

**TURNING INTENT INTO ACTION: STRATEGIES AND
PRIORITIES FOR NON-STATE ACTORS TO SUPPORT
IMPLEMENTATION OF THE RECOMMENDATIONS MADE TO
KENYA BY THE COMMITTEE ON THE RIGHTS OF PERSONS
WITH DISABILITIES**

United Disabled Persons of Kenya (UDPK)

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Acronyms and Abbreviations

Accessibility Plan: National Action Plan on Accessibility and Disability Rights in Kenya

'Committee' or 'CRPD Committee': Committee on the Rights of Persons with Disabilities

'CRPD' or 'Convention': Convention on the Rights of Persons with Disabilities

CSOs: Civil society organisations

DCIC: Disability Caucus on Implementation of the Constitution

DPOs: Disabled peoples' organisations

KNCHR: Kenya National Commission on Human Rights

National Plan of Action: 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

'NCPD' or 'Council': National Council for Persons with Disabilities

NGEC: National Gender and Equality Commission

TSC: Teachers Service Commission

UDPK: United Disabled Persons of Kenya

Table of Statutes

Age of Majority Act (Cap. 33)
Basic Education Act (No. 14 of 2013)
Children Act (Cap. 141)
Civil Procedure Act (Cap. 21)
Civil Procedure Rules
Constitution of Kenya (2010)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
Convention on the Rights of Persons with Disabilities (2006)
Criminal Procedure Code (Cap. 75)
County Government Act (No. 17 of 2012)
Elections Act (Cap. 7)
Evidence Act (Cap. 80)
HIV and AIDS Prevention and Control Act 246A)
Kenya National Commission on Human Rights Act (No. 9 of 2003)
Kenya Society for the Blind Act (Cap. 251)
Law of Succession Act (Cap. 160)
Marriage Act (No. 4 of 2014)
Mental Health Act (Cap. 248)
Penal Code (Cap. 63)
Persons with Disabilities Act (Cap. 133)
Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009
Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010,
Sale of Goods Act (Cap. 31)
Sexual Offenses Act (Cap. 62A)
Social Assistance Act (No. 24 of 2013)
Traffic Act (Cap. 403)

TURNING INTENT INTO ACTION: PRIORITIES AND STRATEGIES FOR NON-STATE ACTORS TO SUPPORT IMPLEMENTATION OF THE RECOMMENDATIONS MADE TO KENYA BY THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

Summary

This paper offers guidance to disabled peoples' organisations, civil society organisations and other non-state stakeholders working on disability matters. It establishes the strategies and priorities which these stakeholders should keep in mind as they engage the State to ensure full implementation of the recommendations made to Kenya by the Committee on the Rights of Persons with Disabilities.

The paper stresses the importance of participation by persons with disabilities both for their own benefit as human beings and for the benefit of society. It highlights the successes and challenges which persons with disabilities have faced in their endeavours to be full participants in Kenyan society, and suggests how future participation should be shaped.

The strategies which the paper identifies for purposes of engaging the State effectively to ensure full implementation of the CRPD Committee's recommendations include research and documentation; advocacy; technical support; resource mobilisation; coalition-building; awareness-raising and capacity-building; and monitoring.

The paper proposes priority content on which stakeholders should focus and it discusses areas of outstanding concerns on which the most time and energy should be spent. Of note are questions of reasonable accommodation; judicial litigation; accessibility; access to

information; right to life; torture and ill-treatment; legal capacity; access to justice; political participation; education; health; work; social protection; and cross-cutting issues.

The paper concludes that the State's implementation track-record is dire and stakeholders must force their issues and concerns at every opportunity for the attainment of significant progress in the realization of the rights of persons with disabilities.

I: Introduction

Policy, legislative and institutional arrangements for persons with disabilities in Kenya have witnessed some positive changes since May 2008 when the United Nations Convention on the Rights of Persons with Disabilities¹ ('CRPD' or 'Convention') came into force and following Kenya's ratification of the Convention during the same month.² Since that milestone, Kenya's constitutional and statutory landscape has evolved to include provisions specifically covering matters of pertinence to persons with disabilities. The Constitution of Kenya (2010)³ and a number of post-promulgation statutes establish specific normative and institutional advances of actual or potential benefit to persons with disabilities.

