



DISCUSSION PAPER 163
PROJECT 148
DOMESTICATION OF THE UNITED NATIONS
CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES

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SOUTH AFRICAN LAW REFORM COMMISSION

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

The members of the SALRC are:

Justice Chris Jafta (Chairperson)
Professor Wesahl Domingo (Deputy-Chairperson)
Advocate Jacob Skosana
Dr Sejako Senatle
Dr Keneilwe Radebe
Dr N Shaik-Peremanov
Professor Debbie Collier Reed
Professor Karthy Govender
Professor Tshepo Mongalo

The Secretary of the SALRC is Mr TN Matibe. The project leader for this investigation is Dr N Shaik-Peremanov. The researcher assigned to this investigation is Ms A Makhwanya.

The members of the advisory committee for Project 148 are:

Dr N Shaik-Peremanov (Project leader from 24 February 2024)
Advocate HJ De Waal, SC (Project leader until 4 October 2023)
Mr AK Dube (Chairperson)
Justice D Pillay (Retired) (Advisory Committee member since 2 August 2023)
Mr P Strasheim
Professor I Grobbelaar-du Plessis
Ms C Fransolet
Professor C Ngwena (Advisory Committee member until 2 August 2023)
Mr B Palime (Department of Women, Youth and People with Disabilities)

The SALRC's office is in the Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Gauteng. Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
PRETORIA 0001

Enquiries and correspondence about the investigation may be directed to and marked for the attention of Ms A Makhwanya. Her details are as follows:

Telephone: (012) 622-6316

E-mail: AMakhwanya@justice.gov.za

Website: <https://www.justice.gov.za>

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REQUEST FOR COMMENTS

OBJECTS OF THE SALRC

The SALRC was established by section 2 of the SALRC Act. In terms of section 4 of the SALRC Act, the main object of the SALRC is to research all branches of South African law, to study, investigate and make recommendations for the development, improvement or reformation of the law.

BACKGROUND TO THE INVESTIGATION

Project 148: Domestication of the United Nations on the Rights of Persons with Disabilities was included in the SALRC's research programme on request from the Department of Justice and Constitutional Correctional Services in 2018.

Issue Paper 33 was published on 24 March 2021 for general information and public comment. It set out current problems, defined the area of investigation, and requested comments from the public.

Riding on the research undertaken by the Advisory Committee and responses from the public to the issue paper, this discussion paper aims to elicit responses on the preliminary findings and recommendations for legislation. It is meant to serve as a basis for the SALRC's further deliberations and developing a final report with draft legislation. Therefore, this paper's opinions, conclusions, and proposals are not the SALRC's final views.

INVITATION TO SUBMIT COMMENTS

Respondents are requested to submit written comments and representations to the SALRC by addressing correspondence to the Secretary of the SALRC, for the attention of Ms A Makhwanya. Given that this is not the final report, respondents are not restricted to the issues covered in this paper and may draw other relevant matters to the SALRC's attention.

This discussion paper has been compiled on the premise that respondents agree that the SALRC may quote from or refer to their comments and may attribute comments to the respondent concerned, unless the comment is marked as confidential.

Respondents should be aware that the SALRC may be required to release information contained in their submissions under the Promotion of Access to Information Act 2 of 2000.

CLOSING DATE FOR COMMENTS

The return date for comments is 04 December 2024.

WORD OF GRATITUDE

The SALRC would like to extend its enormous gratitude to the members of the Advisory Committee (past and present) for their assistance in developing the discussion paper.

Special mention needs to be made of Advocate HJ De Waal (Project Leader until 4 October 2023) for his assistance on earlier drafts of Chapters 1-4; to Mr P Strasheim and Professor I Grobbelaar-Du Plessis for their refining of chapters in an earlier iteration of the draft discussion paper, and to Justice D Pillay for drafting and finalising the Draft Bill and this discussion paper.

A further word of gratitude is expressed to Dr Shaik-Peremanov, Mr B Palime, Mr P Strasheim, and Professor I Grobbelaar-Du Plessis, for availing their time and expertise on the subject and assisting the SALRC in the preparation of and finalisation of the discussion paper. Gratitude goes to Mr A K Dube for hosting and chairing meetings of the Advisory Committee and to Ms Makhwanya for her secretarial services in expediting the presentation of this discussion Document.

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EXECUTIVE SUMMARY: PROJECT 148

A INTRODUCTION

The Republic of South Africa became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (the CRPD) and its Optional Protocol on 30 November 2007. Project 148 of the SALRC is the process of domesticating the CRPD into South African legislation. Domesticating international law into national legislation involves research and the publication of issue papers and discussion documents to facilitate meaningful public participation in shaping the content of the ensuing legislation. This discussion document is a step in that direction.

South Africa was a signatory to the United Nations Declaration on the Rights of Disabled Persons (1975), the predecessor of the CRPD. Changing the lexicon from “disabled people” to “persons with disabilities” is a starting point. Delving deeper, the CRPD replaces the 13 brief paragraphs protecting some rights in the 1975 law, with fifty substantial articles incorporating all human rights, plus an optional protocol for enforcement. This sea-shift in legal and cultural consciousness away from patronising welfarism towards developmental human rights and inclusion of persons with disabilities has inspired some influential individuals to advocate forcefully for the CRPD. For instance,

Judge Navanethem Pillay, United Nations High Commissioner for Human Rights 2008-2014:

“... The Convention and its Optional Protocol challenge previous perceptions of disability — as a medical problem or a generator of pity or charitable approaches — and establish an empowering human rights-based approach to disability. ... Through this historic paradigm shift, the Convention forges new ground and requires new thinking. Its implementation demands innovative solutions.”

Kofi Atta Annan, Nobel Peace Prize winner with UN in 2006, and seventh Secretary-General of the United Nations 1997 to 2006:

“Today promises to be the dawn of a new era. This Convention is a remarkable and forward-looking document”

Judge Louise Arbour, UN High Commissioner for Human Rights, a former justice of the Supreme Court of Canada and Court of Appeal on Ontario, Canada:

“The convention... marks a historic step in ensuring that persons with disabilities enjoy full participation in society and can contribute to the community to their full potential. ... attitudes, rather than resource constraints, often create the strongest barriers to the enjoyment of rights by persons with disabilities, ... [States] bear the primary responsibility for ensuring equality and eliminating unfair discrimination”

Professor of Law Gerard Quinn, lawyer, disability law scholar at University of Lund (Sweden) and Leeds (UK) and UN Special Rapporteur on the Rights of Persons with Disabilities from 2020:

“The Convention ... articulates a theory of justice that every citizen can subscribe to and in which every citizen has a stake. It is not a case of special rights for a particular group; it is about equal rights for all. And it is about making the democratic process open to all voices so that blockages can be dissolved and solutions found to deal with the legacy of the past and build a more inclusive society for all.”

Prof of Law Arlene S. Kanter, lawyer and disability law scholar at Syracuse University:

“Most ratifying States will have to enact new laws or amend current laws to give effect to the Convention. ... More typically, a country will have strong legal protections, but the implementation of such laws remains inadequate.... As such, each individual Member State will need to review and perhaps reconsider long-held cultural norms, not to mention long-standing domestic laws and policies, in order to comply fully with purpose, principles, and terms of the new Disability Convention. This will not be an easy task.”

The opinions cited above anticipate the dramatic positive difference that the CRPD is expected to have on the lives of persons living with disabilities and the challenges for the State and others responsible for their care. As an evolving concept, disability is neither static nor intrinsic to the person. Mobility may depend on whether a person has a wheelchair; but when expanded, even if a wheelchair is available, the built environment must be conducive for its use. The ability to speak is possible with a speech-generating device, without which, in the case of Stephen Hawking, *A Brief History of Time* might never have come to be.

The CRPD is the springboard for the international movement towards identifying people in terms of their ability, without discounting their disability. Conversely, identifying people in terms of their disability discounts their ability. Beethoven produced his Ninth Symphony, “Ode to Joy” in a state of complete deafness. Aided by technology, Paralympians can participate in most Olympic sports. They inspire the human rights approach to renovating the law.

MANDATE

The SALRC was tasked with investigating the CRPD’ impact on South Africa’s obligations. Following an initial consultative process spanning grassroots, state, and non-governmental organisations and stakeholders, the SALRC received useful feedback. Those jurisdictions that preceded South Africa’s CRPD domestication process were also examined, not as a blueprint, but rather as examples for standard setting and best practice. Examining the appropriate vehicle for realising South Africa’s CRPD obligations present a few options.

Two schools of thought emerge: Existing legislation including the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 and the Employment Equity Act 55 of 1988 should be amended. Alternatively, an entirely new Act should be crafted. Sidestepping the binary, a hybrid model is preferred.

The SALRC proposes new legislation that would take the form of a framework statute to be followed in due course with bespoke sectoral laws to regulate pragmatically for differences. Crafting a single statute would better ensure comprehensive compliance with the CRPD. It would minimize the risks of not only omitting to adopt any article but also of generating conflicting ad hoc or piecemeal amendments of a plethora of legislation.

Comprising five chapters, Chapter One of this discussion document begins with an outline of the law reform process, the history of the evolution of CRPD, and the SALRC’s mandate. Chapter Two outlines the contents of the CRPD; it lays the basis for assessing its compatibility with South African law. A summary of Articles 5 to 30 of the CRPD elaborates on rights in the Bill of Rights. The expansive constitutional rights already applicable to persons with disabilities seems to be a welcoming receptacle for legislation domesticating the CRPD. In Chapter Three, the research into foreign law for best practice is brief because it is discussed extensively in the issue paper. Now the focus is

on questions of definition. Public responses to pertinent questions posed in the SALRC's issue paper in 2020 is summarised in Chapter Four. They commend the domestication of the CRPD and drill deeper into giving effect to the rights in the Bill of Rights. The participation of the disability community fortifies the discussion document. Chapter Five is an exposition of the constitutional obligation to give effect to the CRPD. This discussion document concludes with findings and recommendations favourable to domesticating the CRPD in the form of a framework law.

To expedite the law reform process, the SALRC offers a Draft Bill (for Persons with Disabilities) for deliberation and comment. Five chapters constitute the Draft Bill. Typically, Chapter One covers definitions, and the purpose, interpretation and application of the Act. Chapters Two (discrimination) and Three (equality) are two sides of the coin that constitute the heard of the Act. Chapter Two describes prohibited conduct that would constitute discrimination and the measures to prevent discrimination. Chapter Three promotes equality and the protection of information. In Chapter 5, the general provisions cater for regulations, codes of good practice, delegations, establishment of a conflict administration unit, dispute resolution, burden of proof, offences, penalties, optional protocol, monitoring, implementation, repeal of laws and transitional arrangements, and the short title and commencement. The schedule of laws to be repealed is suggestive rather than comprehensive.

INTRODUCTION

The opinions of influential individuals cited above indicate the dramatic positive difference the Convention on the Rights of Persons with Disabilities (CRPD) is expected to have on the lives of people living with disabilities and the challenges the State and others responsible for their care. The CRPD is a sea-shift in legal and cultural consciousness towards practising human rights inclusive of people with disabilities.

As an evolving concept, disability is neither static nor intrinsic to the person. Mobility may depend on whether a person has a wheelchair; but when expanded, even if a wheelchair is available, the built environment must be conducive for its use. The ability to speak is possible with a speech-generating device, without which, in the case of Stephen Hawking, *A Brief History of Time* might never have come to be.

The CRPD represents an international movement towards identifying people in terms of their ability, without discounting their disability. Conversely, identifying people in terms of their disability discounts their ability. Beethoven produced his Ninth Symphony, “Ode to Joy” in a state of complete deafness. He, amongst others, inspired the human rights approach to renovating the law.

A Domestication

The Republic of South Africa became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (the CRPD) and its Optional Protocol. Therefore, the content of the CRPD must become part of South Africa’s domestic legislation. Domesticating legislation involves a myriad of factors that compel meaningful public consultation.

The SALRC was tasked with investigating the CRPD’s contents directly impacting South Africa’s obligations. Examining the appropriate vehicle for realising South Africa’s CRPD obligations presented a few options. Following a consultative process spanning grassroots, state, and non-governmental organisations and stakeholders, the SALRC received useful feedback. Naturally, those jurisdictions that preceded South Africa’s CRPD domestication process were also examined, not as a blueprint, but rather as examples for standard setting and best practice.

The SALRC proposes new legislation that would take the form of a framework statute followed by bespoke sectoral laws to regulate pragmatically for differences. Comprising five chapters, Chapter One of this discussion document begins with an outline of the law reform process, the history of the evolution of CRPD, and the SALRC's mandate. Subsequent chapters cover the contents of the CRPD to lay the basis for assessing its compatibility with South African law; foreign law for best practice; and public responses to pertinent questions the SALRC asked in its issue paper in 2020. Chapter Five is an analysis of the Constitution, taking account of all the materials garnered in the preceding chapters and concludes with findings and recommendations favourable to domesticating the CRPD. To expedite the law reform process, the SALRC offers a Draft Bill (for Persons with Disabilities) for deliberation and comment.

CHAPTER 1: PROCESS, HISTORY, MANDATE, OVERVIEW

A Introduction

1.1 South Africa ratified the CRPD and its Optional Protocol on 30 November 2007. Ratification created obligations for South Africa to domesticate the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Project 148 of the SALRC is aimed at fulfilling those obligations. This discussion document is a step towards achieving that aim.

1.2 In this chapter the processes and mandate for the domestication of the CRPD are projected. Thereafter, an overview is presented of the ensuing four chapters that constitute this discussion paper. Finally, the accompanying Draft Bill, provisionally titled the Promotion of Equality and Protection against Discrimination of Persons with Disabilities Bill, 2024, is introduced for discussion.

B Law reform process

1.3 After obtaining approval from the Minister of Justice and Constitutional Development (the Minister), the SALRC adopted the investigation into domesticating the CRPD onto its programme. Supported by the Advisory Committee, the SALRC developed and published Issue Paper No 39 of Project 148 on 9 December 2020.¹ The issue paper set out current problems, presented research on the CRPD and foreign law, and defined the area of investigation. It then called for submissions by 31 May 2021 from the public on what needs to be done. Those submissions inform this discussion paper.

1.4 This discussion paper is the second stage of domestication. It reiterates existing problems for which possible solutions are to be sought in the domestication of the CRPD. Based on the submissions it received in response to the issue paper, this discussion

¹ South African Law Reform Commission (SALRC) Issue Paper 39 Project 148 “*Domestication of the United Nations Convention on the Rights of Persons with Disabilities*” (December 2021) (hereinafter Issue paper); Issue Paper No 39 of Project 148 <https://www.saflii.org/za/other/ZALRC/2020/1.pdf>

paper aims to produce findings and recommendations for further public comment, debate, and feedback that would determine how the provisions of the UNCRPD would be integrated into South African law.

1.5 The final stage of domestication involves further consultations to solicit public opinion to finalise the preparation and publication of the Draft Bill before promulgation as an Act.

1.6 Parallel to the domestication of the CRPD, South Africa has obligations to report to the UN's Committee on the Rights of People with Disabilities (CRPD Committee) which oversees the implementation of the CRPD by States Parties. Progress with the domestication process must form a part of such reports.

C History

1.7 Before 1970, the United Nations (UN) approached disability issues from a social welfare perspective, paying little attention to societal barriers. Re-evaluation began in earnest on 11 December 1969, with the General Assembly adopting the Declaration on Social Progress and Development, which advocated for the provision of free health services, social security and social welfare services, measures to rehabilitate the mentally and physically "disabled" to facilitate their integration into society, education, job training and placement, and vocational and social guidance. In short, the 1969 Declaration advanced the medical model for addressing the needs of people with disabilities.

1.8 On 9 December 1975, the General Assembly adopted the United Nations Declaration on the Rights of Disabled Persons, which recognised that "disabled persons" were entitled to the same political and civil rights as others. These included rights to education, medical services and placement services, economic and social security, to employment, live with their families, participate in social and creative events, protected against all exploitation, abuse or degrading behaviour, and to avail themselves of legal aid.

1.9 The fundamental problem with the 1975 Declaration was that it continued to propagate the medical and welfare model of disability. That model emphasized the medical condition (disability) as rendering a person with disability incapable of

participation in all areas of life and who must therefore remain an object of welfare and charity.

1.10 By the end of the 20th century, the aims of the CRPD evolved to change that model. In its preamble, the CRPD unambiguously affirms a human rights model for disability when it promotes “the full enjoyment by persons with disabilities of their human rights and fundamental freedoms”. Elevating disability discrimination to “a violation of the inherent dignity and worth of the human person” pegs disability discrimination firmly within the human rights paradigm.

1.11 Charitable motives towards people with disabilities must now shift towards a human rights ethos. Persons with disabilities are no longer to be treated as objects of welfare, medical treatment, and social protection but as subjects with rights, not merely specific rights, but all human rights, without discrimination. Persons with disabilities, together with national states and institutions must frame their grievances and injustices in the lexicon of rights. This social model recognises that real disability resides in the barriers and obstacles that prevent the exercise by persons with disabilities of their human rights. By emphasising respect and attentiveness and accommodating differences, the CRPD seeks to eradicate the tendency to perceive people with disabilities as problems and view them instead in terms of their rights.²

D Mandate

1.12 In May 2018, the SALRC received its mandate from the Department of Justice and Correctional Services (DOJCS) for this investigation to domesticate of the CRPD into South African law, in the following terms:

² The Issue Paper provides more details on the law reform process and history of the CRPD. <https://www.saflii.org/za/other/ZALRC/2020/1.pdf> (downloaded 1 July 2024)

Gerard Quinn and Theresia Degener et al *Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability United Nations* New York and Geneva 2002 Copyright © United Nations 2002 HR/PUB/02/1

... to commence with an in-depth investigation into proposals for the efficacy of developing a single disability legislation or a cut across statute to give effect to disability rights and further proposals for the domestication of the [UN]CRPD.³

1.13 Consistent with this mandate, the SALRC has developed for discussion, a framework Draft Bill to give effect to the articles of the CRPD. The SALRC anticipates that following the adoption of a Draft Bill, specific sectoral legislation would evolve to dovetail it.

E Overview of chapters

1.14 Chapter Two of this discussion paper summarises the CRPD and its Optional Protocol to lay the foundation for deliberation on its adaptability to the content of the domestic law in Chapter Five. Chapter Three is a sample survey of foreign law when best practices can be drawn. Chapter Four summarises public responses to specific issues raised in the issue paper. Chapter Five identifies clauses in the Constitution of the Republic of South Africa that implicate the domestication of the CRPD and anticipates legislation for reform. Chapter Five concludes with the findings of the investigation and makes recommendations in the form of a Draft Bill.

1.15 The Draft Bill: Promotion of Equality and Protection against Discrimination of Persons with Disabilities Act, 2025

1.16 The Draft Bill's primary objective is to provide a legal framework for enacting the CRPD for persons with disabilities as rights-holders, and all the legal obligations established in the CRPD for duty bearers toward persons with disabilities. It comprises four chapters and a schedule. Chapter One of the Draft Bill covers the following headings: definitions, purpose, interpretation and application. Chapter Two addresses the promotion of equality and dignity, detailing the substantive rights to access to justice, various freedoms, education, health, rehabilitation, work, socioeconomic rights, political rights, culture, public awareness, international cooperation, tax relief, incentives and

³ Memorandum to the Minister of Justice and Constitutional Development "Investigation into Specific Disability Legislation for The Promotion, Protection and Fulfilment of The Rights of Persons with Disabilities and Domestication of Convention on The Rights of Persons with Disabilities 6 June 2016"; Memorandum directed to the Minister from Adv. Ooshara Sewpaul "Investigation into Specific Disability Legislation for The Promotion, Protection and Fulfilment of The Rights of Persons with Disabilities and Domestication of Convention on The Rights of Persons with Disabilities." 12 June 2018

grants. Chapter Three covers the protection against and prohibition of discrimination. Chapter Four typically comprises of the general provisions relating to regulations, codes, dispute resolution, burden of proof, offenses, the Optional Protocol, monitoring, implementation, repeal of laws, transitional arrangements, short title and commencement.

1.17 In the Schedule to the Draft Bill, the SALRC suggests the legislation that could be implicated. The Schedule is far from comprehensive or conclusive. It is intended to signal the progressive nature of the domestication process.

