |
|-----------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 8. Education                | <ul style="list-style-type: none"> <li>- Make reference to the Basic Education Act, 2020 and not of 1996.</li> <li>- Terms applicable in education are learners for basic education and students for higher education.</li> </ul> | The included provisions are learners in terms of basic education which includes resource schools, primary schools and high schools and students for higher learning such as universities and colleges and vocational training.                                                                                                                                                      |  |
| 9. Sheltered employment     | <ul style="list-style-type: none"> <li>- Will they be subsidized by government?</li> </ul>                                                                                                                                        | Included in the policy as Sheltered employment shall be subject to the general supervision by competent authorities, and workers with disabilities in sheltered workshops which shall have an adequate contractual status which takes into account the need for personal assistance and development hence, taking form of a normal employer/employee relationship and remuneration. |  |
| 10. Education and training. | <ul style="list-style-type: none"> <li>- Sector policy on inclusive education.</li> </ul>                                                                                                                                         | Included in the policy as the provision of education shall be based on the fundamental principles of inclusive education, which demand that all children shall be taught together, whenever possible, regardless of individual differences or difficulties they may have.                                                                                                           |  |
| 11. Self-representation     | <ul style="list-style-type: none"> <li>- Persons with disabilities must be represented on ministerial boards.</li> <li>- Capacitate persons with disabilities through meaning contributions.</li> </ul>                           | Included as the policy is aimed at ensuring that at all levels of government and in organs of state, persons with disabilities are self-represented in the inception, design, discussion and implementation, monitoring of legislation, policies and programmes that affect them.                                                                                                   |  |
| 12. Employment              | <ul style="list-style-type: none"> <li>- Panelists in employment sectors must have also disabilities to understand the need of persons with disabilities.</li> </ul>                                                              | Included in terms of the Affirmative Action Program which ensures that persons with disabilities have equal employment opportunities and are equitably represented in a workplace which includes the identification and elimination of employment barriers and making reasonable accommodation to the limitation of persons with disabilities.                                      |  |

|                                         |                                                                              |                                                                                                                                           |                                                                                          |
|-----------------------------------------|------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| 13. Social welfare and living standards | - Homeless with disability to catered for.                                   |                                                                                                                                           | Not included as all homeless should be catered for and not only those with disabilities. |
| 14. Fishing quotas                      | - Fishing quotas protecting persons with disability and how it will be done. | Included in the policy in terms of employment as part of the commitment to funding disability-related activities and the disability fund. |                                                                                          |