Despite this progress, the intervening period from 2008 to date highlights the fact that the life-chances of persons with disabilities in diverse spheres of life such as education, health, social services and work have not gained significant or commensurate advantages. Kenyans with disabilities continue to experience exclusion and marginalisation about decision-making on key matters regarding how to live their lives.

¹ Convention on the Rights of Persons with Disabilities, adopted by the United Nations on 13 December 2006, <http://www.un.org/disabilities/convention/conventionfull.shtml>

² The CRPD came into force on 3 May 2008 and Kenya ratified the Convention on 19 May 2008.

³ Constitution of Kenya (2010), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>

Kenya presented its initial report to the Committee on the Rights of Persons with Disabilities⁴ ('Committee or 'CRPD Committee') in terms of Article 35 of the CRPD on 18-19 August 2015. Article 35 of the Convention requires each State Party to submit to the Committee a comprehensive report of measures taken to give effect to its obligations under the Convention and the progress made in that regard. The initial report detailed the progress which the country had made towards implementation of its obligations under the Convention.

Various civil society organisations (CSOs), including disabled peoples' organisations (DPOs), submitted alternative reports to the CRPD Committee explaining the progress and challenges which Kenya faced while implementing the Convention. As well as written submissions, a selection of CSOs and DPOs made an oral presentation to the Committee on the 18th of August 2015,⁵ preceding Kenya's presentation of its report.

This paper is commissioned by the United Disabled Persons of Kenya (UDPK), the umbrella body of organisations of persons with disabilities in Kenya. The study seeks to enable non-state stakeholders on matters of disability, including CSOs and DPOs, to support realisation of the CRPD by identifying key priorities and offering strategic responses to the recommendations made to Kenya by the CRPD Committee. The paper uses the 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 Kenya⁶ (National Plan of Action) as a basis for establishing how non-state stakeholders may leverage existing opportunities while countering arising challenges to support full implementation of the Committee's recommendations.

⁴ United Nations CRPD/C/KEN/1, 28 July 2014, Committee on the Rights of Persons with Disabilities, Initial Reports of States Parties Due in 2010, Kenya.

⁵ 'Statement of the Civil Society Organisations and Disabled Persons Organisations During the Private Meeting on Kenya at the 14th Session of the Committee on the Rights of Persons with Disabilities', on file with author.

⁶ 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, Ministry of Labour and East African Affairs, Department of Social Development, 2016.

Specific objectives of the paper are:

1. To establish the history and current application of the principle of participation in relation to persons with disabilities;
2. To identify strategies which CSOs, DPOs and other non-state stakeholders should use to ensure full implementation of the recommendations made to Kenya by the CRPD Committee; and
3. To identify and prioritise content which require non-state stakeholder interventions to ensure the State implements fully the CRPD Committee's recommendations.

The methodology employed in the preparation of this paper mostly involved secondary research covering international and national policy and practice. As well, the author spoke to a number of individuals with key information. A draft of the paper was presented at the Feedback and Validation Workshop for Stakeholders organised by UDPK involving 32 individuals from at least 17 organisations within the disability sector which was held on 20 May 2016. The NGEC as well as members of some County Assemblies also attended the workshop.⁷ Feedback from that meeting has been incorporated into the paper.

II: The Principle of Participation for Persons with Disabilities and its Practice in Kenya

A: Normative basis

Participation in community life by persons with disabilities is of cardinal importance for them as well as for society generally. Persons with disabilities make existing as well as potential contributions to the overall well-being and diversity of society, and their full participation in community life enhances their sense of belonging and contributes to

⁷ The annex to the paper sets out the list of participants of that meeting.

significant advances in the human, social and economic development of society and the eradication of poverty.⁸