CHAPTER 2: INTERNATIONAL LAW

A Purpose

2.1 Chapter Two outlines the content of the CRPD and its Optional Protocol to lay the basis for analysing and assessing their adaptability to national laws, especially the Constitution. A detailed clarification of the CRPD commends itself to comprehensively achieving the aims of Project 148. As the mandate of the SALRC focuses on the domestication of the CRPD, other international laws will not be discussed here. Constitutional interpretation must give effect in the Draft Bill to other international law obligations that South Africa incurs.

B CRPD content overview

2.2 The CRPD is a human rights treaty that i) recognises the rights of persons with disabilities, ii) sets out the obligations on States Parties to promote and protect the rights of persons with disabilities, and iii) sets out the national and international institutions necessary for implementing and monitoring the CRPD. In the following grid, the 50 articles of the CRPD are presented as a curtain raiser:⁴

Preamble		Sets out the general context, identifies important background issues, and lays the basis for the ideological shift from a medical to a human rights model for protecting people with disabilities.
Art. 1	Purpose	<p>Sets out the goal of the CRPD, 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.</p> <p>Article 1 also explains who is included in the term “persons with disabilities”.</p>

⁴ Training guide) 27 - 30

Art. 2	Definitions	Key concepts - Communication, language, discrimination, reasonable accommodation, universal design – are defined.
Art. 3	General Principles	The principles apply to interpreting and implementing the CRPD.
Art. 4	General Obligations	The CRPD identifies who is responsible for meeting the rights, what they must do, and when (whether immediately or progressively).
Art. 5 - 30 ⁵	Cross-cutting issues	<p>The CRPD comprises a robust non-discrimination and equality framework, which applies across all its rights, civil, cultural, economic, political, and social.</p> <p>Article 5 requires State parties to ensure the equality of individuals with disabilities, as well as prohibit any discrimination because of disability. This general prohibition is further detailed in the context of specific rights.</p>
	Specific rights	<p>The thematic articles covering the spectrum of human rights, reinforce the interdependence and equal status of all human rights.</p> <p>A range of measures placing obligations on States Parties include:</p> <ul style="list-style-type: none"> • Awareness-raising (Art. 8), needed for the public understanding of the rights of persons with disabilities; • Accessibility (Art. 9), needed to enjoy rights and live independently in the community;

⁵ Many of these rights are affirmed in other UN conventions such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture, but with specific obligations in the CRPD ensuring that they can be fully realized by persons with disabilities; A Byrnes et al *From Exclusion to Equality Realizing the Rights of Persons with Disabilities Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* United Nations Department of Economic and Social Affairs, the Office for the High Commissioner of Human Rights and the Inter-Parliamentary Union Copyright © United Nations Geneva 2007 ISBN 978-92-9142-347-7 hr/pub/07/6 <http://www.un.org/development/desa/disabilities/> (hereinafter UN Handbook) 16

		<ul style="list-style-type: none"> • Situations of risk and humanitarian emergencies (Art.11), to ensure protection; • Access to justice (Art.13), needed to enforce rights; • Personal mobility (Art. 20), needed for independence; • Habilitation and rehabilitation (Art.26) from birth or when a person suffers a disability and is needed to maximise independence and ability; • Statistics and data collection (Art. 31) to formulate and implement policies for the promotion and protection of the rights of persons with disabilities; and • International cooperation (Art.32) to build capacity, research, programmes, facilitate access to scientific knowledge, and technical and economic assistance, inclusive of accessible and assistive devices.
Art. 32	International cooperation	The article builds on human rights treaties that refer to international cooperation and the progressive realisation of economic, social, and cultural rights and lists possible forms of international cooperation to promote the CRPD.
Art. 31 and 33	Implementation and monitoring measures	States Parties must use information, statistical, and research data to formulate and implement policies to give effect to the CRPD (Art. 31), and Art. 33 calls for national implementation and monitoring frameworks.
Art. 34-39	Committee	The CRPD Committee is established and must receive periodic reports from States Parties.
Art. 40	Conference of States Parties	Conference of State Parties must meet regularly to consider any matters about the implementation of the CRPD
Art. 41 -50	Final clauses	Procedures for signature, ratification, entry into force, and other relevant requirements.

C Summary of articles

1 Article 1: Purpose of the CRPD

2.3 Article 1 declares the purpose of the CRPD to be the promotion and protection of the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and respect for their inherent dignity. The CRPD does not define the word “disability”.⁶ However, Article 1 identifies “persons with disabilities” 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.”⁷

2.4 The UN Handbook explains that “[i]n most parts of the world, there are deep and persistent negative stereotypes and prejudices against persons with certain conditions and differences”.⁸ These biases, beliefs and attitudes lead to language which encourages pejorative labels and depiction, resulting in unequal participation, exclusion, prejudice and unfair discrimination. In this regard, the framework reflected in the CRPD appreciates that it is the external environment and attitudes towards disability that equates “disability” to inability.⁹ The concept of “disability” in the CRPD reflects an evolving concept and endorses the understanding of disability as a social construct when it states that disability “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”¹⁰

⁶ Training Guide 17; Preamble of the CRPD; Training guide 24 – 25 “Disability” and “persons with disabilities”; UN Handbook 12 Defining disability; CRPD Preamble para (e);

N Flowers (ed) *Human Rights. YES! Action and Advocacy on the Rights of Persons with Disabilities* Human Rights Education Series: Topic Book 6 (2 ed) University of Minnesota Human Rights Center Developed by BlueLaw International, LLP on behalf of One Billion Strong Copyright © 2012 University of Minnesota Human Rights Center Box Set ISBN-13: 978-0-9675334-6-9 at 21 <http://hrlibrary.umn.edu/edumat/hreduseries/HR-YES/Human%20Rights%20YES%20Final%20PDF.pdf>

⁷ UN Handbook 12-13; Preamble para (e)

⁸ UN Handbook 3-4.

⁹ Training Guide 17

¹⁰ Preambular para (e)

2.5 The notion of “disability” cannot be rigid or static because it depends on the prevailing environment and varies from one society to the next.¹¹ The CRPD advances a dynamic approach to the notion of disability, which allows for adaptation over time and within different socio-economic settings.¹² As the UN Handbook explains, the term “persons with disabilities” is not “exhaustive” and does not “exclude broader categories of persons with disabilities found in national law.”¹³ Ratifying member states may broaden the range of persons protected to include, for example, persons with short-term disabilities”.¹⁴

2 Article 2: Definitions

2.6 Article 2 of the CRPD defines five key terms quoted below:

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

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

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

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

2.7 The CRPD imposes no limits on definitions that ratifying states may add in their legislation.

¹¹ UN Handbook 13

¹² UN Handbook 13

¹³ UN Handbook f 13.

¹⁴ UN Handbook for 2 – 3.

3 Article 3: General principles

2.8 Article 3 lists the following general principles that would guide States Parties and other actors to interpret and implement the CRPD:

1. Respect for inherent dignity, individual autonomy¹⁵ including the freedom to make one's own choices, and independence of persons;
2. Non-discrimination;¹⁶
3. Full and effective participation and inclusion in society;¹⁷
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
5. Equality of opportunity;
6. Accessibility;¹⁸
7. Equality between men and women; and
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

2.9 Fundamental human rights are standards to judge the legitimacy of states.¹⁹ Manifestly, the general principles are cross-cutting and intersecting, re-emerging repeatedly as substantive rights elsewhere in the CRPD. For each CRPD principle above, its footnote gives the corresponding CRPD right.

4 Article 4: General obligations

2.10 Article 4 identifies the following general obligations:

1. Article 4(1)(a): ratifying states must adopt "legislative, administrative and other measures" to implement the CRPD rights.

¹⁵ This principle finds expression in the rights in Article 12 of the Convention

¹⁶ This principle finds expression in rights in most CRPD Articles

¹⁷ This principle finds expression in rights in most CRPD Articles

¹⁸ Articles 9, 13, 19, 21, 24, 25, 26, 27, 28, 29 and 30 of the Convention

¹⁹ Jordan Daci "Legal Principles, Legal Values and Legal Norms: are they the same or different?" European School of Law and Governance, Prishtina, Kosovo Universum University, Prishtina, Kosovo at 114 <https://www.academicus.edu.al/nr2/Academicus-MMX-2-109-115.pdf>

"As a consequence of the universal value of human rights as universal judgment standards on the validity of state legitimacy and also on the state law, fundamental human rights can be considered also as legal principle inter alia, because they impose to individuals and government general standardized behaviour manners in an identical way as the legal principle impose general standardized meanings and understandings to other legal norms."

2. Article 4(1)(b): ratifying states must enact “legislation” and take “all appropriate measures” to “modify or abolish” unfair discrimination in “existing laws, regulations, customs and practices”.
3. Article 4(1)(c): a ratifying state’s “policies and programmes” must “take into account” the “protection and promotion of the human rights” of persons with disabilities.
4. Article 4(1)(d): ratifying states may not act in a manner “inconsistent with the present CRPD” and ensure that public bodies “act in conformity with the present CRPD”.
5. Article 4(1)(e): ratifying states must ensure that measures are taken to “eliminate” disability discrimination by “any person, organization or private enterprise”.
6. Articles 4(1)(f)-(i): ratifying states must undertake research and develop goods, services, technologies, mobility aids, and assistive devices at affordable costs. They must make information accessible to persons with disabilities and promote the training of staff working with persons with disabilities.
7. Articles 4(2): ratifying states must undertake to the maximum available resources and needs to progressively realise the economic social and cultural rights of persons with disabilities.
8. Articles 4(3): ratifying states must consult and actively involve persons with disabilities in developing and implementing legislation and policies to give effect to the CRPD.
9. Articles 4(4): the CRPD imposes no limitations on provisions that are more conducive to the realisation of the rights of persons with disabilities, which may be in force in the national or international law applicable to state parties. There would be no derogation from existing human rights and fundamental freedoms recognised by any State Party.
10. Articles 4(5): the CRPD applies to all parts of federal States without any limitations or exceptions.

5 Article 5: Equality and non-discrimination

2.11 Article 5 is the point on which all other rights and obligations under the CRPD turn. It cross-cuts other rights and obligations. For instance, non-discrimination and equality are listed as general principles in Article 3; “discrimination based on disability” is defined in Article 2; substantive socio-economic rights must apply equally and without discrimination.

2.12 The CRPD Committee issues authoritative statements known as General Comments to clarify specific provisions of the CRPD. Such a General Comment was issued on equality and non-discrimination under General Comment No. 6 (2018).²⁰ This General Comment also explains the relationship of equality and non-discrimination with other substantive provisions of the CRPD.²¹

2.13 The content of the rights includes recognition as persons before and under the law; enjoying equal protection and benefit of the law; protection against discrimination based on disability; having equal and effective legal protection against discrimination on all grounds; reasonable accommodation; and measures to achieve de facto equality.

2.14 Concomitantly, duty bearers must protect and promote the right to equality in all its facets described above – and more – and protect persons with disabilities against discrimination.

6 Article 6: Women with disabilities

2.15 Article 6 requires States Parties to recognise women and girls with disabilities as people subject to multiple forms of discrimination, and to take all appropriate measures to ensure their full development, advancement and empowerment, thus guaranteeing to them the exercise and enjoyment of human rights and fundamental freedoms.

7 Article 7: Children with disabilities:

2.16 Article 7 affirms the right of children to the full enjoyment of all human rights and fundamental freedoms, with their best interests being a primary consideration. Children with disabilities have the right to express themselves freely on all matters affecting them with due weight being given to their views, based on their maturity.

²⁰ United Nations CRPD/C/GC/6 Committee on the Rights of Persons with Disabilities; General Comment No. 6 on Equality and Non-discrimination (2018); https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en

²¹ Such as article 6-9 of the Convention, 12-14 of the Convention, 19, 23-25, 27-29 and also article 31 and 32.

8 Article 8: Awareness-raising

2.17 Awareness-raising places an obligation on States Parties to implement measures to guarantee the rights of persons with disabilities.²² Barriers that persons with disabilities face include negative attitudes. By raising awareness of the rights of persons with disabilities, as well as the capabilities of persons with disabilities, negative attitudes are reduced.²³ Awareness-raising involves both increasing the understanding of disability rights, as well as combating stereotypes through, amongst others, public awareness campaigns, education, and encouraging responsible media reporting and training.

2.18 At multiple levels, the right to awareness-raising within the family, in the entire education system, and throughout society, includes awareness of respect and dignity, the capabilities and contributions of persons with disabilities, and the duty to combat stereotypes, prejudice, and harmful practices endured by persons with disabilities.

2.19 States Parties must initiate and maintain public awareness campaigns to nurture receptiveness of the rights of persons with disabilities; to promote positive perceptions and social awareness toward persons with disabilities; and to promote the recognition of their skills, merits, and capabilities, especially in the world of work. Additionally, States Parties must encourage the media to portray persons with disabilities positively in the light of the CRPD; and promote awareness-training programmes about persons with disabilities and their rights.

9 Article 9: Accessibility

2.20 The CRPD stresses that persons with disabilities should be able to live independently and participate fully in all aspects of life. To this end, States Parties should take appropriate measures to ensure that persons with disabilities have access to the physical and digital environment, e.g. buildings, roads, housing, transportation, information and communications technology, and to other facilities and services provided to the public.²⁴ Accessibility is both a general principle in Article 3 and a specific right in Article 9 of the CRPD.

²² Training Guide 29

²³ Training Guide 34

²⁴ Training Guide 16

2.21 General Comment was issued on “Accessibility” under General Comment No. 2 (2014) to explain the relationship of accessibility with other substantive rights of the CRPD. States Parties must take measures to give effect to the content of the right to accessibility. Such measures must include identifying and eliminating barriers to accessibility to buildings, roads, transportation, and other indoor and outdoor facilities including schools, housing, medical facilities, and workplaces; and information, communication, and other services including electronic services and emergency services.

2.22 Additionally, States Parties must take appropriate measures to develop, promulgate, and monitor the following:

- 1 Minimum standards and guidelines on the accessibility of facilities and services open or provided to the public.
- 2 Entities offering public facilities and services account for all accessibility.
- 3 Training on accessibility issues for stakeholders.
- 4 The provision of Braille and signage in easy-to-read and understandable formats in buildings and other facilities open to the public.
- 5 The provision of live assistance and intermediaries inclusive of guides, readers, and professional sign language interpreters to create accessibility in buildings and service facilities.
- 6 The provision of other forms of assistance and support to ensure access to information, the Internet, and new information and communication and technology systems.
- 7 The promotion at an early stage of the design, development, production, and distribution of accessible information and communication technologies and systems, to ensure accessibility at minimum costs.

10 Article 10: Right to life

2.23 Article 10 affirms the inherent right to life and its effective enjoyment by persons with disabilities.

11 Article 11: Situations of risk and humanitarian emergencies

2.24 Article 11 affirms the obligation, under international law, of States Parties to ensure the protection and safety of persons with disabilities in situations of risk, armed conflict, humanitarian emergencies, and natural disasters.

12 Article 12: Equal recognition before the law

2.25 Article 12 affirms the right to equal recognition before the law and the legal capacity of persons with disabilities. States Parties must provide effective safeguards in accordance with international human rights law, to prevent abuse of the exercise of legal capacity. Such safeguards must include measures to exercise the rights and preferences of the person, devoid of conflict of interest and undue influence, and tailored to the person's circumstances. Such measures must be subject to regular review by a competent, independent, and impartial authority. Additionally, States Parties must ensure the right of persons with disabilities to own, inherit and control their property and financial affairs without the risk of arbitrary deprivation of the property.

13 Article 13: Access to justice

2.26 Article 13 affirms the right of access to justice for persons with disabilities on an equal basis with others through the provision of procedural and age-appropriate accommodations, to enable direct and indirect participation in all stages of investigations and legal proceedings. Concomitantly, States Parties must promote training for personnel working in the administration of justice, and police and correctional services.

14 Article 14: Liberty and security of person

2.27 Article 14 prohibits the unlawful and arbitrary deprivation of liberty and disability being used to justify deprivation of liberty. States Parties must guarantee due process if persons are to be deprived of their liberty.

15 Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment

2.28 Article 15 prohibits anyone from being subjected to torture or cruel, inhuman or degrading treatment or punishment, or, without their consent, to medical or scientific experimentation. States Parties must implement measures to prevent persons with disabilities from being subjected to such treatment.

16 Article 16: Freedom from exploitation, violence and abuse

2.29 Article 16 imposes obligations on States Parties to implement measures to protect persons with disabilities from all forms of exploitation, violence and abuse; to prevent such treatment by supporting persons with disabilities, their families and caregivers and by providing information and education on avoiding, recognising, and reporting such treatment. States Parties must also monitor facilities and programmes serving persons with disabilities; promote programmes for the recovery of victims of such treatment in environments that foster health, welfare, self-respect, dignity, and autonomy; and implement legislation to investigate and prosecute perpetrators of harmful treatment.

17 Article 17: Protecting the integrity of the person

2.30 Article 17 recognises the right of persons with disabilities to respect their physical and mental integrity.

18 Article 18: Liberty of movement and nationality

2.31 Article 18 imposes obligations on States Parties to recognise the rights of persons with disabilities to liberty of movement, to freedom of choice regarding their residence and nationality; to change their nationality and to not be deprived of it arbitrarily based on disability, to obtain and use documents pertaining to nationality and identification; and to use immigration proceedings, if necessary, to facilitate the exercise of the right to freedom of movement.

2.32 Children with disabilities must be registered immediately after birth. They must enjoy the right to a name, to acquire nationality, and to know and be cared for by their parents.

19 Article 19: Living independently and being included in the community

2.33 Article 19 requires States Parties to implement measures to recognise the right of all persons with disabilities to live and participate in their community, to choose their place of residence and with whom they live, and not be obliged to live in a particular living arrangement. States Parties must facilitate access to in-home and community support services, and personal assistance for inclusion in the community.

20 Article 20: Personal mobility

2.34 Article 20 recognises the right to personal mobility to ensure independence. Quality mobility aids, devices, assistive technologies, and forms of live assistance and intermediaries must be available at an affordable cost.

2.35 Concomitantly, States Parties must in addition, to giving effect to the content of the rights above, provide training in mobility skills for persons with disabilities and specialist staff working with them. They must encourage makers of mobility aids, devices, and assistive technologies to consider all aspects of mobility for persons with disabilities.

2.36 Personal mobility interconnects with other Articles in the CRPD, such as the general obligations (Articles 4(g) and 4(h)), accessibility (Article 9), liberty of movement and nationality (Article 18), living independently and being included in the community (Article 19), habilitation and rehabilitation (Article 26), and the right to inclusive education (Article 24).

21 Article 21: Freedom of expression and opinion, and access to information

2.37 Article 21 obliges States Parties to implement measures to recognise the rights of freedom of expression and opinion, to seek, receive, and impart information and ideas; to provide information in accessible formats and technologies promptly, without

additional cost to persons with disabilities; to accept and facilitate the use of sign languages, braille, and other accessible modes of communication; and to encourage private entities and the media to do likewise.

22 Article 22: Respect for privacy

2.38 Article 22 recognises the right of persons with disabilities not to be subjected to arbitrary or unlawful interference with their privacy, family, home, and correspondence, or unlawful attacks on their honour and reputation. States Parties must protect the privacy of personal, health and rehabilitation information of persons with disabilities.

23 Article 23: Respect for home and family

2.39 Article 23 obliges States Parties to eliminate discrimination relating to marriage, family, parenthood and relationships of persons with disabilities; to recognise their rights to marry and found families based on the consent of the intending spouses, to decide freely and responsibly about matters pertaining to their children, their right to have access to education and information about family planning, and to retain their fertility.

2.40 States Parties must have national legislation to regulate the rights and responsibilities of people with disabilities, regarding guardianship, wardship, trusteeship and adoption, with the best interests of the children being paramount. States Parties must help persons with disabilities in performing their child rearing responsibilities.

2.41 To realise the rights of children with disabilities to family life, to prevent their concealment, abandonment, neglect and separation, States Parties must render comprehensive information, services, and support to the children. Separating children from their parents against their will may be allowed exceptionally, only, when necessary, in the best interest of the child and subject to judicial review. The disability of either children or parents must not be a reason for separation. States Parties must try to provide alternative care within the wider family or the community if their immediate family is unable to care for children with disabilities.