The normative content of the principle of participation by persons with disabilities is enhanced variously in the Convention. Full and effective participation and inclusion in society is identified as one of the eight principles at the heart of the Convention.⁹ States are required to consult closely with and actively involve persons with disabilities through their representative organisations in the development and implementation of legislation and policies to implement the Convention and in other decision-making processes concerning issues relating to persons with disabilities.¹⁰ The Convention makes it clear that the measures it requires States to undertake have the goal of enabling persons with disabilities to live independently and participate fully in all aspects of life.¹¹ An inclusive education system at all levels and lifelong learning is directed *inter alia* to enable persons with disabilities to participate effectively in a free society.¹² The Convention also underscores the importance of education in ensuring full and equal participation by persons with disabilities when it requires States 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.¹³ In respect of habilitation and rehabilitation, the CRPD requires States to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.¹⁴ Article 29 of the Convention focuses wholly on participation in political and public life; while Article 30's focus is on participation in cultural life, recreation, leisure and sport. Finally, Article 33 of the Convention, which establishes a framework for national implementation and monitoring of the Convention, provides that civil society and in particular persons with

⁸ Preambular Paragraph (m) of the CRPD, *supra*.

⁹ Article 3 (c) of the Convention, *ibid*.

¹⁰ Article 4 (3) of the Convention, *ibid*.

¹¹ Article 9 (1) and Article 19 of the Convention, *ibid*.

¹² Article 24 (1) (c) of the Convention, *ibid*.

¹³ Article 24 (3) of the Convention, *ibid*.

¹⁴ Article 26 (1) of the Convention, *ibid*.

disabilities and their representative organisations shall be involved and participate fully in the envisaged monitoring process.

B: The practice of participation by Kenyans with disabilities

The right of persons with disabilities to participate in the political, economic and social life of Kenya has been linked closely with the conflicted regard which society has historically had for persons with disabilities. Four tendencies have influenced the relationship between society and persons with disabilities in recent Kenyan history.

The first trend revolved around the charity and medical models of disability. Precolonial and colonial Kenya in many instances exhibited little regard for persons with disabilities as individuals with full human dignity: individuals were abandoned or killed because they had a disability; and colonial and even independent Kenya tended to treat persons with disabilities as broken objects or sick bodies which required fixing or healing. Alternatively, persons with disabilities were pitied and given charity whenever that was convenient. As an example, mission schools were began to cater for children with disabilities. These schools solicited for school fees from benefactors and even food was brought to the schools on the feast-days of various religious groups.¹⁵ A common feature of this trend was the messaging about what persons with disabilities could not do rather than what they could do: the bottle was half empty, not half full.

The second tendency focused on rehabilitation for persons with disabilities as a near-exclusive response to their needs. This was the context within which laws such as the Kenya Society for the Blind Act (Cap. 251)¹⁶ was formulated in 1956, with its objects including: the promotion of the welfare, education, training and employment of the blind; and awakening public interest in the welfare of the blind and in all matters relating to blindness.

¹⁵ Author's experiences at the Salvation Army High School for the Blind, Thika.

¹⁶ Kenya Society for the Blind Act (Cap. 251),
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.251>

Other notable milestones during this phase included:¹⁷

1. The 1964 Ominde Commission which led to Sessional Paper No. 5 of 1968 which provided guidance on provision and coordination of services for persons with disabilities;
2. The 1971 establishment of the Industrial Rehabilitation Centre and later 10 rural vocational rehabilitation centres;
3. The 1975 establishment of the Special Education Section within the Ministry of Education to coordinate education for children with special needs;
4. The declaration of 1980 as the National Year for the Disabled;
5. The 1981 establishment of the National Fund for the Disabled of Kenya, an endowment fund established to utilise its income for the benefit of persons with disabilities in Kenya;
6. Establishment of Community Based Rehabilitation;
7. The 1984 introduction of the Educational Assessment and Resource Service; and
8. Establishment of the Kenya Institute for Special Education in 1987.

The third trend which happened in the 1990s saw the beginnings of political and technical activism by persons with disabilities. Individuals began to agitate for the recognition of persons with disabilities as full participants in society.¹⁸ During this same period, in 1993, the Attorney General established a taskforce to review laws relating to persons with disabilities.

The final trend began with the passage in 2003 by Parliament of two key statutes. The Persons with Disabilities Act (Cap. 133)¹⁹ for the first time explicitly recognised various

¹⁷ <http://www.globaldisabilityrightsnow.org/infographics/disability-kenya>

¹⁸ Chomba Munyi sought, and was denied, the possibility of seeking elective office as an MP, apparently on the basis that being blind he could not read. Then, in 1999, when Richard Leakey who coincidentally had become disabled left his nominated seat in Parliament to join the civil service, the Safina Party took the extremely savvy step of replacing him with Josephine Sinyo, who is blind.

¹⁹ Persons with Disabilities Act (Cap. 133), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.133>

rights of persons with disabilities while at the same time initiating an institutional framework for implementing the statute, including by establishing the National Council for Persons with Disabilities ('NCPD' or 'Council') whose membership included individuals with disabilities. The Kenya National Commission on Human Rights Act (No. 9 of 2003) specifically provided that Kenya's new national human rights institution should include a member with a disability.

Other notable events of the next decade were:

1. The negotiations which led to the adoption of the CRPD in which Kenyan DPOs were represented integrally;
2. The Bomas of Kenya constitutional negotiations where again persons with disabilities had adequate occasion to articulate their proposals both as members of the National Constitutional Conference and as members of the Constitution of Kenya Review Commission;
3. The promulgation of the 2010 Constitution which includes specific provisions covering persons with disabilities;
4. The beginnings of domesticating the Convention and the passage of post-promulgation laws which included disability-specific content; and
5. The 2013 general elections which for the first time resulted in the election of notable numbers of candidates with disabilities to the National Assembly, the Senate and County Assemblies.

The Constitution includes a number of general and specific provisions relevant to the participation of persons with disabilities in national development. The national values and principles of governance include participation of the people.²⁰ The exercise of political rights by persons with disabilities is affirmed in the Constitution which provides every adult citizen the right, without unreasonable restrictions, to be registered as a voter; to vote by secret ballot in any election or referendum; and to be a candidate for public office,

²⁰ Article 10 of the Constitution, *supra*.

and, if elected, to hold office.²¹ The Constitution also provides mechanisms for ensuring representation of persons with disabilities in elective bodies. Voters with disabilities may, like their non-disabled peers, vote or stand for the elective seats in the National Assembly, Senate and County Assemblies. Additionally, these three governance bodies include persons drawn from party lists to represent persons with disabilities, youth, workers, women and other marginalised groups. Specifically, 12 seats are established to be allocated on a proportional basis to represent special interests such as youth, persons with disabilities and workers.²² Two persons of opposite genders are nominated to represent persons with disabilities in the Senate.²³ The Constitution also provides that a law should determine the number of members from marginalised groups including persons with disabilities to be in the County Assemblies.²⁴

Perhaps the high-point yet for the realisation of political participation by persons with disabilities was the 2013 general elections. Those polls resulted in the election either through the first-past-the-post or party list electoral systems of at least 12 Members of Parliament and Senators with disabilities and at least 100 Members of County Assemblies with disabilities.²⁵ This was an extremely positive step compared with the pre-promulgation dispensation when the country's institutions of governance invariably had no representatives with disabilities.²⁶

Organisations of and for persons with disabilities have over the years advocated for the rights of persons with disabilities. The Disability Caucus on Implementation of the Constitution (DCIC) has in recent years played pivotal roles both in seeking domestication of the CRPD and in the implementation of the Constitution. DCIC has in this sense collaborated closely with the UDPK.

²¹ Article 38 (3) of the Constitution, *ibid.*

²² Article 97 of the Constitution, *ibid.*

²³ Article 98 of the Constitution, *ibid.*

²⁴ Article 177 of the Constitution, *ibid.*

²⁵ See: 'Towards the 2017 General Elections: Nuts and Bolts for Ensuring Effective Inclusion and Participation by Persons with Disabilities in Kenya's Politics', United Disabled Persons of Kenya, August 2013.

²⁶ The Eighth Parliament (1998-2002) in particular had included at least two MPs who self-identified as persons with disabilities: Richard Leakey and after him Josephine Sinyo; while the Ninth Parliament included at least one such MP: Sammy Leshore. The 10th Parliament was totally lacking in legislators with disabilities.