24 Article 24: Education

2.42 Article 24 states that persons with disabilities should be guaranteed the right to inclusive education at all levels, regardless of age, without discrimination, based on equal opportunity, and aimed at the full development of human potential, dignity, self-worth, respect for human rights, fundamental freedoms and human diversity. Lifelong learning must be directed at developing the personality, talents, creativity, and mental and physical abilities to the fullest potential, and at enabling persons with disabilities to participate effectively in a free society. Persons with disabilities must have effective access to inclusive, quality, free and compulsory primary, secondary, and tertiary education, vocational training, adult education and lifelong learning.

2.43 To give effect to the right to education, States Parties must ensure reasonable accommodation and support to meet individuals' requirements. To enable persons with disabilities to learn life and social skills, States Parties must take appropriate measures to facilitate the learning of braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation; mobility skills, peer support and mentoring; and sign language and the promotion of the linguistic identity of the deaf community. The education of persons, particularly children, who are blind or deaf, must be delivered in the most appropriate languages and means of communication. Teachers, including teachers with disabilities, must be trained in disability awareness, be qualified in sign language or Braille, and be able to use augmentative and alternative modes and formats of communication, educational techniques, and materials to support persons with disabilities.

2.44 General Comment No. 4 (2016) was issued on the right to inclusive education.²⁵ This General Comment also explains the relationship of the right to education with other substantive provisions of the CRPD.

25 Article 25: Health

2.45 States Parties must recognise that persons with disabilities must enjoy the highest attainable standard of gender-sensitive health including health related rehabilitation, reproductive health, public health programs, and services specific to

²⁵ UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment No. 4 (2016), Article 24: Right to Inclusive Education, CRPD/C/GC/4, 2 September 2016, <https://www.refworld.org/legal/general/crpd/2016/en/112080> (downloaded 9 July 2024)

disabilities. Health professionals must render accessible quality care based on consent, awareness of human rights, dignity and autonomy. States Parties must prohibit discrimination in the provision of health and life insurance and the denial of health services based on disability.

26 Article 26: Habilitation and rehabilitation

2.46 Article 26 obligates States Parties to implement measures, including through peer support, 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; and to these ends to organise, strengthen and extend comprehensive habilitation and rehabilitation services, particularly in health, employment, education, and social services. Such services must begin at the earliest possible stage, be multi-disciplinary and available as close to communities as possible. They must enable voluntary community participation.

2.47 States Parties must provide for the training of personnel working in rehabilitation and habilitation services with persons with disabilities; and the use and knowledge of assistance devices and technologies.

27 Article 27: Work and employment

2.48 Article 27 recognises the right of persons with disabilities to work and employment. States Parties must safeguard the realisation of the right to work, promote equal opportunities and remuneration for work of equal value, and prohibit discrimination in the recruitment, hiring, employment, career advancement and health and safety of working conditions. States Parties must ensure that persons with disabilities can exercise their labour and trade union rights, have effective access to general technical and vocational guidance programs, placement services and training, be employed in the public sector, have opportunities for self-employment and entrepreneurship, have reasonable accommodation in the workplace, not be held in servitude and be protected from forced labour.

28 Article 28: Adequate standard of living and social protection

2.49 Article 28 recognises the right of persons with disabilities to enjoy an adequate standard of living and to the continuous improvement of their conditions. States Parties have a duty to ensure that people with disabilities have access to clean water, affordable services and devices, and to programs for social protection, poverty reduction, public housing, and retirement benefits.

29 Article 30: Participation in cultural life, recreation, leisure and sport

2.50 Article 30 recognises the rights of persons with disabilities to participate in cultural life, have access to cultural materials in accessible formats, television programs, films, theatre, monuments, and national sites of interest.

2.51 States Parties must enable persons with disabilities to develop and use their creative, artistic, and intellectual potential to benefit themselves and society. Laws protecting intellectual property rights must not impede access by persons with disabilities to cultural materials. States Parties must promote persons with disabilities to participate in mainstream sporting activities, disability-specific sporting and recreational activities, and ensure that they have accessible venues and services.

30 Article 31: Statistics and data collection

2.52 Article 31 imposes a duty on States Parties to collect statistical and research data on persons with disabilities to formulate and implement policies to give effect to the CRPD. States Parties have obligations to safeguard the confidentiality and privacy of persons with disabilities, comply with ethical principles in collecting and using statistics, be responsible for the dissemination of statistics, and ensure that persons with disabilities have access to them.

31 Article 32: International cooperation

2.53 Article 32 underlines the importance of international cooperation, development programmes, capacity building, information sharing, training, research and access to scientific and technical knowledge, and technical and economic assistance.

32 Article 33: National implementation and monitoring

2.54 Article 33 clarifies mechanisms for implementing the CRPD. States Parties must designate one or more focal points in government to implement the CRPD; consider creating a coordinating mechanism within government to facilitate action in different sectors and levels; and establish frameworks to promote, protect and monitor implementation of the CRPD. Civil society and organisations for persons with disabilities must participate fully in the monitoring process.

2.55 The UN emphasizes that States Parties should clarify the institutional framework that would oversee the implementation and monitoring of national laws. For this, the following institutional arrangements for each State are recommended:²⁶

- 1 designate one or more dedicated points of contact within the government to deal with matters relating to implementing the CRPD;
- 2 consider putting a coordinator or dedicated office in place to link with all levels of government across sectors;
- 3 establish an independent process to promote, protect and monitor the implementation of the CRPD; and
- 4 involve civil society in the national monitoring process.

2.56 Additionally, all new or proposed legislation that may affect the interests of persons must identify duty-bearers, that is, those who are responsible for guaranteeing human rights at different levels of government as well as private sector actors.

33 Article 34: The Committee on the Rights of Persons with Disabilities

2.57 Article 34 establishes the CRPD's Committee on the Rights of Persons with Disabilities (CRPD Committee) as a body of human rights experts tasked with monitoring the implementation of the CRPD. It determines the terms of office and reference of the CRPD Committee.

²⁶ United Nations Department of Economic and Social Affairs (DESA) Division for Social Policy and Development (DSPD) *Toolkit on Disability for Africa - Legislating for Disability Rights* Feb 2017 at <https://www.un.org/esa/socdev/documents/disability/Toolkit/Legislatingfordisabilityrights.pdf> Aligning Domestic Legislation with Disability Rights Principles

34 Article 35: Reports by States Parties

2.58 States Parties must submit regular reports to the CRPD Committee on their progress with implementing the CRPD rights. States Parties must report within two years of ratifying the CRPD, and every four years after that, or whenever requested by the CRPD Committee.

35 Article 36: Consideration of reports

2.59 Article 36 requires the CRPD Committee to consider reports from States Parties, make suggestions and recommendations or request further information relevant to implementing the CRPD. The CRPD committee may notify States Parties to comply with the reporting obligations within three months. Reports must be made widely available to the public for suggestions and recommendations.

2.60 South Africa submitted its initial country report under Article 35 of the CRPD on 26 November 2014.²⁷ The CRPD Committee considered that report on 28 and 29 August 2018 and adopted Concluding Observations.²⁸ The CRPD Committee found South Africa wanting in respect of giving effect to most rights of persons with disabilities and specific obligations as a State Party. Regarding compliance with Article 33 on implementation and monitoring, the CRPD Committee recommended, amongst others, that South Africa must “[e]xpedite the designation of the South African Human Rights Commission as the independent monitoring mechanism and allocate sufficient financial resources to enable it fully to execute its mandate.”

²⁷ Republic of South Africa Department of Women, Children and People with Disabilities *The Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa* Approved by Cabinet on 17 April 2013; UN Doc CRPD/C/ZAF/1 (26 November 2014). https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRPD/C/ZAF/1&Lang=en

²⁸ United Nations Convention of the Rights of Persons with Disabilities CRPD/C/ZAF/CO/1 Committee on the Rights of Persons with Disabilities *Concluding Observations on the Initial Report of South Africa* (23 October 2018); UN Doc CRPD/C/ZAF/CO/1(23 October 2018) <https://documents.un.org/doc/undoc/gen/g18/323/08/pdf/g1832308.pdf>

2.61 The SALRC notes that the Constitutional Court has considered the General Comments of Committees established under United Nations CRPDs.²⁹ The CRPD Committee has adopted eight General Comments. They are:³⁰

9 September 2022	General comment No. 8 (unedited version)	Article 27: Work and Employment
21 September 2018	General comment No. 7	Article 4.3 and 33.3: Participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the CRPD.
9 March 2018	General comment No. 6	Article 5: Equality and non-discrimination
31 August 2017	General comment No. 5	Article 19: Right to independent living
26 August 2016	General comment No. 4	Article 24: Right to inclusive education
26 August 2016	General comment No. 3	Article 6: Women and girls with disabilities
11 April 2014	General comment No. 2	Article 9: Accessibility
11 April 2014	General comment No. 1	Article 12: Equal recognition before the law

36 Article 37: Cooperation between States Parties and the Committee

2.62 Article 37 imposes duties on States Parties to cooperate with the CRPD Committee. In turn, the CRPD Committee must consider enhancing capacities for implementing the CRPD through international cooperation.

²⁹ General Comments of the Committee established under the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the Committee on Economic, Social and Cultural Rights - were considered by the Constitutional Court in the following decisions:

Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011); *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (7 December 2021)

³⁰ General Comments Committee on the Rights of pPersons with Disabilities <https://www.ohchr.org/en/treaty-bodies/crpd/general-comments> accessed on 7 April 2024

37 Article 38: Relationship of the Committee with other bodies

2.63 Article 38 encourages international cooperation in the field of disability with specialised agencies and other United Nations organs.

38 Article 39: Report of the Committee

2.64 Article 39 requires the CRPD Committee to report every two years to the General Assembly and to the Economic and Social Council of the United Nations on its activities and make suggestions and recommendations.

39 Article 40: Conference of state parties

2.65 Article 40 regulates the Conference of States Parties.

40 Article 41: Depositary

2.66 Article 41 identifies the General Secretary of the United Nations as the depositary of the CRPD, that is, the official with whom reports must be lodged.

41 Article 42: Signature

2.67 Article 42 determined the date for signing the CRDP as 13 March 2007.

42 Article 43: Consent to be bound

2.68 Article 43 determines the ratification and accession requirements of the CRPD.

43 Article 44: Regional integration organisations

2.69 Article 44 provides for accession and participation by regional integration organisations.

44 Article 45: Entry into force

2.70 Article 45 determines the date for the entry into force of the CRPD.

45 Article 46: Reservations

2.71 Article 46 eschews reservations incompatible with the CRPD.

46 Article 47: Amendments

2.72 Article 47 regulates the procedure for amending the CRPD.

47 Article 48 Denunciation

2.73 Article 48 provides the procedure for States Parties to denounce the CRPD.

48 Article 49: Accessible format

2.74 Article 49 requires the CRPD to be available in accessible formats.

49 Article 50: Authentic texts

2.75 Article 50 confirms that texts of the CRPD in other languages are equally authentic.

D Optional Protocol to the Convention on the Rights of Persons with Disabilities

2.76 Article 1 recognises the CRPD Committee as the institution responsible for receiving and considering communications (complaints) from persons claiming to be victims of violations of the CRPD by States Parties who are party to the Protocol. Article 2 lists the requirements for admissible communications.

2.77 Articles 3, 4, and 5 regulate the procedure of the CRPD Committee in responding to communications concerning States Parties, the exercise of its discretion to avoid irreparable damage to victims of violations on an interim basis; and holding confidential closed meetings when examining communications. Articles 6 and 7 regulate the procedure and powers of the CRPD Committee to conduct confidential inquiries about reliable communications and make observations, findings, comments, and

recommendations to States Parties, while also seeking their cooperation and compliance.

2.78 Article 8 gives States Parties the option of not recognising the CRPD Committee and thus avoiding its supervisory competence. Notably, South Africa elected not to exercise this option. Articles 9 to 18 replicate provisions of the CRPD for consistency and administration of the Protocol, in tandem with the CRPD.

E Guides

2.79 The United Nations Handbook for Parliamentarians on the CRPD on the Rights of Persons with Disabilities is the outcome of cooperation between the United Nations Department of Economic and Social Affairs, the Office of the United Nations High Commissioner for Human Rights, and the Inter-Parliamentary Union. It is a tool to assist lawmakers to interpret and apply the CRPD.

2.80 The Office of the High Commissioner for Human Rights (OHCHR) has developed a training package on the CRPD and its Optional Protocol. The package consists of a Training Guide and eight training modules that help to build the capacity of national stakeholders to implement and monitor the implementation of the CRPD and its Optional Protocol.

CHAPTER 3: FOREIGN LAW

A Purpose

3.1 In this chapter, general observations are made about the form of legislation, policies, and programmes adopted in a few countries to give effect to the CRPD, with more focused attention on a sample of three countries and their treatment of some definitions and concepts.

3.2 The issue paper contained an extensive exposition of the relevance of foreign law for law reform and constitutional interpretation and a wider survey of foreign law whence best practice can be drawn.

B CRPD compliance legislation

3.3 Many countries have disability statutes with anti-discrimination provisions and sector-specific legislation, covering employment, education, access to premises, provisioning of goods, services, facilities, accommodation, and public transport, amongst others. Similarly, African countries generally provide for disability rights in their constitutions and disability-specific legislation. Consistently with the CRPD, they enforce the protection of rights to equality along with other fundamental human rights and prohibit all forms of unfair discrimination. Most countries establish national disability implementation and monitoring bodies. Some define “disability” while others describe it and the specific sectors that the legislation covers. Here are some examples of legislation adopting this design:

- 1 Malawi – Disability Act 2012
- 2 Zambia – Persons with Disabilities Act 2012
- 3 United Republic of Tanzania – Persons with Disabilities Act 2010
- 4 Ghana – Persons with Disabilities Act 2006
- 5 Uganda – Persons with Disabilities Act 2006
- 6 Kenya – Persons with Disabilities Act No. 14 of 2003
- 7 Namibia – National Disability Council Act 26 of 2004
- 8 India – The Rights of Persons with Disabilities Act, No. 49 of 2016
- 9 Nigeria - Discrimination Against Persons with Disabilities (Prohibition) Act 2018

C Examples of policies and programmes

3.4 Among States that have ratified the CRPD, some have policies and programmes such as the following:

- 1 Afghanistan – Strategy for Disability and Rehabilitation 2013-2016
- 2 Bhutan – Disability Prevention and Rehabilitation (DPR) and Lifestyle Related Disease (LSRD) Program
- 3 Botswana – National Policy on Care for Persons with Disabilities (1996)
- 4 Croatia – Plan for Deinstitutionalisation and Transformation of Social Welfare and Other Legal Entities Providing Social Care Services in the Republic of Croatia 2011 – 2016 (2018)
- 5 France – Plan 2010-2012 for the deaf or hard of hearing / National Plan for the social and socio-medical organization for rare disabilities 2009-2013
- 6 Italy – Biennial action plan for the promotion of the rights and the integration of people with disabilities
- 7 Kenya – National Plan of Action on implementation of recommendations made by the Committee on the Rights of Persons with Disabilities in relation to the initial report of the Republic of Kenya, September 2015-June 2022
- 8 Lithuania – Action Plan for 2014-2020 on transition from institutional care, to care in the family and the community for people with disabilities and children without care of parents
- 9 Namibia – Disability Mainstream Programme 2011 – 2013
- 10 Norway – Job strategy for people with disabilities
- 11 Poland – Government Program for People with Disabilities and their Integration with the Society
- 12 Romania – National Strategy on social protection, integration and inclusion of people with disabilities for the period 2006 – 2013. “Equal opportunities for people with disabilities – towards a non-discriminatory society”
- 13 Russian Federation – State programme of the Russian Federation – Accessible environment 2011-2015
- 14 Scotland – A Fairer Scotland for Disabled People: delivery plan
- 15 Serbia – Strategy for Improving the Situation of Persons with Disabilities in the Republic of Serbia 2007 – 2015

D Reports on non-compliance

3.5 Institutions reporting on compliance with the CRPD by States Parties are another source of foreign law on CRPD compliance. These include the CRPD Committee, organisations of and for persons with disabilities, and human rights commissions. The reports of these entities flag issues that could be regarded as non-compliance with international law. Reports on the United Kingdom (UK) and Australia below are informative.

1 United Kingdom

3.6 In 2016, formal complaints by several UK disability organisations about welfare reforms in the UK since 2010 led to an investigation. The CRPD Committee investigated the complaints and found that the reforms had resulted in “grave or systematic violations” of the CRPD rights.³¹

3.7 The CRPD is not incorporated into UK law. Instead, separate policies and legislation, including the Equality Act 2010 give effect to it. In 2018, the UK Government established an Inter-Ministerial Group on Disability and Society to “drive coordinated action across Government and implement the UN CRPD.” In June 2019, the UK Government launched a new cross-Government approach on disability to focus on:

- 1 Consulting on how employers can support people with disabilities to remain in work.
- 2 Consulting on raising mandatory accessibility standards for all new homes.
- 3 A Green Paper on health and disability support, to “enable a conversation about building a welfare system ... that is an ally of disabled people”.
- 4 Improving consumer outcomes for people with disabilities by developing metrics to compare how well companies deliver for disabled customers.

³¹ L Abreu *The UN Convention on the Rights of Persons with Disabilities: UK implementation* House of Commons Library Research Briefing 10 November 2022 <https://researchbriefings.files.parliament.uk/documents/CBP-7367/CBP-7367.pdf>

2 Australia

3.8 In Australia, the Australian Human Rights Commission, in accordance with its statutory power to promote and protect human rights under the Australian Human Rights Commission Act, 1986 submitted a report to the CRPD Committee.³² That report identified the following gaps and inconsistencies:

- 1 Many rights in the CRPD had not been incorporated into domestic law.
- 2 There was a need to introduce a legal framework that recognised the equal legal capacity of people with disability and enabled and facilitated the creation and implementation of various supports for the exercise of legal capacity.
- 3 Action had to be accelerated to ensure that people with disability were not unlawfully or arbitrarily deprived of their liberty based on disability, including in the criminal justice system.
- 4 The practice of sterilisation of children with disability, and adults with disability without their free, prior, and informed consent had to be prohibited.

3.9 A Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disabilities (“Royal Commission”) was established on 4 April 2019.³³

3.10 Before the CRPD was ratified, Australia enacted the Disability Discrimination Act 1992 (“DDA”). Its purpose was to protect persons with disabilities against unfair treatment because of their disability. It makes disability discrimination unlawful while

³² Australia Human Rights Commission *Submission to the United Nations Committee on the Rights of Persons with Disabilities; Information concerning Australia’s compliance with the Convention on the Rights of Persons with Disabilities* (25 July 2019) https://humanrights.gov.au/sites/default/files/int_crpd_nhs_au_35594_e.pdf

³³ Australia *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Final Report Executive Summary, Our vision for an inclusive Australia and Recommendations* (September 2023) <https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Executive%20Summary%2C%20Our%20vision%20for%20an%20inclusive%20Australia%20and%20Recommendations.pdf> at 39

The establishment of this Royal Commission marked the culmination of years of campaigning and advocacy by disability advocate organisations and people with disability. The campaigns reflected the struggles, values and expectations of many Australians with disability. At 44 In late 2012, the Victorian Advocacy League for Individuals with Disability (VALID) and other disability advocates began calling for a royal commission into institutional abuse against people with disability. ?

promoting equal rights and opportunities as well as equal access for persons with disabilities.³⁴

3.11 The Australian Human Rights Commission describes disability discrimination in the federal DDA as:

...when people with a disability are treated less fairly than people without a disability. Disability discrimination also occurs when people are treated less fairly because they are relatives, friends, carers, co-workers or associates of a person with a disability.

3.12 In November 2009, a National Disability Strategy was initiated through the Council of Australian Governments (COAG) as a central mechanism for implementation of the CRPD in Australia, setting out a national policy framework for improving life for Australians with a disability, their families and carers, reflecting a unified, national approach to policy and program development.

3.13 In July 2013, implementation of the National Disability Insurance Scheme (NDIS) began, which was said to represent a new way of providing community linking and individualised support for people with permanent and significant disability, their families and carers. The focus of the scheme is on individual support and greater choice and control over the support received by people with disability.