C: Some conclusions

In view of the foregoing history and context, the immediate future for successful participation in national and county life by persons with disabilities should involve a congruence of issues. Persons with disabilities must invest more in ensuring that their newly-found political opportunities work for them. Individuals as well as organisations must engage and support leaders in national and county governments to deal with their policy, legislative and administrative needs. Relatedly, the sector must make better use of institutions established dedicatedly to support disability matters. The NCPD has been dismissed and lampooned as ineffectual and irrelevant by some stakeholders, and this attitude should change. The Council clearly needs more streamlining, and the ongoing review of the Persons with Disabilities Act should deal with that matter. The sector must engage with State technocracy which is best-positioned to move matters of disability to the next level. The sector must ensure it does not fight itself into a corner of marginalisation by insisting on disability-specific policies and laws in every instance. Inclusion and mainstreaming must be central pillars of sectoral initiatives and strategies. Finally, the non-state sector must be revitalised and strengthened. Bodies such as UDPK and the DCIC must continue playing pivotal strategic roles in supporting the State's initiatives towards realisation of the rights of persons with disabilities. Towards this end, the next two parts of this paper detail the strategies and priorities which non-state stakeholders should keep in mind.

III: Strategies for Ensuring State Implementation of the Recommendations Made to Kenya by the Committee on the Rights of Persons with Disabilities

Stakeholders on matters of disability, including CSOs and DPOs, will play crucial roles to support implementation by the State of the recommendations made by the CRPD Committee. These roles range from research and documentation; advocacy; technical support; resource mobilisation; coalition-building; awareness-raising and capacity-building; and monitoring.

Research and documentation

Many areas will continue to demand innovative ideas and solutions and stakeholders should deploy their research competencies and capacities to deal with such issues. Stakeholders should in particular consider assisting the NCPD to undertake or facilitate the various researches anticipated pursuant to the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009. Noted areas of research include: prevention of disability; rehabilitation including community based rehabilitation; development of assistive devices including their psycho-social aspects; job identification for persons with disability; on-site modifications in offices and factories; and disaggregated data on persons with disabilities.²⁷ DPOs which work in communities with persons with disabilities should collect and collate information garnered from such work. As an example, some DPOs are doing excellent work around issues of legal capacity.

The question of documentation remains very relevant. Much work on disability has been done by various organisations and this should be documented to protect against the wastefulness of reinventing the wheel and also to ensure against loss of institutional

²⁷ Regulation 6 of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, 29 May 2009, Legal Notice No. 62, <http://kenyalaw.org/kl/index.php?id=713>

memory. A database of available resources should be put in place. As an example, NGECC should share the model county legislation on disability which it has prepared.²⁸

Advocacy

Advocacy on disability matters must continue. Stakeholders should identify pressing matters where the voices of persons with disabilities and their allies need to be heard. Self-advocacy by persons with disabilities should be at the centre of this strategy, including by those with developmental and psychosocial disabilities. Areas of advocacy could cover matters such as whether and when Kenya should become party to the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Advocacy strategies may include initiatives to seek judicial interpretation on the exercise of rights by persons with disabilities. Advocacy agendas should be prepared on the basis of need and should cover both national and county/local spaces and issues. Stakeholders should be vigilant to ensure they feed back into ongoing legislative and policy-making processes: they must engage with the facts instead of complaining after the facts.

Awareness-raising and capacity-building

The capacities of individuals who work within the disability sector as well as their allies must be built on a continuing basis. So too should the capacities of State agencies and private corporations. As well, the public should be made aware of issues of disability. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations require the State to provide training, sensitisation and awareness-raising programmes on the rights of persons with disabilities for community workers, social workers, media professionals, educators, decision makers, administrators and other concerned persons to enable them acquire skills for proper information dissemination and education on the rights of persons with disabilities. In doing this, the State is required to ensure the

²⁸ Information by participant at the Feedback and Validation Workshop from NGECC.

involvement and participation of persons with disabilities, and of organisations of and for persons with disabilities.²⁹

Technical support

The capacity-building referred to above may include technical support which will be called for to ensure proper understanding, framing and implementation of issues. As an example, the State should be made to appreciate the close nexus between ensuring the rights of persons with disabilities and implementation of the sustainable development agenda initiated globally in 2015. The sustainable development goals and indicators include specific references to disability.

Coalition-building

CSOs and DPOs must establish or re-establish effective linkages with key agencies. This will engender synergy between relevant actors to ensure more concerted initiatives on the various issues concerning persons with disabilities. So-called mainstream human rights organisations should be drawn into meaningful dialogue so that they may work with DPOs. Organisations which provide services to persons with disabilities should also be mobilised.