3.14 The NDIS provides eligible persons with disabilities with funding for supports and services. Participants create their own plans.³⁵ Eligibility is determined by the National Disability Insurance agency (NDIA). Relevant legislation is the NDIS Act of 2013.³⁶

³⁴ <https://humanrights.gov.au/our-work/disability-rights/about-disability-rights> Accessed on 18 March 2024.

³⁵ NDIS “How the NDIS works” <https://www.ndis.gov.au/understanding/how-ndis-works> accessed on 18 March 2024

³⁶ NDIS “Who’s delivering the NDIS” <https://www.ndis.gov.au/understanding/what-ndis/who-s-delivering-ndis> accessed on 18 March 2024

E Definitions

1 Disability

(a) *United Kingdom*

3.15 The UK's Equality Act 2010³⁷ is a general equality and anti-discrimination statute that protects against discrimination on the prohibited ground of disability. The UK's Equality Act's definition of disability specifies who the legislation affords rights to.

(b) *Australia*

3.16 The DDA enacts a "broad definition ... to ensure that everyone with a disability is protected" and covers the following categories or classes of disability:

- 1 physical,
- 2 intellectual,
- 3 psychiatric,
- 4 sensory,
- 5 neurological and Learning disabilities,
- 6 physical disfigurement, and
- 7 disease-causing organisms in the body.

(c) *Kenya*

3.17 The Kenyan Constitution protects against discrimination generally. Article 27 provides the right to equality and freedom from discrimination and prohibits discrimination based on disability.³⁸ The Kenyan Persons with Disabilities Act, 14 of 2003 defines "disability" in section 2 as follows:

‘disability’ means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation;

³⁷ Equality Act 2010; <https://www.legislation.gov.uk/ukpga/2010/15/contents>

³⁸ *Kenya Convention on the Rights of Persons with Disabilities CRPD/C/KEN/1 Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of State parties due in 2010* at 80 Kenya United Nations Digital Library <https://digitallibrary.un.org/record/811054/usage?v=pdf>

3.18 The Persons with Disabilities Amendment Bill of 2023 is before the national parliament. Subsidiary enactments in the form of regulations and orders have also been promulgated.³⁹ The 2003 Act defines “discriminate” in section 2 as follows:

‘discriminate’ means to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability;

3.19 The 2023 Persons with Disabilities Amendment Bill expands the above definition with the following:

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

2 Reasonable accommodation

3.20 The CRPD right to “reasonable accommodation” is critical to the removal of environmental and attitudinal barriers, and in turn, the promotion of equality and the prevention of unfair discrimination above. The treatment of this concept in the UK, Australia, and Kenya is presented below.

(a) *United Kingdom*

3.21 The UK Equality Act’s provisions that relate to persons with disabilities establish in section 20 the “duty to make reasonable adjustments” as a primary means to promote equality and prevent unfair discrimination for persons with disabilities. The duty “comprises three requirements” that enacted in section 20(3) and (4) and (5), each of which arise in the specific circumstances referred to in these sections, which place a “disabled person” at a “substantial disadvantage”:

³⁹ 1. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009
 2. The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations, 2009
 3. The Persons with Disabilities (Registration) Regulations, 2009
 4. The Persons with Disabilities (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board of Trustees) Regulations, 2009.
 5. The Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010

20(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

20(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

20(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

20(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(b) Australia

3.22 The Australian Disability Discrimination Act, No. 135 of 1992⁴⁰ was enacted before Australia ratified the CRPD. It had not introduced the right to "reasonable accommodation" as the US Americans with Disabilities Act had done in 1990. Instead, the right to "reasonable adjustment" was enacted.

3.23 The right to "reasonable adjustment" and the duty to afford it is reflected in the definition: "an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person". The failure or refusal to make "reasonable adjustments" gives rise to "direct disability

⁴⁰ Australian Disability Discrimination Act, No. 135 of 1992
<https://www.legislation.gov.au/C2004A04426/2018-04-12/text>

discrimination” in section 5,⁴¹ in “indirect disability discrimination” in section 6,⁴² and in the “inherent requirements” exception.⁴³

(c) Kenya

3.24 The Kenyan Persons with Disabilities Amendment Bill 2023 defines “denial of reasonable accommodation” as a form of unfair discrimination. The Amendment Bill’s definition of “inclusive education”⁴⁴ accords the right to “reasonable accommodation”, a central role in enabling and reducing barriers to unequal participation. It defines “reasonable accommodation”,⁴⁵ as the right to “necessary and appropriate modification

⁴¹ 5 Direct disability discrimination

(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and

(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

⁴² 6 Indirect disability discrimination

(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

⁴³ 21A Exception—inherent requirements

(1) This Division does not render it unlawful for a person (the discriminator) to discriminate against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discrimination relates to particular work (including promotion or transfer to particular work); and

(b) because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.

⁴⁴ "inclusive education" means an approach where learners and trainees with disabilities are provided with appropriate educational interventions within regular institutions of learning with reasonable accommodations and support;

⁴⁵ "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular

and adjustments” afforded to “ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

3 Monitoring and reporting

(a) United Kingdom: Framework to Promote Protect and Monitor Implementation

3.25 The Independent Monitoring Mechanism (“IMM”) of the UK is a national human rights institution.⁴⁶ It is mandated with promoting, protecting, and monitoring the implementation of the CRPD by the United Kingdom of Great Britain and Northern Ireland government.

(b) Australia: Framework to Promote Protect and Monitor Implementation

3.26 By June 2023, there was “no designated independent national monitoring mechanism in Australia, as is required under Article 33(2) of the CRPD” in Australia,⁴⁷ Written complaints against the occurrence and effect of discrimination are channelled, first to the other party involved or to the Australian Human Rights Commission, which

case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

⁴⁶ United Nations, United Nations Human Rights Office of the High Commissioner Treaty bodies Committee on the Rights of Persons with Disabilities United Kingdom of Great Britain and Northern Ireland – IMM situation <https://www.ohchr.org/en/treaty-bodies/crpd/united-kingdom-great-britain-and-northern-ireland-imm-situation#:~:text=Monitoring%20the%20implementation%20of%20the%20CRPD%3A%20The%20United%20Kingdom%20of,Kingdom%20of%20Great%20Britain%20and>

⁴⁷ B Gauntlet Disability Discrimination Commissioner “*Australian Disability Discrimination Commissioner’s intervention at COSP 16* Human Rights Commission (14 June 2023) <https://humanrights.gov.au/about/news/speeches/disability-discrimination-commissioners-intervention-cosp16>

“...In Australia, the main policy framework for the implementation of the CRPD is Australia’s Disability Strategy. This is the second national strategy since Australia ratified the CRPD in 2008 and was developed with significant consultation with people with disability. An ongoing challenge in harmonizing national policies and strategies with the CRPD is due to the federated model of government that exists in Australia, which creates disparities in rights protections in different Australian jurisdictions.

...

There is though no designated independent national monitoring mechanism in Australia, as is required under Article 33(2) of the CRPD. To enable several important policy indicatives to thrive, this needs to change..” .

tries to resolve the situation through conciliation. If that fails, the complainant can approach the Federal Court of Australia or the Federal Circuit Court.⁴⁸

3.27 Australia has designated the Attorney–General’s Office and the Department of Families, Housing, Community Services and Indigenous Affairs as joint focal points for implementation of the CRPD. The Attorney-General’s Office is responsible for human rights matters and the DDA for legislative issues and coordinating the country reports. The Department is responsible for policy, advice, and sector expertise when implementing the CRPD.⁴⁹ A Disability Discrimination Commissioner⁵⁰ has also been established and falls under the Australian Human Rights Commission.

(c) Kenya

3.28 Kenya National Commission on Human Rights (KNCHR) is established under Article 59 of the Constitution of Kenya, 2010 and the Kenya National Commission on Human Rights Act, 2011.⁵¹ In February 2011, the Kenyan Attorney-General designated KNCHR to be the independent monitoring body on the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) under Article 33(2) of the CRPD. Later, he transferred this mandate to a “sister” Commission. The KNCHR monitored the implementation of the CRPD in Kenya between 2011 and 2014 and published a report of its findings”. Amongst other measures, it uses scorecard to assess compliance.

⁴⁹ Australia *United Nations Convention of the Rights of People with Disabilities CRPD/C/AUS/1 Committee on the Rights of People with Disabilities Implementation of the Convention on the Rights of People with Disabilities Initial Report submitted by State Parties under Article 35 of the Convention at 212.* https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5

⁵⁰ <https://humanrights.gov.au/our-work/disability-rights/about-disability-rights> Accessed on 18 March 2024

⁵¹ Kenya National Commission On Human Rights *A Report To The Committee on the Rights of Persons with Disabilities - A Response to the List of Issues on Kenya’s Initial Report on The Implementation of the Convention on the Rights of Persons with Disabilities*(July 30 2015) CRPD UN Committee on the Rights of Persons with Disabilities https://www.ecoi.net/en/file/local/1189418/1930_1440682692_int-crpd-nhs-ken-21336-e.doc

CHAPTER 4: RESPONSES RECEIVED FROM THE PUBLIC

A Purpose

4.1 Chapter Four summarises the responses received from the public to 17 specific issues⁵² that the SALRC invited submissions on in its issue paper.

B Need for Specific Legislation

4.2 **CapaXity, Go George, Zoom Workshop:** an Act is not necessary. CapaXity: the CRPD has been incorporated but must be aligned with legislation. A monitoring and implementation body is lacking.

4.3 **Go George:** agrees - the Human Rights Council (HRC) and the equality courts are not sufficiently capacitated to deal with domestication.

4.4 **Legal Aid and Mongologa:** an Act is necessary to create public awareness and to inform persons with disabilities of their rights, especially about their right to access to courts and to participate in court proceedings. An Act must guide the implementation of the Employment Equity Act, 1998, local policies, the practices in the public and private sectors with the view to making violations of the rights of persons with disabilities prosecutable.

4.5 **Social Justice Coalition:** an Act is needed to progressively implement the human rights of persons with disabilities.

⁵² "THE QUESTIONS THE SALRC INVITES YOUR SUBMISSIONS ON ARE THESE: 1. Need for an Act; 2. Scope of an Act; 3. Type of Act; 4. Existing Acts; 5. Criminal and Civil law; 6. Harmful practices; 7. Specific criminal offences; 8. White Paper on the Rights of Persons with Disabilities; 9. Barriers to Equal Dignity, Treatment And Participation; 10. De-institutionalisation and Incarcerated Persons with Disabilities; 11. Insurance, Pensions, Workmans Compensation and Social Grants; 12. Gender based violence; 13. Foreign law as a Guideline for Domestication; 14. International law as a Guideline for Domestication; 15. Security services; 16. Asylum and refugees; 17. Other."

4.6 **Centre for Child Law:** an Act is needed to ensure implementation of laws, programmes, and budgets.

4.7 **Department of Small Business Development (DSBD):** agrees with the above views.

4.8 **Cape Mental Health:** an Act is needed to eradicate negative attitudes and behaviours as well as physical and social barriers to ensure access to justice and to guarantee non-discrimination.

4.9 **The Northwest Provincial Government:** an Act is needed to ensure full access to and participation in society.

4.10 **Booyesen:** an Act is needed to provide a clear understanding of the needs of persons with disabilities.

4.11 **Down Syndrome South Africa (DSSA):** an Act is necessary.

4.12 **Equal Education:** clear, adequate, and specific **legislation** is needed.

4.13 **Psychiatry and Mental Health:** an Act is needed to coordinate intersectoral public service delivery and to create updated legislation and terminology.

4.14 **Stroke foundation:** an Act is needed to regulate disability in the public and private sectors as such rights are not recognised, and to provide for reasonable accommodation. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) provides for equality but is available only once a breach of human rights has taken place.

4.15 **The South African Disability Alliance (SADA):** an Act is needed to emphasize the issue, create effective monitoring and enforcement mechanisms, and be the definitive legal position on disability rights.

C Type of Act

1 General Observations

4.16 **Psychiatry and Mental Health**: an Act superior to all other legislation necessary to bring together all laws that prohibit discrimination.

4.17 **Shonaquip**: legislation must deal with industry regulations, Chapter Nine institutions, and all human rights.⁵³

4.18 **Action in Autism**: if the Act only **contains** industry regulations and Chapter Nine institutions, it will be like PEPUDA because it will contain the grounds for discrimination.

2 Type of Disability Legislation – the Three Approaches

4.19 The SALRC issue paper solicited **public** opinion on the first three options below drawn from the Handbook for Parliamentarians and added another two options:

- 1 Option (a): incorporating disability rights into the “supreme law”.
- 2 Option (b): “a national law incorporating the content of the Convention”.
- 3 Option (c): “additional implementing legislation” and “[n]on-discrimination laws in different sectors” and a “[d]isability-equality law”.
- 4 Option (d) referred to the option of “amend[ing] existing legislation to delete provisions that are unfair barriers / discriminate unfairly on the ground of disability, and to enact new provisions aligned to CRPD”.
- 5 Option (e): “promulgate regulations, or publish helpful Codes of Good Practice under legislation”.

4.20 The preferred options are **summarised** below.

⁵³ This response related to Issue Paper option (c).

3 The Disability Legislation Approaches: Responses Received

4.21 **Capius:** favoured issue paper option (c) as it is all-inclusive. Option (b) deals with sector specific legislation, which will require separate acts. Amendments will take too long. Option (a) which advocates for a general anti-discrimination law like PEPUDA and will not include all CRPD articles.

4.22 **Centre for Human Rights:** recommended constitutionally mandated legislation.

4.23 **DSSA:** favoured Option (a) on the basis that a general anti-discrimination Act including all constitutional rights is needed. In addition, Option (c) as a standalone disability Act is necessary to create a framework compatible with the Handbook, industry regulations, and Chapter 9 institutions.

4.24 **Legal Resource Centre (LRC):** favoured Option (c) dealing with industry regulators and Chapter 9 institutions and all constitutional rights.

4.25 **Northwest Provincial Government:** favoured Option (a) because the Constitution is the supreme law of the land, with the HRC monitoring unfair discriminatory actions.

4.26 **Stroke Foundation:** favoured Option (d) and (e) above.

4.27 **SADA:** recommended that an Act should be developed that functions as an umbrella act and all other legislation should support this Act.

D Scope of Act

4.28 Many respondents⁵⁴ favoured review of all areas of law relating to disability, including, issues like dignity, equality, discrimination, reasonable accommodation, public emergencies, derogatory terms, definitions, and traditional law.⁵⁵

⁵⁴ The Centre for Human Rights, Equal Education, Western Cape Forum, Legal Aid, LRC the Northwest Provincial Government, Booyesen, The Centre for Child Law

⁵⁵ Cape Mental Health

1 Importance of Reasonable Accommodation

4.29 The respondents recommend that reasonable accommodation must be made mandatory in the public and private sectors.⁵⁶ Awareness should be raised on this matter.⁵⁷ Areas like constitutional rights, industry regulators, and Chapter 9 institutions are to be included in the Act.⁵⁸ Communication issues to be addressed include “assistive devices, assistive technologies, personal assistance (such as facilitators) and alternative and augmentative communication in public services, including educational and work environments (work adaptations),” and victimization.⁵⁹ Direct and indirect discrimination must be reviewed.⁶⁰

2 Definition

4.30 On the issue of a definition, a general definition based on the CRPD and thus the social model of definition, is supported, while the details can be spelt out in regulations.⁶¹ Respondents emphasized that the definition must also be rights specific. An umbrella act supported by all other legislation is needed. A general legislative review is needed to raise awareness about the CRPD.

4.31 Respondents emphasized that the present eight General Comments published by the CRPD Committee, and the White Paper directives must be used to implement specific rights.⁶²

3 Traditional Leadership

4.32 The issue of traditional leadership was also raised.⁶³ Specific respondents suggest that traditional leaders are well placed to inculcate the rights of persons with disabilities and the impact on the rights of women.

⁵⁶ Action in Autism

⁵⁷ SADA

⁵⁸ LRC

⁵⁹ Action in Autism, LRC

⁶⁰ Stroke Foundation

⁶¹ SADA

⁶² SADA. They agree with the requirement by Ngwena of what a definition must contain.

⁶³ Social Justice Coalition

4 Inclusive Education

4.33 Inclusive education was found to be lacking and should be included in the Act.⁶⁴ The **Stroke Foundation** identifies areas like criminal and civil justice, health, banks and financial services like insurance, social development, and sign language are important to review. Most respondents indicated that all areas of law are to be reviewed.⁶⁵

4.34 **Shonaquip** wants an inclusive Act that removes barriers and focuses on the measures necessary for domestication and the impact of disability on the extended family. The focus must be on the human rights of persons with disability. Statistics on disability are also needed. A guide must accompany the Act to assist in the transition period.

5 Monitoring

4.35 Several respondents⁶⁶ indicated that the HRC must be the monitoring body. As to the role of the HRC, other Chapter 9 institutions and provincial and local government. **Action in Autism** says that the HRC does not do enough to assist persons with disabilities to exercise their rights. The HRC must have obligations included in the Act. They want the Public Protector and other Chapter 9 institutions to:

- 1 “ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice;
- 2 ensure effective, accountable and responsible government; and
- 3 investigate sensitive and potentially embarrassing affairs of government.”

4.36 Provincial departments, municipalities, and local governments must:

- 1 commit to work with persons with disabilities;
- 2 identify developmental needs;
- 3 create sustainable solutions for the immediate or progressive implementation of socio-economic rights; and
- 4 functionaries must coordinate services to persons with disabilities and be monitored through performance assessment systems.

⁶⁴ Equal Education

⁶⁵ Western Cape Forum, Equal Education, Centre for Human Rights, Stroke Foundation, Legal Aid, LRC, Northwest Provincial Government and the Centre for Child law.

⁶⁶ Action in Autism; Centre for Human Rights; DSBD; Equal Education; Kungwini; Legal Aid; Mongologga; Booysen; Social Justice Coalition; Stroke Foundation.

4.37 The **Helen Suzman Foundation** recommended that further monitoring bodies would be:

- 1 The Mental Health Review Boards in terms of the Mental Health Care Act 17 of 2002;
- 2 The Office of Health Standards Compliance (OHSC); and
- 3 The Health Ombud in terms of the National Health Amendment Act.

4.38 The **Helen Suzman Foundation** indicates that persons who seek to challenge their admission to mental health institutions should be assisted to approach the Mental Health Services.

E Review Boards.

1 Implementation and enforcement

4.39 Questions were asked as to what the government is doing to implement the Concluding Observations made by the CRPD Committee; how the implementation of the CRPD will be effected so it can be fit for purpose; and how the implementation can be mainstreamed into provinces and local government. The implementation must be made mandatory and be enforceable.

2 Need for and Type of Act

4.40 The Concluding Observations support the idea of a Disability Act with regulations to cover each article.

4.41 Other legislation will need to be reformed. A cross-cutting single act is needed to regulate departmental actions for persons with disabilities. Concern was expressed about how the cross-cutting sections of the CRPD are to be coordinated throughout all departments if one act is implemented and amendments to individual Acts will be time consuming and temporary.

4.42 The single cross cutting Act must cover all key areas, have reasonable accommodation in all areas, and have a monitoring function. This must include the Chapter 9 institutions, but their capacity to monitor might be an issue.

The HRC must be the monitoring body.

3 Definition

4.43 The issue of a definition of disability arose. It was indicated that the Act must contain such a definition. All government departments must apply the same definition of disability. The Chairman mentioned there are different definitions for different sectors and expressed the view that the new act should create one definition of disability for all areas.

4.44 The importance of not defining disability was that it could become impossible for a person with a disability to prove that they are disabled enough. The equality provisions in South Africa will prevent this from happening. The Act must also make provision for inclusivity and mainstreaming in all government departments. The focus must be on intersectionality of rights and human rights protection.

4 Harmful Cultural Practices

4.45 **Legal Aid** mentions three areas where people with disabilities (especially women) are more vulnerable when dealing with harmful cultural practices:

4.46 Vulnerability arises due to sexual violence arising from stereotyping and mistaken belief, the exclusion of capacity issues in the procedures of traditional courts, and the influence of intersectional discrimination on women. For women, a higher statistical vulnerability of having disabilities exist, and it is more difficult for women with disabilities to access goods and services due to cultural beliefs and practices.

5 Specific Criminal offences

4.47 The **Stroke Foundation**, **SADA**, and the **Centre for Human Rights** indicate that exploitation and abuse of a vulnerable person must be criminalised.

4.48 The offence can be crafted as follows:

- 1 intention to harm a vulnerable person or group;
- 2 the offender should have known that a person is part of a vulnerable group or a victim that is specifically targeted because of vulnerability;
- 3 the perpetrator targeted the victim for this vulnerability;
- 4 intention should result in a harsher punishment, similar to ordinary crime punishments;
- 5 serious crimes should attract imprisonment, less serious crimes should attract a fine; and
- 6 offenders should attend diversity training.

6 Gender-Based Violence (“GBV”)

4.49 The **Centre for Human Rights** indicates that GBV against persons with disabilities consists of exploitation, violence, and abuse (physical, mental, sexual, and emotional.) It takes place in all settings including the home, care facilities, educational institutions, and workplaces.

4.50 The **LRC** indicates that the State must fulfil its duty towards persons with disabilities.

4.51 **Legal Aid** indicates that isolation, social stigma, and dependence of care givers are barriers which lead to greater vulnerability and sexual abuse.

4.52 Police handling of crime reports from individuals with disabilities needs scrutiny. Disabilities may hinder the reporting and investigation of crimes, affecting the availability of protection orders. Important legislation includes the following:⁶⁷

- 1 The Sexual Offences Act,
- 2 The Criminal Procedure Act,
- 3 The Domestic Violence Act, and
- 4 PEPUDA.

4.53 Critique by the **Social Justice Coalition** on some of these acts are the following:

- 1 The Sexual Offences Act No. 23 of 1957 does not make provision for consensual sexual activities between persons with disabilities.

⁶⁷ Social Justice Coalition

- 2 The Domestic Violence Act No. 116 of 1998 does not sufficiently provide for the causes of GBV against persons with disabilities.

7 Security Services

4.54 **Legal Aid** highlights concern about the lack of disability training for the Police and the fear persons with disabilities have of law enforcement.

4.55 **DSSA** and **SADA** support the criminalisation of abuse in institutions. They emphasize the need for training for Police and court officials in serving individuals with disabilities and call for legislation to enforce this requirement. Discrimination on the grounds of supposed lack of ability to give evidence needs to be eliminated.⁶⁸

4.56 The **Centre for Child Law** feels that there are implementation problems in the criminal justice system. There is a lack of child friendly courts services for all children either as witnesses or victims:

- 1 There is difficulty in obtaining information on the reasonable accommodations that are supposed to be provided.
- 2 There is a lack of job security for intermediaries.

4.57 The **Centre for Child Law** also identifies challenges for children with mental illness in the criminal justice system: Children with emotional and behavioural problems are more likely to end up in the criminal system as there are insufficient care facilities for them.

4.58 Legislation identified are articles 9, 10, 27, 28, 29, 31 and 35 of the Constitution, the Correctional Services Act, No 111 of 1998, the White Paper on Corrections, and the Criminal Procedure Act, No 51 of 1977.

8 Access to justice

4.59 The **Social Justice Coalition** indicates that problems with access to justice by persons with disabilities are faced in both the criminal and civil law. Persons with disabilities face barriers in terms of:

⁶⁸ SADA

- 1 Reporting of a crime.
- 2 Questioning by police.

9 Health, Capacity, and Choice

4.60 The Human Rights Commission's Report of the National Investigative Hearing into the Status of Mental Health Care in South Africa dated 14-15 November 2017 informs the Draft Bill. That Report must continue to inform both the anticipated sectoral legislation and implementation of the CRPD.

4.61 Amending the Choice of Termination of Pregnancy Act and Sterilization Act should be amended as follows:

It is recommended that the provisions about sterilization in the Sterilization Act which allows sterilization without consent of a person, including children, with 'mental' disabilities be repealed. Instead, all persons should be provided with the same freedom as non-disabled persons to make a decision about sterilization, and where necessary be provided with support measures (and safeguards) to exercise their decisions in relation thereto. The principles listed in the Disability Bill suggested above in recommendation 1, should be incorporated in the amendment to the legislation. Acutely, access to information about the procedure, risks and harms and irreversible nature should be provided in accessible formats.

10 De-institutionalisation

4.62 The **Centre for Child Law** states that children must grow up in a family environment but for various reasons are placed in institutional settings, due to the lack of alternative care that is family-based. They support de-institutionalisation to create, through capacity building and resourcing, better care for children in communities and families. They mention five principles that form the basis of de-institutionalisation:

- 1 community based services must be in place;
- 2 the workforce in institutions must be committed to change – they can be an asset or a liability;
- 3 political support at the highest and broadest levels is crucial;
- 4 timing is key to the success of the de-institutionalisation;
- 5 even though institutional care is inefficient and costly, a process of effective de-institutionalisation needs additional resources (and not merely a reallocation of resources), at least in the short term.

4.63 The **Centre for Child Law** indicates that:

- 1 Data should be collected on learners with disabilities to determine and monitor the conditions in those special school hostels still in existence;
- 2 The de-institutionalisation process should be aligned with other relevant legislation like the Children's Act; and
- 3 Inclusive education must be achieved to eliminate special school hostels as much as possible.

4.64 **SADA** states that a set of minimum standards of care is needed together with a body that has monitoring, accountability, reporting, and enforcement functions.

4.65 Both **Booyesen** and **Legal Aid** mention the Life Esidimeni tragedy and the impact on the public trust in the government's ability in this regard.

11 Adequate Standard of Living, Insurance, and Employment

4.66 The **Centre for Human Rights (CHR)** states that persons with disabilities have difficulty in buying health and life insurance products resolving that to protect this right of persons with disabilities through legislation. They create certain requirements:

- 1 The price of the products must be equal to that of products for able-bodied persons.
- 2 The payout process must be easy.

4.67 **Mongologa** suggests that disability policies are acceptable while **SADA** suggests that insurance and funeral policies are to be free to persons with disabilities as insurance is unaffordable without discrimination.

4.68 **Booyesen** addresses the issue of public liability insurance indicating that people with psycho-social disabilities have no public liability insurance when they get injured at work or in public.

4.69 **SADA** and the **Stroke Foundation** indicate that the social protection system is insufficient, while **Legal Aid** reports that it is sufficient with caveats.

4.70 **Kungwini** states – and is echoed by the **CHR**, –service level agreements are not signed in time; thus subsidies are not paid in time, suggesting that the HRC monitors the system.

4.71 **Legal Aid** indicates that disability grants are insufficient as the payment ignores the extra cost of disability like “disability accommodation, assistive devices, care and support, housing and additional health care needs,” echoed by the **DSBD**, **SADA**, and the **Stroke Foundation**.

4.72 **Legal Aid** suggests that the State should:

- 1 create accessible and affordable basic services;
- 2 mainstreaming of livelihood programmes;
- 3 create individual support to cover disability-related costs; and
- 4 grant determination must be based on the individual disability need.

4.73 The **Social Justice Coalition** indicate the eligibility test for grants is discriminatory as it is a combined income spousal test.

4.74 **Booyesen** states that child disability grants are problematic as not all children with disabilities can obtain a disability grant. The Social Assistance Act is interpreted as providing for a child disability grant only if there is a need for permanent care and support.

4.75 The **Centre for Child Law** agrees on the grant qualification criteria for children, as supported by **Mongologa** and point to SASSA Office challenges with **SADA** agreeing on review processes. The Social Assistance Act provides for children who need permanent care and support due to physical and mental disabilities, even though the Act has been amended to grant the child disability grant. The Centre for Human Rights states that the grants must be used for their intended purpose.

12 Accessibility, Mobility, Habilitation and Rehabilitation, Access to Transport and the Environment

4.76 **Go George** indicates that universal accessibility should be more than SANS 10400 Part S (2011) and go beyond transport or building requirements to universal access service delivery. It is emphasized that accountability is critical for policy and target monitoring and that a dedicated forum must address disability matters. The Department

of Women, Youth and Persons with Disabilities (DWYPD) must ensure persons from the disability sector are nominated to sit on a Council for Disabilities that is DWYPD-funded with adequate training considering international best practice. Existing bodies can be used for this purpose. Non-compliance must attract sanctions.

4.77 The **Human Science Research Council** (HSRC) suggests a list of actions to make the environment more accessible⁶⁹ and that SDGs on education (4), growth (8), inequality (10), accessibility of human settlements (11), data (17) collection and monitoring should be considered. The Department of Small Business Development (DSDB) indicates that infrastructure and resources for persons with disabilities are "...inadequate, ineffective and inaccessible...".

4.78 The **LRC** and **Department of Transport** agreed on ramps and toilet design, with the latter including spatial planning.

13 Accessibility and Reasonable Accommodation

4.79 **SADA**: recommends that denial of reasonable accommodation is discrimination and widening the ambit to participation and decision-making.

4.80 **Northern Cape Provincial Government**: used HRC 2002 report of the HRC "Towards a Barrier Free Society – Report," indicating a review of existing legislation.

⁶⁹ Subtitling and sign language on national public and private television broadcasts;
 Universal design should receive attention;
 Disability counters should be in all commercial spaces and places where the public has access;
 Personnel should be trained to assist persons with disabilities;
 Complete induction loop systems should be installed at all services points;
 Public recreation areas should make use of universal design;
 Taxis need to provide access to persons with disabilities;
 Bus stops need improvement;
 Lifts must be provided on buses;
 There must be better signage on busses and at bus stops;
 Telecoil systems must be provided for in buses;
 Teletype messages and sounds must be provided to indicate next destination on busses;
 Train station need similar upgrading.

4.81 HSRC, together with Psychiatry and Mental Health also agreed, indicating that there are accessibility challenges with physical and service access, and that services must be culturally sensitive.

4.82 **SADA** responded that persons with neurological and psychiatric disabilities experience attitudinal barriers due to previously mentioned challenges.

4.83 **The Northern Cape Government:** recommends a penalty to be levied for non-compliance with accessibility standards and measures. This was also supported by SADA, which reiterates the BB-EE standard setting.

4.84 Taxi licences and permits should contain universal access and design measures. An act should ensure that this suggestion is enforceable.

14 Housing

4.85 **The Human Sciences Research Council:** housing for children with disabilities should be universally designed and such requirements should be legally enforceable. Access to "...housing, water, electricity and employment" is hampered by physical barriers and cited case law supporting this position.

4.86 **Action in Autism:** emphasises that reasonable accommodation for parents and caregivers and parents of adult dependent children with disabilities in the workplace is needed.

15 Access to information

4.87 The responses received from the public deal with the controlled access to information, the Copyright Act as well as the appropriate use of terminology related to persons with disabilities who indicated that the Protection of Personal Information Act (POPIA) does not make provision for reading and the terminology usage should be inclusive. Shonaquip and SADA agreed.

16 Mobility

4.88 **Pacsen:** notes that the Department of Basic Education provides wheelchairs for the use of children with disability in schools and the Department of Health provides wheelchairs for use between home and school. Pacsen indicates that the problem, however, is the transportation of these wheelchairs as they do not fit into a taxi. Pacsen also indicates that assistive devices are provided at schools but that some devices like the nappies needed for children and adults with disabilities cannot be obtained in South Africa, making the product extremely expensive.

4.89 **Shonaquip Social Enterprise (SSE):** the need for assistive devices that are fit for individual purpose and affordable. The provision of such devices must be available in hard-to-reach areas. The devices must be adjustable over the lifetime of the person.

4.90 **SADA:** availability and affordability of assistive devices is an issue. There is a lack of personnel providing training in the use of assistive devices and doing assessments.

4.91 **Centre for Child:** Free and accessible health care should be provided for children with disabilities. Also not provided are early screening, identification, and treatment assistive devices; and [non-existence hereof a problem see stroke foundation]; sexual and reproductive services.

4.92 **Shonaquip:** There is no access to mobility or support devices that are fitted for the person. Wheelchairs are needed but in general, there are no production facilities or support services. Families that deal with disabilities are isolated. There is no ECD or training for teachers or awareness raising.

4.93 **Action in Autism:** An act should include access to communication provisions like:

...assistive devices, assistive technologies, personal assistance (such as facilitators) and pertinently alternative and augmentative communication in public services, including educational and work environments (work adaptations).

4.94 **SSE:** provision must be made for children with disabilities requiring assistive devices in accordance with the World Health Organization (WHO) Guidelines that are affordable, appropriate and dignified, inter alia with professional assistance. This is made

worse when a person with a disability is poor and lives in a rural area. Healthcare services are not accessible.

17 Disasters

4.95 **Action in Autism:** individual litigation is needed to regulate the needs of the autistic community during emergencies.

4.96 **SADA:** persons with disabilities are not included in a national disaster risk plan in terms of consultation, informational accessibility, and exclusion from vaccine roll out [See Action in Autism]

F Education

1 Legislation

4.97 The Constitution's article 29,⁷⁰ The Schools Act,⁷¹ and the White Paper 6 on Inclusive Education must be reviewed.⁷² Further policies and publications mentioned were the National Education Policy,⁷³ the Draft Ordinary Schools Admission Policy, and the Draft Guidelines for resourcing an Inclusive Education system as National Norms and Standards for the resourcing of an Inclusive Education system.⁷⁴

4.98 Legislation and policies relating to higher education referred to were the following:⁷⁵

- 1 The 1997 Education White Paper 3: Transformation of the Higher Education System;
- 2 2001 National Plan for Higher Education;
- 3 2012 the Green Paper for Post School Education and Training;
- 4 National Disability Policy and Strategic Framework;

⁷⁰ Chapter 5, HEDSA

⁷¹ Legal Aid, Gap Analysis Chapter 5

⁷² IDEA, Gap Analysis Chapter 5, HEDSA

⁷³ SADA

⁷⁴ Western Cape Forum

⁷⁵ Gap Analysis Chapter 6, HEDSA

- 5 White Paper on Post-school Education and Training;
- 6 Strategic Policy Framework on Disability for the Post-School Education and Training Sector;
- 7 Section 29 of the bill of rights;
- 8 Higher Education Act 101 of 1997;
- 9 The National Plan for Higher Education (Ministry of Education, February 2001; and
- 10 White paper 6⁷⁶

2 Access to education

4.99 **Hedsa Higher Education:** citing the UNCRPD's article 24, it was recommended that an appropriate educational environment should be created providing "effective education and individualized support measures...", measures like "...alternative learning material, alternative communication methods and the facilitation of peer support and mentoring and train professionals and staff to support persons with disabilities," and equal access; service provision; and scholastic assessments.

4.100 **Idea:** accessibility relates to the place of teaching but also to curriculum access and appropriate assessment measures.

4.101 **PACSEN:** notes that accessibility is only recognised once new schools are built.

4.102 **LRC:** mentions the inequality between urban and rural areas makes access to learners with disabilities in rural areas difficult.

3 Barriers

- 1 **SADA:** notes the number of learners with disabilities not going to school or who are educated in special schools, and the distinction between mainstream and special schools.
- 2 **Equal Education:** emphasises the lack of legislation regulating the inclusive education system which creates a host of other problems.

⁷⁶ HEDSA

- 3 **Social Justice Coalition:** raises questions as to what the boundaries of inclusive education are.
- 4 **Stroke Foundation:** notes that special schools still exist, which results in a lack of education for learners with disabilities and is identified as a barrier to the lack of the provision of reasonable accommodation in ordinary schools.
- 5 **The Human Sciences Research Council (HSRC):** questions how inclusive education will be implemented in ordinary schools.
- 6 **The Legal Resource Centre (LRC):** The distance from home when a learner with a disability must attend special schools is problematic. There is also a lack of quality education in special schools. Discrimination and abuse (physical, sexual, emotional, verbal) are ever present in these schools. The investigation of abuse at special schools is not on par with such investigations in ordinary schools.
- 7 **The Western Cape forum:** the right to education of children with severe and profound disabilities is denied if they cannot be educated in ordinary schools.
- 8 **IDEA:** inaccessible facilities, inappropriate assessment measures for a specific disability and non-adapted curricula for a specific disability create barriers to access to education.
- 9 All Stakeholders responding to the Committee's recommendations understood the need for the progressive realisation of rights.

4 Asylum-Seekers and Refugees

4.103 Responses were received from the following:

- 1 Centre for Human Rights;
- 2 The DSBD;
- 3 Legal Aid;
- 4 Mongologa; and
- 5 SADA.

4.104 Asylum seekers and refugees should receive equal protection and treatment.

5 White Paper on the Rights of Persons with Disabilities

4.105 The following organisations responded:

- 1 Centre for Human Rights;

- 2 DSBD;
- 3 Equal Education;
- 4 LRC;
- 5 Mongologga; and
- 6 Stroke foundation.

4.106 All institutions indicate the White Paper and the Integrated National Disability Strategy (“INDS”) as appropriate documentation.

4.107 Other respondents mentioned the National Development Plan and the Equal Citizens Plan.

6 Barriers

4.108 No barriers were indicated.

7 Solutions

4.109 **Centre for Human Rights:** the White Paper must be implemented through enforcement and accountability measures as well as evidenced based interventions and innovations. Subsidiary legislation must be made up of the eight General Comments and the White Paper.

4.110 **DSBD:** the White Paper must be implemented by departments while the SAHRC must be the monitoring body, while Equal Education indicates that the White Paper must be used rather than the INDS.

4.111 **LRC:** the White Paper does not provide guidance on the implementation thereof. The White Paper will inform other legislation once it is enacted. They feel that the White Paper and the INDS must be the basis for the development of legislation.

4.112 **Mongologga:** the White Paper must be interpreted into South African law and that the INDS and the Equal Citizens plan should function as guidelines for interpretation.

4.113 **Stroke foundation:** the White Paper should be used as basis for a disability act, but all three documents can also be used.

8 Evaluation

4.114 The conclusion seems to be that all three documents are to be used with the focus being on the White Paper.

G Euthanasia and persons with disabilities

4.115 Respondents on this subject recommend the following:

“In respect of selective abortion, this mean:

Thoroughly investigating the implications of the advancement of the constitutional value of human dignity and life for the protection of unborn babies with disabilities from selective abortion.

4.116 In respect of euthanasia and assisted suicide, this means:

Ensuring the constitutional rights to life and human dignity of persons with disabilities are protected from irreversible violation by way of any form of euthanasia or assisted suicide.

CHAPTER 5: NATIONAL LAWS

A Purpose

5.1 The purpose of Chapter Five is to review the Constitution of the Republic of South Africa, 1996 to investigate the legal basis for ratifying and domesticating the CRPD. This chapter also flags for consequential amendment, abolition, or renovation of a sample of laws that may be impacted by the CRPD. This chapter concludes with findings and recommendations of the SALRC.

B Constitution of the Republic of South Africa 1996

1 Founding provisions

5.2 Section 1 of the Constitution declares the founding values to include human dignity, the achievement of equality and the advancement of human rights, freedoms, non-racialism, non-sexism, the supremacy of the Constitution, and the rule of law. The supremacy of the Constitution means firstly, that law or conduct inconsistent with the Constitution is invalid; and secondly, that the obligations imposed by the Constitution must be fulfilled.⁷⁷

5.3 Having a common South African citizenship means that all citizens are equally entitled to the rights, privileges, and benefits of citizenship. Concomitantly, all citizens are equally subject to the duties and responsibilities of citizenship.⁷⁸

2 The Bill of Rights

5.4 The Bill of Rights enshrines the rights of all people and affirms the democratic values of human dignity, equality, and freedom. It imposes obligations on the state to respect, protect, promote, and fulfil the rights in the Bill of Rights, which are subject to

⁷⁷ Constitution of the Republic of South Africa 1996 (hereinafter Constitution) Section 2 of the Constitution

⁷⁸ Section 3 of the Constitution

limitations.⁷⁹ The Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary, all organs of state, and depending on the nature of the rights and duties implicated, natural or juristic persons. The application of the Bill of Rights, on both natural or juristic persons, means that the State is not the only bearer of duties. Corporates, organisations, and individuals may bear legal duties to persons with disabilities in certain circumstances. Courts have a duty to give effect to the Bill of Rights and develop the common law.⁸⁰

5.5 The Bill of Rights recognises the following human rights:

- 1 Section 9: Equality
- 2 Section 10: Human dignity
- 3 Section 11: Life
- 4 Section 12: Freedom and security of the person
- 5 Section 13: Slavery, servitude and forced labour
- 6 Section 14: Privacy
- 7 section 15: Freedom of religion, belief and opinion
- 8 Section 16: Freedom of expression
- 9 Section 17: Assembly, demonstration, picket and petition
- 10 Section 18: Freedom of association
- 11 Section 19: Political rights
- 12 Section 20: Citizenship
- 13 Section 21: Freedom of movement and residence
- 14 Section 22: Freedom of trade, occupation and profession
- 15 Section 23: Labour relations
- 16 Section 24: Environment
- 17 Section 25: Property
- 18 Section 26: Housing
- 19 Section 27: Healthcare, food, water and social security
- 20 Section 28: Children
- 21 Section 29: Education
- 22 Section 30: Language and culture
- 23 Section 31: Cultural, religious and linguistic communities
- 24 Section 32: Access to information
- 25 Section 33: Just administrative action

⁷⁹ Section 7 of the Constitution

⁸⁰ Section 8 of the Constitution

26 Section 34: Access to courts

27 Section 35: Arrested, detained and accused persons

5.6 For the purposes of this discussion document, it can be accepted that the content of the rights recognised above meets the minimum thresholds aspired for in, for instance, the United Nations Declaration of Human Rights. Notably, however, the right to equality prohibits discrimination on the ground of disability. No further exposition of the contents of each of the rights is required.

3 Section 38: Enforcement of rights

5.7 Section 38 generously permits access to courts to enforce rights. Persons who may do so include anyone acting in their own interest, on behalf of other persons who cannot act for themselves, a group or class of persons, anyone acting in the public interest, and an association acting in the interest of its members.

4 Section 39: Interpretation of Bill of Rights

5.8 Section 39 stipulates that when interpreting the Bill of Rights regard must be had to promoting the values that underlie an open and democratic society based on human dignity, equality, and freedom. International law must be considered. Foreign law may be considered. When interpreting legislation and developing the common law or customary law, adjudicators must promote the spirit, purport, and objects of the Bill of Rights.

5.9 Significantly, the Bill of Rights does not deny the existence of other rights and freedoms recognised by the common law, customary law, and legislation, provided they are consistent with the Bill. Notably, section 39 is not qualified by the requirements for domestication of international agreements below for purposes of interpretation.

5 Section 231: International agreements

5.10 Section 231 places the responsibility for negotiating and signing all international agreements on the national executive. International agreements bind South Africa only after they have been approved by resolution in both the National Assembly and the National Council of provinces. Exceptions to this general rule include international

agreements of a technical, administrative or executive nature, which do not require either ratification or accession. Although they are entered into by the national executive without approval of the two Houses, they must be tabled before them within a reasonable time.

5.11 Other international agreements become law when they are enacted by national legislation. However, a self-executing provision of an agreement that has been approved by Parliament is law in South Africa, unless it is inconsistent with the Constitution or an Act of Parliament. South Africa is bound by international agreements which were binding on the Republic when the Constitution took effect.

6 Section 232: Customary international law

5.12 Section 232 recognises customary international law as law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.

7 Section 233: Application of international law

5.13 Section 233 directs that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

8 Section 234: Charters of Rights

5.14 Section 234 anticipates that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution to deepen the culture of democracy established by the Constitution.

C Consequential renovation, amendments, abolition of laws

5.15 Domestication of the CRPD anticipates that several laws and practices must be rendered compliant with the CRPD either by amendment, renovation, abolition, and promulgation of new laws. Simultaneously with the domestication process, the SALRC must comprehensively review other laws and practices. Some are foreshadowed in the

Schedule to the Draft Bill. For purposes of illustration, it suffices to discuss two statutes that are directly implicated.

D Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

5.16 The purpose of PEPUDA is to give effect to the equality provisions of section 9 of the Constitution. That means enabling everyone to enjoy all rights and freedoms, promote equality, the values of non-racialism, and non-sexism; to prevent unfair discrimination and protect human dignity; and to prohibit inciting hatred based on race, ethnicity, gender or religion. PEPUDA calls for measures to achieve these aims.

5.17 Additionally, PEPUDA calls for the education of the public, raising awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment. PEPUDA requires remedies for victims of unfair discrimination, hate speech, and harassment.

5.18 PEPUDA recognises the obligation to facilitate compliance with international law, treaties, particularly the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

5.19 PEPUDA defines “discrimination”, “equality”, “family responsibility”, “harassment” (which specifically identifies sex, gender or sexual orientation, but not any other prohibited grounds), “person” (which includes juristic and non-juristic entities) and “prohibited grounds”, (which includes disability). Noticeably, it does not define disability. However, it does seek to prevent, prohibit, and eliminate unfair discrimination, hate speech and harassment based on disability,⁸¹ and to promote equality based on disability.⁸²

5.20 It is binding on both the state and all persons, except employers and employees to whom the Employment Equity Act, 1998 (below) applies.

⁸¹ Section 9 of PEPUDA.

⁸² Section 28 of PEPUDA.

5.21 If PEPUDA conflicts with any other law, except the Constitution or an Act of Parliament expressly amending PEPUDA, then PEPUDA would prevail.⁸³

E Employment Equity Act, 55 of 1988 (EEA)

5.22 The purpose of the EEA is to achieve unity in the workplace by promoting equal opportunity and fair treatment in employment, by eliminating of unfair discrimination, by implementing affirmative action measures to redress disadvantages by designated groups and ensuring equitable representation in all categories and levels in the workforce. “Designated groups are defined to include people with disabilities. The EEA also defines “people with disabilities”, “reasonable accommodation” “suitably qualified person”, “family responsibility”, and “medical testing”.

5.23 Harassment of an employee is treated as unfair discrimination and prohibited on one or more of the prohibited grounds of unfair discrimination, which includes disability.⁸⁴

5.24 The Code of Good Practice on the Employment of Persons with Disabilities dated 9 November 2015 defines “unjustifiable hardship” as “action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.”⁸⁵

5.25 The duty to reasonably accommodate persons is limited if it imposes unjustifiable hardships on the business of the employer.

5.26 Another concept in the Code often interpreted as a limitation and barrier to employment, is the “inherent requirements of the job”. They are,

those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job.⁸⁶

⁸³ Section 5(2) of PEPUDA.

⁸⁴ Section 6 of the EEA.

⁸⁵ Item 6.12 of the Code.

⁸⁶ Item 7.1.2 of the Code.

5.27 The EEA prohibits medical testing unless legislation permits it or it is justifiable based on medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Psychometric testing is prohibited unless the test is proven to be scientifically valid, reliable, is applied fairly to employees, and is not biased against any employee or group.

5.28 Affirmative action measures must include those that identify and eliminate employment barriers and unfair discrimination which adversely affect people from designated groups. Measures aimed at furthering diversity in the workplace based on equal dignity and respect for all people must include reasonable accommodation for people from designated groups to ensure that they enjoy equal opportunities and are equitably represented in the workforce.⁸⁷

5.29 Any conflict in the EEA between the EEA and any other law, other than the Constitution or an Act of Parliament expressly amending the EEA, the provisions of the EEA must prevail.⁸⁸

F Findings and recommendations

5.30 Having investigated the content of the CRPD, foreign legislation for best practice, and national laws in the form of the Constitution, the PEPUDA make findings and recommendations regarding the domestication of the CRPD.

1 Findings

5.31 The CRPD coheres closely with the Constitution and its aspirations for a better life for people with disabilities. The specific rights, values and concepts, and the duty to account for their recognition and implementation, are consistent with the Constitution.

5.32 Precisely because of this synergy, domesticating the CRPD would clarify and deepen the promotion of the constitutional rights and values of equality, dignity and freedom and concomitantly prohibit unfair discrimination against all persons with

⁸⁷ Section 15 of EEA.

⁸⁸ Section 63 of the EEA.

disabilities, irrespective of age, gender, sex, origin, social class and race, to facilitate their full enjoyment of all rights.

5.33 Furthermore, the interpretation clause in the Constitution that compels decision-makers to consider international law means that all international law must be considered. The CRPD is already accessible through constitutional interpretation. Consequently, the Constitution has been the vehicle for recognising and practising human rights for the benefit of people with disabilities as an interest group, notwithstanding the lack of domestication of the CRPD.

5.34 The expansive nature of the Constitution is more generous than foreign law. Nevertheless, foreign law remains a guide for designing bespoke laws to address specific sectors of people with disabilities.

5.35 As for national laws, two statutes surveyed were post-apartheid, but they predated the CRPD. PEPUDA and the EEA have similar stipulations that in case of conflicts with any other law, except the Constitution or an Act of Parliament expressly amending PEPUDA or EEA, then the latter would prevail.⁸⁹ Therefore, the Schedule to the Draft Bill must carefully scrutinise and prioritise these statutes for renovation in light of the Draft Bill.

5.36 The public supports domesticating the CRPD and the radical stance it espouses as human rights rather than welfare and medical law. Ideologically, the shift is welcome. Disability interest groups anxiously await the legislation. Many respondents anticipate delays and barriers in implementing a new Act. In addition to the socio-economic departmental assessments that must accompany a new Act, assistance to access justice to enforce the claims of people with disabilities also requires practical, affordable, and effective dispute systems design.

5.37 Consequently, having considered the four criteria above, none pose impediments to domesticating the CRPD. A new Act can seamlessly thread together the promotion of equality, and the prevention, protection, and prohibition of discrimination. However, implementing the CRPD across sectors pose challenges.

⁸⁹ Section 5(2)

2 Recommendations

5.38 Based on its investigations and findings, the SALRC recommends a framework Act for the first phase of law reform concerning people with disabilities. As the CRPD mirrors the constitutional rights to equality and prevention and protections against discrimination, a framework Act would give effect comprehensively to both the promotion of all fundamental human rights and protections against harms.

5.39 Furthermore, a framework Act would be consistent with the ministerial mandate, ... to commence with an in-depth investigation into proposals for the efficacy of developing a single disability legislation or a cut across statute to give effect to disability rights and further proposals for the domestication of the CRPD.

5.40 A framework Act would be a foundation on which to base disaggregated laws (statutes, regulations, codes, guidelines, agreements) responsive to the needs of specific sectors such as health, education, sports, and culture.

5.41 Both the framework Act and ensuing laws must recognise the radical shift that necessitated the CRPD to replace its predecessors. The CRPD lexicon is to “prohibit all discrimination on the basis of disability ... and guarantee equal and effective legal protection”. This means that “all” and not only “unfair” discrimination must be prohibited. Not once is the word “unfair” used in the CRPD.

5.42 Effective legal protection cannot be confined to costly civil litigation. Effective must mean appropriate dispute systems design that includes litigation, arbitration, mediation, and criminal prosecution. Suitably equipped institutions, staffed by competent and trained professionals must be responsible for enabling people with disabilities to advocate for and enforce their rights.

5.43 In pursuit of this recommendation, the SALRC presents a Draft Bill with this Discussion Document for public discussion.

5.44 To minimise delay in implementing a new Act, the application for a socioeconomic impact assessment (SEIAS) should be initiated parallel to the consultations on the Draft Bill.

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APPENDIX A: LIST OF WRITTEN INPUT RECEIVED ON ISSUE PAPER 39

1	30 June 2021	Andries van Niekerk Communications Manager	National Institute for the Deaf
2	30 June 2021	Tiyisela Mahumani (Private
3	30 June 2021	Cause for Justice	Cause for Justice
4	20 July 2021	Centre for Child Law Endorsed by Equal Education Law Centre	Centre for Child Law Endorsed by Equal Education Law Centre
5	30 June 2021	Chantelle Booysen	Private
6	28 November 2019	Craig Berkowitz	Private
7	30 June 2021	Daleen Botes Chief Executive Officer	Kungwini Welfare Organisation
8	30 June 2021	Down Syndrome South Africa (DSSA)	Down Syndrome South Africa (DSSA)
9	31 May 2021	Equal Education Law Centre endorsed by Autism South Africa, Centre for Child Law, University of Pretoria, Down Syndrome South Africa, Inclusive Education South Africa, National Council of and for Persons with Disabilities, The Chaeli Campaign and the Western Cape Forum for Intellectual Disability	Equal Education Law Centre endorsed by Autism South Africa, Centre for Child Law, University of Pretoria, Down Syndrome South Africa, Inclusive Education South Africa, National Council of and for Persons with Disabilities, The Chaeli Campaign and the Western Cape Forum for Intellectual Disability
10	29 March 2018	Gap analysis Centre for Human Rights “ <i>South Africa Disability Legislation and Policy Analysis</i> ” University of Pretoria.	Gap analysis Centre for Human Rights “ <i>South Africa Disability Legislation and Policy Analysis</i> ” University of Pretoria.
11	30 June 2021	H. Tayob	Graduate

12	2 December 2019	Human Science Research Council	Human Science Research Council
13	21 May 2021	Judith McKenzie (PhD) Associate Professor	Including Disability in Education in Africa (IDEA)
14	30 June 2021	Khensani Motileni, Ntebaleng Morake and Thandokazi Georg	Social Justice Coalition
15	May 2021	Legal Aid SA	Legal Aid SA
16	30 June 2021	Margaret Linegar Occupational Therapist	Shonaquip Social Enterprise (SSE) Enabling Education
17	30 June 2021	Mariza Jurgens Chairperson	CapaXity Foundation
18	24 June 2021	Ms C Fransolet	Zoom Workshop on the Domestication of the UNCRPD in South Africa for the GO GEORGE Integrated Public Transport Network (GIPTN): Minutes
19	20 May 2021	Ms C Fransolet	Zoom Workshop on the Domestication of the UNCRPD in South Africa: Minutes
20	28 June 2021	Ms J Hoff	PACSEN
21	7 June 2021	Ms. Martie Miranda (Chairperson, UFS); Mr. Nevil Balakrishna (Vice-Chairperson, UKZN); Mr Sam Van Musschenbroek (Secretary, UFH); Ms Anneline Taljaard (Treasurer, Boland College); Mr Andrew Sam (Acting Publicity and Communications, WITS), Mrs Nosiphiwo Delubom (Co-Opted Member: NMU)	The Higher and Further Education Disability Services Association (HEDSA)
22	30 June 2021	Petra Marais, Attorney, Amy-Leigh Payne, Attorney,	Legal Resources Centre (LRC)

		Zimkhitha Mhlahlo, Attorney Charlene Kreuser, Candidate Attorney, John Carpenter, Intern	
23	30 June 2021	Professor Melvyn Freeman	Private
24	31 May 2021	Professor Sharon Kleintjes MA (Clinpsych), Mphil (CAMH), Dphil	Chair And Professor of Intellectual Disability Division of Intellectual Disability, Department of Psychiatry And Mental Health, UCT
25	30 June 2021	Secretariat: Melanie Lubbe	SADA
26	30 June 2021	Tebogo Donald Mongologa	Private
27	30 June 2024	The Disability Rights Unit, Centre for Human Rights	The Disability Rights Unit, Centre for Human Rights
28	28 May 2021	The Helen Suzman Foundation	The Helen Suzman Foundation
29	30 June 2021	The Stroke Survivors Foundation	The Stroke Survivors Foundation
30	31 May 2021	Thina Mthembu & Willene Holness	Private
31	31 May 2021	Western Cape Forum for Intellectual Disability	Western Cape Forum for Intellectual Disability
32	30 June 2021	Willene Holness, Liza Aziz, Row Naidoo, Puvasha Naidoo & Kirsten Miller	Action in Autism
33	25 November 2019	Civilian Secretariat for Police	Civilian Secretariat for Police
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35	5 November 2019	Department of Energy	Department of Energy
36	5 November 2019	Department of Public Enterprises	Department of Public Enterprises
37	30 June 2024	Department of Small Business Development	Department of Small Business Development
38	28 May 2021	Department of Transport	Department of Transport

39	11 December 2019	Department of Water and Sanitation	Department of Water and Sanitation
40	30 June 2021	Northwest Province Disability Sector Northwest	Northwest Province Disability Sector Northwest
41	30 June 2024	Office of the Premier of the Northern Cape	Office of the Premier of the Northern Cape
42	27 November 2019	SARS	SARS

APPENDIX B: PROPOSED DRAFT BILL

Protection and Promotion of Persons with Disabilities Act X of 2024

[Assented to ... 2024]

[Date of commencement to be proclaimed]

(English text signed by the President)

ACT

To provide a framework law for *persons with disabilities* to transform from a welfarist to a human rights model of disability; to promote all human rights and fundamental freedoms of infants, children, adults and older persons; to protect and promote the right to *equality* and dignity; to prevent and prohibit discrimination; to create offences and provide penalties for discrimination; to provide for incidental matters; and to domesticate the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

Preamble. –Recognising–

that the Constitution of the Republic of South Africa, 1996 is founded on the value of human dignity, the achievement of *equality* and the advancement of human rights and freedoms;¹

that the *Constitution* is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled;²

that the Bill of Rights in the *Constitution* enshrines the rights of all people in our country and affirms the democratic values of human dignity, *equality* and freedom;³

¹ Section 1(a) of the Constitution

² Section 2 of the Constitution

³ Section 7(1) of the Constitution

that the Bill recognises that everyone is equal before the law and has the right to equal protection and benefit of the law;⁴

that *equality* includes the full and equal enjoyment of all rights and freedoms;⁵

that neither the *state* nor any person may unfairly discriminate, directly or indirectly, against anyone on any grounds including disability;⁶

that the *Constitution* binds natural and juristic persons if, and to the extent that it is applicable, considering the nature of the right and the nature of any duty imposed by the right;⁷

that the *Constitution* provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of *equality*;⁸

that international agreements bind the Republic only after they have been approved by a resolution in both the National Assembly and the National Council of provinces, unless the agreement is of a technical, administrative or executive nature, or the agreement does not require either ratification or accession and is entered into by the national executive;⁹

that an international agreement becomes law in the Republic when it is enacted into law by national legislation;¹⁰

that the Republic ratified the United Nations Convention on the Rights of Persons with Disabilities and its *Optional Protocol* on 30 November 2007;

that the Republic ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979, on 15 December 1995, and the Convention on the Rights of the Child, 1989 on 16 June 1995;

that *persons with disabilities* suffer multiple, intersecting layers of discrimination;

⁴ Section 9(1) of the Constitution

⁵ Section 9(2) of the Constitution

⁶ Section 9(3) and (4) of the Constitution

⁷ Section 8(2) of the Constitution

⁸ Section 9(4) of the Constitution

⁹ Section 231(2) and (3) of the Constitution

¹⁰ Section 231(4) of the Constitution

that *persons with disabilities* are no longer to be treated as objects of welfare, medical treatment, and social protection but rather as subjects with rights, not merely specific rights, but all human rights and fundamental freedoms, without discrimination;

Therefore, the Republic seeks to give effect to its obligations under the *Convention* and *its Optional Protocol*.

Chapter I

1) Definitions, Purpose, Interpretation and Application

1. Definitions– In this Act, unless the context otherwise indicates –

"accessibility" includes enabling persons with disabilities to live independently and participate fully in all aspects of life, taking appropriate measures to ensure to *persons with disabilities* access on an equal basis with others to the physical environment, to transportation, to information and *communication*, to relevant technologies and systems, and to other facilities and services provided to the public in both urban and rural areas; as amplified in section 10 of *this Act*; ¹¹

"barriers" include interactions between *persons with disabilities* and attitudinal and environmental obstacles that hinder their full and effective participation in society on an equal basis with others" ¹²; as amplified in section 11 of *this Act*; ¹³

"caregiver" includes an institution, service, individual, relative, friend or employee who is responsible for or takes care of *persons with disabilities*;

"Code of Good Practice" means a document issued by the *Minister* in terms of section 31 of *this Act*;

¹¹ Article 9

¹² UNCRPD Preamble - The States Parties to the present Convention,
 "(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

¹³ Article 9

“**commencement**” means the date *this Act* fixed by the President by proclamation in the *Gazette*;

“**Commission**” means the Human Rights Commission established by section 181(1) of the *Constitution*;

“**Committee**” means the Committee on the Rights of Persons with Disabilities established in terms of article 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities;

“**communication**” includes languages, display of text, Braille, tactile interaction, large print, accessible multimedia, written, audio, plain-language, human-reader, augmentative and alternative modes, means and formats of interaction, including accessible information and technology;

“**Conflict Administration Unit**” or “**Unit**” refers to the unit established in terms of section 33;

“**Constitution**” means the Constitution of the Republic of South Africa 1996;

“**Convention**” means the Convention on the Rights of Persons with Disabilities, 2007;

“**disability**” includes long-term physical, mental, intellectual or sensory impairments which, in interaction with various *barriers*, hinder people’s full and effective participation in society on an equal basis with others;

“**Director-General**” means the Director-General in the Department of women, youth and persons with disabilities;

[*alternatively* “**Director-General**” means the Director-General in the Department of Justice and Constitutional Development;]¹⁴

“**discrimination**” means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly–

- a. imposes burdens, obligations or disadvantage on; or
- b. withholds benefits, opportunities or advantages from,

any person or anyone or more of the prohibited grounds;

¹⁴ The SALRC must recommend a policy choice.

“discrimination based on disability” means any distinction, exclusion or restriction based on *disability* which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field;

“equality” as amplified in Chapter II of *this Act* ¹⁵ includes–

- a. both a value and a substantive right; ^{16 17}
- b. equal protection and benefit of the law;
- c. recognition, exercise and enjoyment on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural and civic fields; and
- d. treatment, participation, use, exercise and enjoyment of products, services and facilities on an equal basis with others.

¹⁵ UNCRPD Committee - General comment No. 6 on Article 5 - Equality and non-discrimination (9 March 2018)

¹⁶ UNCRPD Committee - General comment No. 6 on Article 5 - Equality and non-discrimination (9 March 2018)

IV. Legal character of non-discrimination and equality

12. Equality and non-discrimination are principles and rights

¹⁷ UNCRPD Committee - General comment No. 6 on Article 5 - Equality and non-discrimination (9 March 2018)

“9. The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.

...

11. Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (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. The Convention is based on inclusive equality.”

“Equality Court” means all the Magistrates Courts and High Courts designated as equality courts by the Minister of Justice and Constitutional Development, in Government Gazette 32516, GoN 859;

“Equal Opportunities Office” or **“Office”** refers to the office established in terms of section 35;

“habilitation” means inpatient or outpatient healthcare services such as physical therapy, occupational therapy, speech-language pathology, and audiology that address the competencies and abilities needed for optimal functioning to interact with their environments, to enable *persons with disabilities* to attain and maintain maximum independence, full physical, mental, social, and vocational ability, full inclusion and participation in all aspects of life; as amplified in section 17 of *this Act*; ¹⁸

“harmful practices” include behaviour attitudes and practices based on tradition, culture, religion, superstition or other reasons which negatively affect the human rights and fundamental freedoms of persons with disabilities or perpetuate discrimination; ¹⁹

“language” includes spoken and South African Sign Languages, and other forms of non-spoken languages;

“Minister” means the Minister of Women, Youth and Persons with Disabilities;

[*alternatively* **“Minister”** means the Minister of Justice and Constitutional Development;]²⁰

“Optional Protocol” means the optional protocol to the *Convention*;

“persons with disabilities” means people who have long term or recurring physical, mental, intellectual or sensory impairments which, in interaction with various *barriers* hinder their full and effective participation and substantially limit their ability to function and advance in society on an equal basis with others;

“prescribed” means prescribed by a regulation made under section X;

¹⁸ AU documents

¹⁹ AU documents

²⁰ The SALRC must recommend a policy choice.

"necessary accommodation" means in a particular case, the minimum needs, including modifications, adjustments and practices which must be accommodated to ensure to persons with disabilities their full participation in society;

"reasonable accommodation" means in a particular case, appropriate modifications, adjustments and practices, not imposing a disproportionate or *undue burden*, that ensure to *persons with disabilities* the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms, as amplified in section 8 of *this Act*;

"rehabilitation" means inpatient or outpatient healthcare services such as physical therapy, occupational therapy, speech-language pathology and psychiatric rehabilitation services that help a person keep, restore or improve skills and functioning for daily living and skills related to *communication* that have been lost or impaired because a person was sick, injured or disabled; as amplified in section 17 of *this Act*; ²¹

"state" includes an organ of *state* as defined in section 239 of the *Constitution*;

"South Africa Sign Language" means the official sign language recognised in section 6 of the *Constitution*;

"this Act" includes any regulations made in section 30 but excludes any footnote;

"undue hardship" means modifications, adjustments and practices that will impose a disproportionate burden to provide *reasonable accommodation* to *persons with disabilities*;

2. Purpose of this Act. –The purpose of *this Act* is –

- (1) to give effect to the rights and obligations *under the Constitution*;
- (2) to give effect to the obligations of the Republic under the *Convention* and the *Optional Protocol*;
- (3) to promote the implementation of the following principles for the protection and advancement of *people with disabilities*:
 - (a) respect for the inherent dignity, individual autonomy, freedom to make choices and independence of persons;
 - (b) effective participation and inclusion of *persons with disabilities* in society;
 - (c) equality of opportunity and the full and equal enjoyment of all rights and freedoms;

²¹ AU documents

- (d) protection against *discrimination based on disability* and any other intersecting grounds;
 - (e) recognition and respect for difference and acceptance of *people with disabilities* as human beings;
 - (f) recognition and respect for the evolving capacities of children with disabilities and their right to preserve their identities;
 - (g) access to goods, services, facilities, equipment, information and technology;
 - (h) *reasonable accommodation* and affirmative measures to give effect to the principles above.
- (4) to provide a framework for the *state* and persons to implement other measures to achieve the purposes above.

3. Interpretation of *this Act*. – *This Act* must be interpreted

- (a) in compliance with the *Constitution*;
- (b) to give effect to the purpose of the *Constitution*, the *Convention* and its *Optional Protocol*
- (c) considering any relevant *Code of Good Practice* issued in terms of *this Act*; and
- (d) in compliance with the international law obligations of the Republic, particularly those contained in the Convention on the Elimination of All Forms of Discrimination against Women, 1979, and the Convention on the Rights of the Child, 1989.

4. Application of *this Act*. –(1) *This Act* binds the *state* and *persons* as the context requires.

(2) If any conflict relating to a matter dealt with in *this Act* arises between *this Act* and the provisions of any other law, other than the *Constitution* or an Act of Parliament expressly amending *this Act*, the provisions of *this Act* must prevail, unless the provisions of the other law are more conducive to the realization of the rights of *persons with disabilities*.²²

²² Article 4(4)

Chapter II

Promotion of equality and dignity

5. Equality and dignity

- (1) Everyone is equal before and under the law and is entitled without any discrimination to the equal protection and equal benefit of the law.
- (2) *Persons with disabilities* have the right on an equal basis with others—
 - (a) to life and to the effective enjoyment of life;²³
 - (b) to dignity;
 - (c) to respect for their physical and mental integrity;²⁴
 - (d) to recognition everywhere as persons before the law;²⁵
 - (e) to enjoy full legal capacity in all aspects of life;²⁶
 - (f) to access the support they require to exercise their legal capacity;²⁷
 - (g) to own or inherit property;
 - (h) to control their own financial affairs;
 - (i) to have equal access to bank loans, mortgages and other forms of financial credit;
and
 - (j) to not be arbitrarily deprived of their property.²⁸

²³ Article 10

²⁴ Article 17

²⁵ Article 12(1)

²⁶ Article 12(2)

²⁷ Article 12(3)

²⁸ Article 12(5)

6. Access to justice

- (1) *Persons with disabilities* are guaranteed equal and effective legal protection against discrimination on all grounds.
- (2) *Persons with disabilities* have the right on an equal basis with others—
 - (a) to effective access to justice, through the provision of procedural and age-appropriate accommodations, to have meaningful roles as direct and indirect participants in all stages of investigations and legal proceedings; and
 - (b) to access justice with the assistance of trained personnel working in the administration of justice, and police and correctional services.²⁹

7. Legal capacity

- (1) Measures relating to the exercise of legal capacity must provide proportional and effective safeguards—
- (2) to prevent abuse;
 - (a) to ensure respect for the rights, will and preferences of *persons with disabilities*;
 - (b) to prohibit conflict of interest and undue influence;
 - (c) to be proportional and tailored to the circumstances of *persons with disabilities*;
 - (d) to apply for the shortest time possible; and
 - (e) be subject to regular review by the *Commission* and the *Equality Court* as the context requires.³⁰

8. Reasonable accommodation

- (1) *Persons with disabilities* have a right to *reasonable accommodation* to function independently and participate fully in all aspects of life.³¹

²⁹ Article 13

³⁰ Article 12(4)

³¹ Article 9

- (2) The *state* and any *person* who provides *reasonable accommodation*–
- (a) must confer with the *persons with disabilities* or their representatives;
 - (b) must assess the relevance, feasibility and effectiveness of modifications, adjustments and practices;
 - (c) must ensure that the modifications, adjustments and practices implemented are fit for the purposes of promoting equality and eliminating discrimination;
- (3) The *state* and any *person* may refuse to provide *reasonable accommodation* if–
- (a) that will impose an *undue hardship*;
 - (b) after careful search and assessment, no modifications, adjustments and practices are fit for the purposes of promoting equality and the eliminating discrimination.
- (4) The *state* and any *person* who has the duty to provide *reasonable accommodation* bears the burden of proving justification for refusing to provide *reasonable accommodation*.

9. Necessary accommodation

- (1) Persons with disabilities must be given the bare minimum needs to optimise their physical and intellectual participation in public life.
- (2) Necessary accommodation must be made available on request.

10. Accessibility

- (1) *Persons with disabilities* must have *accessibility* to live independently and participate fully in all aspects of life.³²
- (2) The *state* must implement and monitor measures to ensure –
- (a) access to the physical environmental, buildings, structures, and infrastructure;
and
 - (b) transportation, information, communication, and services open to the general public,

³² Article 9

- (c) that are built, manufactured, produced or rendered after the *commencement* of *this Act*.
- (d) The *state* may in consultation with any person, including employers and providers of goods and services, assign to that person the duty to provide *accessibility* to *persons with disabilities*.
- (e) The *state* and any person who have a duty to provide *accessibility* to *persons with disabilities*, bear the burden of proving justification for refusing to provide *accessibility* to a *person with disabilities*.

11. Barriers

- (1) The *state* must implement measures to identify and eliminate *barriers* to *accessibility* by—
 - (a) updating, developing, promulgating and monitoring the implementation of minimum standards, codes and guidelines for *accessibility*;
 - (b) ensuring that *persons* who offer facilities, goods and services to the public enable access for *persons with disabilities*;
 - (c) providing training on *accessibility* for *persons* requesting it;
 - (d) providing in buildings and other facilities open to the public signage in Braille, tactile signage or in easy to read and understand forms;
 - (e) providing guides, readers, professional South African Sign Language interpreters, caregivers, intermediaries, assistance animals and other forms of live assistance, as the circumstances require, to facilitate *accessibility* to buildings and other facilities open to the public; and
 - (f) promoting other appropriate forms of assistance and support to *persons with disabilities* to ensure their access to information, the Internet and new information and *communication* technologies at minimum cost to them.³³

³³ Article 9

- (2) The *state* may in consultation with any person, including employers and providers of goods and services, assign to that person the duty to remove *barriers* for *persons with disabilities*.
- (3) The *state* and any person who have a duty to remove *barriers* for *persons with disabilities*, bear the burden of proving justification for refusing to remove *barriers* for *persons with disabilities*.

12. Older persons, women and children

- (1) *Persons with disabilities*, particularly older persons, women and children have a right to be provided with special measures to mitigate the intersecting impact of multiple forms of inequality and indignity, to ensure their full development, advancement and empowerment, for the purpose of guaranteeing to them the exercise and enjoyment of human rights and fundamental freedoms under this *Act*.
- (2) In the case of children with disabilities—
- (a) the primary consideration is the best interests of the child;
 - (b) national legislation to ensure the rights and responsibilities of *persons with disabilities*, through guardianship, wardship, trusteeship, curatorship, proxies, adoption or similar institutions rendering appropriate assistance to *persons with disabilities* must in the performance of their child-rearing responsibilities, act in the best interests of the child.³⁴
 - (c) they must be free to express their views easily on all matters affecting them;
 - (d) due weight must be accorded to their views having regard to their age and maturity, on an equal basis with other children; and
 - (e) they must be provided with *disability* and age-appropriate assistance to realise their rights fully.³⁵
 - (f) Children with disabilities and their families have equal rights to family life and to receive early and comprehensive information, services and support to realise

³⁴ Article 23(2)

³⁵ Article 7(3)

these rights, and to be safeguarded from concealment, abandonment, neglect and segregation.³⁶

- (g) When the immediate family is unable to care for a child with disabilities, the *state* must provide alternative care within the wider family, or within the community in a family setting.³⁷

13. Community

- (1) *Persons with disabilities* have a right to live in the community, with choices equal to others, to the full enjoyment of inclusion and participation in the community by³⁸–

(a) having the opportunity to choose their place of residence and where and with whom they live and by not being obliged to live in a particular living arrangement;³⁹

(b) having access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation and segregation from the community;⁴⁰ and

(c) having community services and facilities that are available for the general population also responsive to their needs.⁴¹

- (2) *Persons with disabilities* have the right to personal mobility with the greatest possible independence in the manner and at the time of their choice, and at affordable cost, including by⁴²–

(a) having access to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, and at affordable cost; and

³⁶ Article 23(3)

³⁷ Article 23(5)

³⁸ Article 19(1)

³⁹ Article 19(1) (a)

⁴⁰ Article 19(1) (b)

⁴¹ Article 19(1)(c)

⁴² Article 20

- (b) having training in mobility skills and access to specialist staff; and the state encouraging entities that produce mobility aids, devices and assistive technologies to consider all aspects of mobility for *persons with disabilities*.⁴³

14. Freedom of expression and communication

- (1) *Persons with disabilities* have the right to—
- (a) the freedom of expression and opinion,
 - (b) the freedom to seek, receive and impart information and ideas
 - (c) to use forms of *communication* and *language* of their choice,
 - (d) to receive information intended for the general public in accessible and usable formats and technologies appropriate to different kinds of disabilities timeously and without additional cost.⁴⁴
 - (e) The *state*, the mass media and other providers of information through the Internet to the general public, must—
 - i) provide information and services in accessible and usable formats for *persons with disabilities*; and
 - ii) recognize and promote the use of South African Sign Language.⁴⁵

15. Education

- (1) *Persons with disabilities* have the right to access education, without discrimination and based on equal opportunity, and to lifelong learning directed at—⁴⁶
- (a) developing their full human potential, dignity and self-worth, and the strengthening respect for human rights, fundamental freedoms and human diversity;

⁴³ Article 20

⁴⁴ Article 21

⁴⁵ Article 21

⁴⁶ Article 24

- (b) developing their personality, talents, creativity, and mental and physical abilities, to their fullest potential; and
 - (c) enabling them to participate effectively in a free society.
- (2) *Persons with disabilities* must have access to relevant, appropriate, inclusive, and quality primary and secondary education on an equal basis with others in the communities in which they live.
- (3) of the state must provide primary education for *persons with disabilities* at no financial cost.
- (4) *Persons with disabilities* must have access to general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others with the provision of *reasonable accommodation*, if necessary.
- (5) *Persons with disabilities* must receive the support required, within the general education system, to facilitate their effective education.
- (6) The *state* must implement reasonable accommodation in environments that maximize academic and social development, consistent with the goal of full inclusion.
- (7) To enable *persons with disabilities* to learn life and social development skills to facilitate their full and equal participation in education and as members of the community, the *state* must—:
- (a) facilitate the learning of Braille, alternative script, augmentative and alternative modes, means and formats of *communication* and orientation and mobility skills, and facilitating peer support and mentoring;
 - (b) facilitate the learning South African Sign Language and the promotion of the linguistic identity of the deaf community;
 - (c) ensure that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of *communication* for the individual, and in environments which maximize academic and social development;

- (d) employ teachers, who are qualified in South African Sign Language or Braille;⁴⁷
and
- (e) train professionals and staff who work at all levels of education to have *disability* awareness and the use of appropriate augmentative and alternative modes, means and formats of *communication*, educational techniques and materials to support *persons with disabilities*.⁴⁸

16. Health

- (1) *Persons with disabilities* have the right to the enjoyment of the highest attainable standard of health without *discrimination based on disability*.
- (2) *Persons with disabilities* must have access to health services and health-related *habilitation and rehabilitation*.
- (3) *Persons with disabilities* must be enabled to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

17. Habilitation and rehabilitation

- (1) *Habilitation and rehabilitation* must be—⁴⁹
 - (a) age- and gender-sensitive,
 - (b) of the same range, quality and standard of free or affordable health care and programmes as provided to other persons,
 - (c) include sexual and reproductive health and population-based public health programmes;

⁴⁷ Article 24(4)

⁴⁸ Article 24(4)

⁴⁹ Article 26

- (d) specific to their needs because of their disabilities, including early identification and intervention as appropriate,
 - (e) services designed to minimize and prevent further disabilities, including among children and older persons;
 - (f) services as close as possible to their communities, including in rural areas;
 - (g) of the same quality of care as given to others,
 - (h) based on free and informed consent
 - (i) rendered by health professionals fully aware of their human rights, dignity, autonomy and needs through training and the promulgation of ethical standards for public and private health care.
- (2) The *state* must organise, strengthen and extend comprehensive *habilitation* and *rehabilitation* services and programmes, particularly in health, employment, education and social services,—
- (a) to begin at the earliest possible stage, and be based on the multidisciplinary assessment of individual needs and strengths;
 - (b) to support participation and inclusion in the community and all aspects of society;
 - (c) to be voluntary and available to *persons with disabilities* as close as possible to their own communities, including in rural areas.⁵⁰
 - (d) The *state* must promote the development of initial and continuing training for professionals and staff working in *habilitation* and *rehabilitation* services.⁵¹
 - (e) The *state* must promote the availability, knowledge and use of assistive devices and technologies, designed for *persons with disabilities*, as they relate to *habilitation* and *rehabilitation*.⁵²

⁵⁰ Article 26(1)

⁵¹ Article 26(2)

⁵² Article 26(3)

18. Freedom from exploitation, violence or abuse

- (1) The *state* must implement measures to promote the physical, cognitive and psychological recovery, *habilitation, rehabilitation* and social reintegration of *persons with disabilities* who are victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration must take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and must consider gender- and age-specific needs. ⁵³
- (2) The *state* must ensure that instances of exploitation, violence and abuse against *persons with disabilities*, particularly women and children, are identified, investigated and prosecuted. ⁵⁴

19. Work

- (1) *Persons with disabilities* have the right to work,⁵⁵ and to return to work after *rehabilitation* on an equal basis with others, to make a living through freely chosen work or accepted in a labour market and work environment that is open, inclusive and accessible.
- (2) The *state* must safeguard and promote the realization of the right to work, especially for those who acquire a disability during employment, by implementing measures to—
⁵⁶
 - (a) ensure that *persons with disabilities* can exercise their labour and trade union rights on an equal basis with others; ⁵⁷
 - (b) enable *persons with disabilities* to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

⁵³ Article 16(4)

⁵⁴ Article 16(5)

⁵⁵ Take note that the LRA confers no right to work.

⁵⁶ Article 27(1)

⁵⁷ Article 27(1)(c)

- (c) promote employment opportunities and career advancement for *persons with disabilities* in the labour market, and assistance in finding, obtaining, maintaining and returning to employment;
- (d) promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting their own business;
- (e) employ *persons with disabilities* in the public sector;
- (f) promote the employment of *persons with disabilities* in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (g) promote the acquisition by *persons with disabilities* of work experience in the open labour market; and
- (h) promote vocational and professional *rehabilitation*, job retention and return-to-work programmes for *persons with disabilities*.⁵⁸

20. Socio-economic rights

- (1) *Persons with disabilities* have the right to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and the continuous improvement of living conditions. Appropriate measures must be implemented to safeguard and promote the progressive realization of this right without *discrimination based on disability*.⁵⁹
- (2) *Persons with disabilities* have the right to–
 - (a) social protection and the enjoyment of that right without *discrimination based on disability*;⁶⁰
 - (b) to clean and affordable water and other services
 - (i) devices and other assistance for disability-related needs;

⁵⁸ Article 27(1)(k)

⁵⁹ Article 28(1)

⁶⁰ Article 28(2)

- (c) social protection and poverty reduction programmes, particularly for women, girls and older persons;
- (d) assistance from the *state* with disability-related expenses, including adequate training, counselling, financial assistance and care, particularly for *persons with disabilities* and their families living in situations of poverty;
- (e) public housing programmes; and
- (f) retirement benefits and programmes.⁶¹

21. Political rights

- (1) *Persons with disabilities* have political rights and must have the opportunity to enjoy them.⁶²
- (2) *Persons with disabilities* have the right–
 - (a) to vote by secret ballot in elections and public referendums without intimidation, to stand for elections, to effectively hold office and to perform public functions at all levels of government, using assistive and new technologies when required;
 - (b) to the free expression of their will as voters and to this end, where necessary, at their request, allowing assistance in voting by a person of their choice;
 - (c) to participate in public affairs, in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; and
 - (d) to form and join organizations of *persons with disabilities* to represent them at international, national, regional and local levels.⁶³
 - (e) *Persons with disabilities* must have voting procedures, facilities and materials that are appropriate, accessible and easy to understand and use.

⁶¹ Article 28(2)(e)

⁶² Article 29(a)

⁶³ Article 29(b)

22. Culture

- (1) *Persons with disabilities* have the right to take part on an equal basis with others in cultural life, to enjoy access to—⁶⁴
- (a) cultural materials, television programmes, films, theatre and other cultural activities, in accessible formats; and
 - (b) cultural performances or services, including theatres, museums, cinemas, libraries and tourism services, and, as far as possible, to monuments and sites of national cultural importance.⁶⁵
- (2) The *state* must implement measures to enable *persons with disabilities* to develop and use their creative, artistic and intellectual potential, for their own benefit, and the enrichment of society.⁶⁶
- (3) The *state* must implement measures to enable *persons with disabilities* to exercise the right to protection of their intellectual property rights.
- (4) Conversely, intellectual property rights must not constitute unreasonable or discriminatory *barriers to accessibility by persons with disabilities* to cultural materials.
- (5) The *state* must implement measures to enable *persons with disabilities* to be recognised and supported for their specific cultural and linguistic identity, including *South African Sign Language* and deaf culture.⁶⁷
- (6) To enable *persons with disabilities* to participate equally in recreational, leisure and sporting activities, the *state* must implement appropriate measures to—
- (a) encourage and promote their participation, to the fullest extent possible, in mainstream sporting activities at all levels;

⁶⁴ Article 30

⁶⁵ Article 30(1)

⁶⁶ Article 30(2)

⁶⁷ Article 30(4)

- (b) ensure that they have opportunities to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision of appropriate instruction, training and resources;
- (c) ensure that they have access to sporting, recreational and tourist venues;
- (d) ensure that children with disabilities have equal access to participate in play, recreation, leisure, sports, and activities in schools;⁶⁸ and
- (e) ensure access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.⁶⁹

23. Public awareness and education

The *state* must initiate and maintain effective public campaigns, to raise awareness throughout society, including at the family level, regarding persons with disabilities to⁷⁰–

- (1) foster respect for the rights and dignity of;
- (2) combat stereotypes, prejudices and *harmful practices* including those based on any of the prohibited grounds of discrimination;
- (3) promote consciousness of the capabilities and contributions of *persons with disabilities*;
- (4) to nurture receptiveness;
- (5) to promote positive perceptions and social consciousness;
- (6) to promote the recognition of the potential, skills, merits and abilities of *persons with disabilities*;
- (7) to foster at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of *persons with disabilities*;

⁶⁸ Article 30(5)(d)

⁶⁹ Article 30(5)(e)

⁷⁰ Article 8

(8) to encourage everyone, especially all media, to portray *persons with disabilities* in a manner consistent with the purpose of *this Act*; and

(9) to promote awareness-training programmes and rights.⁷¹

24. International cooperation ⁷²

Without prejudice to its obligations under the *Constitution*, the *Convention*, the *Optional Protocol* and this Act,⁷³ the *state* must implement effective measures in pursuit of international cooperation and promotion to support efforts to realise the purpose and objectives of the *Convention*, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures may include— ⁷⁴

- (1) ensuring that international cooperation and development programmes are inclusive of and accessible to *persons with disabilities*;
- (2) facilitating and supporting capacity-building, including the exchange and sharing of information, experiences, training programmes and best practices;
- (3) facilitating cooperation in research and access to scientific and technical knowledge; and
- (4) providing appropriate technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

25. Tax relief, incentives and grants

The *state* must reimburse or compensate a person who performs any obligation assigned to the *state* in this Chapter by providing— tax relief and incentives; and

⁷¹ Article 8

⁷² Article 32

⁷³ Article 32(2)

⁷⁴ Article 32(1)

- (1) grants and subsidies;
- (2) to donors and *caregivers*.

Chapter III

Protection against and Prohibition of discrimination

26. Protection against discrimination

Persons with disabilities have the effective right on an equal basis with others—⁷⁵

- (1) to the full realization and enjoyment of all human rights and fundamental freedoms without discrimination of any kind based on *disability* or any other prohibited grounds; ⁷⁶
- (2) to legal protection against discrimination on all grounds; ⁷⁷
- (3) to protection and promotion of their human rights in all policies and programmes; ⁷⁸
- (4) to the provision of *reasonable accommodation* ⁷⁹ in the workplace,⁸⁰ in public spaces rendering essential services and in their living spaces;
- (5) to all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the *Convention*⁸¹ to prevent all forms of exploitation, violence and abuse, including by—
 - a. ensuring appropriate forms of gender- and age-sensitive assistance and support for *persons with disabilities*, their families and *caregivers*;
 - b. providing information and education on how to avoid, recognize and report instances of exploitation, violence and abuse;

⁷⁵ Article 5(1) and (2)

⁷⁶ Article 4(1)

⁷⁷ Article 5(2)

⁷⁸ Article 4(1)(c)

⁷⁹ Article 5(3)

⁸⁰ Article 27(1)(i)

⁸¹ Article 4(1)(a)

- c. ensuring that protection services are age-, gender- and *disability*-sensitive;⁸²
- d. ensuring that all facilities and programmes designed to serve *persons with disabilities* are effectively monitored by the *Commission*.⁸³

(6) to the implementation of legislative and all other appropriate measures, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against *persons with disabilities*, to eliminate discrimination based on *disability* by the *state* and any person;⁸⁴

(7) to expect public authorities and institutions to act in conformity with *this Act*;⁸⁵

(8) in the case of children, irrespective of their age, to not be separated from their parents against their will, because of a disability of either the child or of the parents, except when a court orders that such separation is necessary in the best interests of the child.⁸⁶

(9) to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.⁸⁷

27. Prohibition of discrimination

(1) No person may unfairly discriminate, directly or indirectly, against any *persons with disabilities* on any grounds prohibited under section 9 of the *Constitution*.

(2) The *state* must implement appropriate measures—

- (a) to eliminate discrimination based on *disability* by any person;

⁸² Article 16(2)

⁸³ Article 16 (3)

⁸⁴ Article 4(1)(b) and (e)

⁸⁵ Article 4(1)(d)

⁸⁶ Article 23(4)

⁸⁷ Article 27(1)(b)

(b) to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against *persons with disabilities*.

(3) It is discrimination–

(a) to subject *persons with disabilities*–

(i) to violence and abuse, including based on their *disability*, gender, sex or age, both within and outside the home;⁸⁸

(ii) to all forms of exploitation;

(iii) to torture or to cruel, inhuman or degrading treatment or punishment, or to medical or scientific experimentation without their free consent;⁸⁹

(iv) to slavery, or to hold them in servitude, conditions of forced or compulsory labour;⁹⁰

(v) to arbitrary or unlawful interference with their right to protection of privacy, family, home, correspondence or other types of *communication*; or

(vi) to unlawful attacks on their honour and reputation;⁹¹

(b) to deny to *persons with disabilities* *reasonable accommodation* unless *undue hardship* justifies such denial;

(c) to deny to *persons with disabilities* on an equal basis with others the right–

(i) to respect for their physical and mental integrity;

(ii) to health care, health services, food or fluids because of their *disability*;⁹²

(iii) to liberty and security of person;

⁸⁸ Article 16

⁸⁹ Article 15

⁹⁰ Article 27(2)

⁹¹ Article 22(1)

⁹² Article 25(f)

- (iv) to due process and to not be deprived of their liberty unlawfully, arbitrarily or because of their *disability*,⁹³
- (v) to *accessibility*;
- (vi) to obtain, possess and use documentation of their nationality or other documentation of identification, and to use immigration and other relevant processes to facilitate their exercise of the right to liberty of movement;⁹⁴
- (vii) to leave the Republic;⁹⁵
- (viii) to enter their own country;⁹⁶
- (ix) to all necessary measures to ensure their protection and safety in situations of risk, armed conflict, humanitarian emergencies and the occurrence of natural disasters;⁹⁷
- (d) to deprive *persons with disabilities*, arbitrarily or based on *disability*, their nationality, their rights to liberty of movement, freedom to choose their residence and nationality, to acquire and change their nationality, on an equal basis with others;⁹⁸
- (e) to deny children with disabilities the right to be registered immediately after birth, to have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents;⁹⁹
- (f) to exclude *persons with disabilities* from the general education system because of their *disability*;
- (g) to exclude children with disabilities from free and compulsory primary education, or from secondary education because of their *disability*;
- (h) to refuse or fail–

⁹³ Article 14(1) and (2)

⁹⁴ Article 18(1)(b)

⁹⁵ Article 18(1)(c)

⁹⁶ Article 18(1)(d)

⁹⁷ Article 11

⁹⁸ Article 18(1)(a)

⁹⁹ Article 18(2)

- (i) to protect the privacy of personal, health and *rehabilitation* information of *persons with disabilities* on an equal basis with others;¹⁰⁰
- (ii) to provide health and life insurance in a fair and reasonable manner;¹⁰¹
- (iii) to identify and eliminate *barriers*;¹⁰²
- (iv) to take effective measures to eliminate discrimination against *persons with disabilities* in all matters relating to marriage, family, parenthood and relationships equally;¹⁰³
- (v) to recognise the right of *persons with disabilities* who are of marriageable age to marry and to found a family based on free and full consent of the intending spouses;¹⁰⁴
- (i) to arbitrarily or unlawfully, interfere with the rights of *persons with disabilities* to decide freely and responsibly on the number and spacing of their children, and to have access to age-appropriate information, reproductive and family planning education, and the means necessary to enable them to exercise these rights;¹⁰⁵
- (j) to deprive *persons with disabilities* of their fertility without their consent;¹⁰⁶
- (k) to stereotype, prejudice or harm persons based on *disability* with regard to matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;¹⁰⁷

28. Not discrimination

It is not discrimination–

- (1) to provide *reasonable accommodation* to *persons with disabilities*;¹⁰⁸

¹⁰⁰ Article 22(2)

¹⁰¹ Article 25(e)

¹⁰² Article 9 (1)(a) & (b)

¹⁰³ Article 23(1)

¹⁰⁴ Article 23(1)(a)

¹⁰⁵ Article 23(1)(b)

¹⁰⁶ Article 23(1)(c)

¹⁰⁷ Article 27(1)(a)

¹⁰⁸ Article 5(3)

- (2) to implement specific measures which are necessary to accelerate or achieve *equality of persons with disabilities*;¹⁰⁹
- (3) to ensure that women and girls with disabilities, who are subject to multiple intersecting forms of discrimination, their full development, advancement, empowerment and enjoyment of the full and equal enjoyment of all human rights and fundamental freedoms and in the Convention;¹¹⁰ and
- (4) to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on equally with other children, the best interests of the child being the primary consideration.¹¹¹

29. Protection of information –

In the process of collecting and maintaining statistical and research data and other information, to enable them to formulate and implement policies to give effect to this Act the state must—¹¹²

- (1) safeguard and protect data, to ensure confidentiality and respect for the privacy of *persons with disabilities*;
- (2) comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics;
- (3) disaggregate the information collected for use to help assess the implementation of its obligations under the *Convention*, its Optional Protocol and *this Act*, and to identify and address the *barriers* faced by *persons with disabilities* in exercising their rights;¹¹³ and
- (4) assume responsibility for the dissemination of these statistics and ensure their *accessibility* to *persons with disabilities* and others.¹¹⁴

¹⁰⁹ Article 5(4)

¹¹⁰ Article 6(1) and (2)

¹¹¹ Article 7(1) and (2)

¹¹² Article 31

¹¹³ Article 31(2)

¹¹⁴ Article 31(3)

CHAPTER IV

General Provisions

30. Regulations

- (1) The Minister may, by notice in the *Gazette* make any regulation regarding—
- (a) any matter that *this Act* requires or permits to be *prescribed*; and
 - (b) any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of *this Act*.
- (2) The *Minister* must by notice in the *Gazette* make regulations providing for separate and simplified forms and procedures in respect of—
- (a) lodging complaints about discrimination to the South African Police Services;
 - (b) referring disputes to the *Commission* and the *Electoral Court*.

31. Code of Good Practice

- (1) The *Minister* may, on the advice of the *Commission*—
- (a) issue any *Code of Good Practice*; and
 - (b) change or replace any *Code of Good Practice*.
- (2) Any *Code of Good Practice*, or any change to, or replacement of, a *Code of Good Practice* must be published in the *Gazette*.

32. Delegations

- (1) The *Minister* may delegate any power conferred, or assign any duty imposed upon the *Minister* in terms of *this Act*, except the powers and duties contemplated in sections #.
- (2) A delegation or assignment must be in writing and may be subject to any conditions or restrictions determined by the *Minister*.
- (3) The *Minister* may at any time—
- (a) withdraw a delegation or assignment made in terms of subsection (1); and
 - (b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1).

- (4) The *Director-General* may delegate any power conferred, or assign any duty imposed, upon the Director-General in terms of *this Act*, to any employee in the Department.
- (5) Subsections (2) and (3) apply with the changes required by the context to any delegation or assignment by the *Director-General* under subsection (4).

33. Establishment of the *Conflict Administration Unit*

(1) The Minister in the Department of women, youth and persons with disabilities; [alternatively Department of Justice and Constitutional Development] must establish the *Conflict Administration Unit* or *Unit* to administer the resolution of conflicts arising from the interpretation and application of *this Act*.

(2) The forms and procedures of the *Unit* must be prescribed.

34. Procedure for disputes

- (1) A dispute about the interpretation, application or any other matter arising from *this Act* may be referred in writing to the *Unit*.
- (2) The *Unit* must attempt to resolve the dispute through mediation, conciliation or negotiation.¹¹⁵
- (3) If the dispute remains unresolved—
- (a) after a certificate of non-resolution is issued,
 - (b) or the expiry of sixty days,
- whichever occurs first,
- (c) any party to the dispute may refer the dispute to the *Equality Court* for adjudication.
- (4) All the parties to a dispute may agree—
- (a) to forgo the provisions of subsections (1) to (3) above; and
 - (b) to refer the dispute—
 - i) for adjudication before the *Equality Court*; or
 - ii) to any private service for appropriate dispute resolution.
- (5) Any dispute referred to the *Equality Court* is subject to the rules of the *Equality Court*.
- (6) A dispute must be referred either—

¹¹⁵ Section 8 of the Commissions Act, 1947

- (a) by delivery by hand or registered post; or
 - (b) transmitted by email or any other printable electronic mechanism.
- (7) *Persons with disabilities* who meet the requirements must, on request, have legal assistance from the *state*, the *Commission* or Legal Aid.

35. Establishment of the *Equal Opportunities Office*

- (1) *This Act* establishes the *Equal Opportunities Office* or the *Office* in the Department of Women Youth and Persons with Disabilities.
- (2) The *Office* may receive complaints from *persons with disabilities* and their representatives and refer them to the appropriate authorities for resolution.

36. Burden of proof

- (1) Whenever a person alleges that an offence is committed in terms of *this Act*—
- (a) the person making the allegation must prove the facts on which the allegation rests;
 - (b) the person against whom the allegation is made must—
 - i) disprove the facts; or
 - ii) prove that the conduct complained of is justified.

37. Offences

- (1) It is an offence to—
- (a) discriminate against *persons with disabilities*.
 - (b) disclose any confidential information acquired in the performance of a function in terms of *this Act*.
- (2) Subsection (b) does not apply if the information—
- (a) is disclosed to enable a person to perform a function in terms of *this Act*;
 - (b) or must be disclosed in terms of *this Act*, any other law or an order of court.
- (3) Section 105A of the Criminal Procedure Act, 1977 on plea and sentence agreements apply to the prosecution of offences under *this Act*.

38. Penalties

- (1) A person who commits an offence is liable on conviction on indictment—
 - (a) in the case of an individual—
 - i) to a fine not exceeding R100 000;
 - ii) to imprisonment for a term not exceeding six months; or
 - iii) to both such fine and imprisonment; and
 - (b) in the case of an entity, to a fine not exceeding R1 000 000.
- (2) A person who commits an offence is liable on summary conviction—
 - (a) in the case of an individual, to a fine not exceeding R10 000, and
 - (b) in the case of an entity, to a fine not exceeding R100 000.
- (3) The provisions of sections 297 and 300 of the Criminal Procedure Act, 1977 relating to compensation orders apply to the prosecution of offences under *this Act*.
- (4) A person who is alleged to have committed an offence may, with or without admission of guilt, pay an administrative fine—
 - (a) in the case of an individual, not exceeding R5 000, and
 - (b) in the case of an entity, not exceeding R50 000.
- (5) A person who commits a continuing offence is liable for every day or part of a day during which the offence continues, to a further fine not exceeding—
 - (a) R100 in the case of an individual; and
 - (b) R500 in the case of an entity.
- (6) The *Minister* may, with the concurrence of the Minister of Justice and by notice in the *Gazette*, amend the maximum amount of the fines to counter the effect of inflation.

39. Optional protocol

- (1) Any person who claims to be a victim of a violation by the *state* of the provisions of the *Convention* has the right to submit a communication to the *Committee*—
 - (a) by disclosing their identity;

- (b) by providing the *Committee* with substantial and reliable information about the alleged violation;
 - (c) provided that the same matter has not already been examined by the *Committee* or another procedure of international investigation or settlement;
 - (d) after exhausting all available domestic remedies;
 - (e) if the application of remedies is unreasonably prolonged or unlikely to bring effective relief; and
 - (f) the facts that are the subject of the communication occurred after the *commencement date*.
- (2) The *state* must urgently consider any request it receives from the *Committee* to take such interim measures as may be necessary to avoid possible irreparable damage to the victim of the alleged violation.

40. Monitoring

The *Commission* must effectively monitor all facilities and programmes designed to serve *persons with disabilities* to prevent the occurrence and recurrence of all forms of exploitation, violence and abuse.

41. Implementation

- (1) *Persons with disabilities* must be closely conferred with and actively involved, directly or through their representative organizations in all matters concerning them, including in the development and implementation of legislation and policies to implement the *Convention*.¹¹⁶
- (2) The *Minister* bears responsibility for implementing *this Act*.
- (3) To give better effect to *this Act*, and to address particular circumstances to prevent discrimination and promote equality of *persons with disabilities*–
- (a) the *state* may implement legislation and other measures to adapt *this Act*;
 - (b) the *Minister* may establish structures and practices to co-ordinate the actions by the *state* to give effect to *this Act*;
 - (c) the *Minister* may conclude agreements with organisations representing *persons with disabilities*;

¹¹⁶ Article 4(3)

(d) the *Commission* may conclude agreements with *persons with disabilities* or with organisations representing them.

42. Repeal of laws and transitional arrangements

Each of the laws referred to in the first two columns of Schedule 1 is repealed to the extent specified opposite that law in the third column of that Schedule.

43. Short title and commencement

(1) *This Act* is called the Protection and Promotion of Persons with Disabilities Act, 2024.

(2) *This Act* commences on a date to be determined by the President by proclamation in the *Gazette*. The President may determine different dates in respect of different provisions of *this Act*.