During Kenya's presentation of its initial report, the Attorney General stressed that Kenya had determined that the National Gender and Equality Commission (NGEC) was the institution designated to monitor implementation of the Convention under Article 33 (2) of the Convention. Stakeholders must therefore establish close linkages with NGEC and urge it to play its monitoring function more effectively. At the same time, stakeholders must encourage the State as well as NGEC to interpret Article 33 (2) of the Convention in such a way as to ensure the designated body complies with the letter and spirit of that provision. The State must be made to realise that the NGEC's statutory mandate under the National Gender and Equality Act (Cap. 5C) precludes it from being the independent national

²⁹ Regulation 3 of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, *ibid.*

institution contemplated in the Paris Principles and hence Article 33 (2) of the Convention. The NGEAC is as an example required by statute to undertake the function of establishing databases on issues relating to equality and freedom from discrimination for different affected interest groups and producing periodic reports for national, regional and international reporting on progress in the realisation of equality and freedom from discrimination for these interest groups.³⁰ Hence, whenever Kenya presents periodic reports before human rights treaty bodies, NGEAC has invariably been given audience as part of the State delegation rather than as a national human rights institution. The Kenya National Commission on Human Rights (KNCHR) therefore, which has a good track-record in supporting the rights of persons with disabilities, should also be cultivated as a key ally of the sector.

Monitoring

The CRPD provides that civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.³¹ Stakeholders will undertake continuous monitoring of implementation and prepare regular reports for submission to the State as well as the CRPD Committee. Stakeholders will undertake annual or bi-annual monitoring exercises. They should establish a capacity for monitoring and responding to ongoing policy and legislative initiatives. They should explore how to interact with the State's performance contracting framework which includes disability indicators. Stakeholders should keep in mind and participate in monitoring initiatives being undertaken under other human rights procedures, including the Universal Periodic Review mechanism, international treaty-bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, and continental human rights bodies such as the African Commission on Human and Peoples' Rights.

³⁰ Section 8 (n) of the National Gender and Equality Act (Cap. 5C), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.5C>

³¹ Article 33 (3) of the CRPD, *supra*.

Resource mobilisation

Mobilising resources to undertake disability rights work will remain a challenge. Stakeholders may wish to prepare specific strategies for dealing with this challenge.

IV: Priority Areas of Focus by Civil Society and Disabled Peoples' Organisations

The aim of this part of the paper is to identify and prioritise areas on which CSOs and DPOs should focus to ensure Kenya implements fully the recommendations of the CRPD Committee. Three preliminary points though should be made. First, it must be stressed that all human rights apply to individuals with disabilities in the same way as they apply to individuals without disabilities, and initiatives for demanding or enforcing human rights should always include individuals with disabilities. The theory and practice of human rights though over time has highlighted systemic or structural failings and biases which have left persons with disabilities discriminated and disadvantaged. It is the responsibility of the State with the support of CSOs and DPOs to mitigate or correct such discrimination and disadvantages wherever they exist. The following sections explain particular areas of continuing difficulties and the resolutions stakeholders may offer.

Second, stakeholders should keep in mind the necessity of utilising the twin-track approach in ensuring the rights of persons with disabilities. Many persons with disabilities remain attracted to the idea of omnibus policy or legislation that deals with disability matters. While a disability law will continue to be of relevance, stakeholders should realise that it will be far more effective to advocate for inclusion and mainstreaming of disability matters in substantive thematic legislation covering matters like health and education. Initiatives to tackle the exclusion and inequalities of persons with disabilities therefore have to employ both the twin-track approach where disability stand-alone legislation is enacted but while at the same time issues of disability have to be mainstreamed into all other legislation. In

this respect, it is noted that the Persons with Disabilities Act has been undergoing a review process more or less for nearly one decade now without concrete results. Finalisation of this review is important, but the sector should continuously engage all policy and law-making to ensure they are not excluded or marginalised from society.

Finally, implementation of priority areas should be as much national as county initiatives. Partnerships should be created at both levels.

A: Equality and non-discrimination

The CRPD requires Kenya to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection.³² The promotion of equality and elimination of discrimination requires the country to take all appropriate steps to ensure that reasonable accommodation is provided.

In light of the recommendations made to Kenya by the CRPD Committee, the National Plan of Action provides that Kenya's objective is to ensure persons with disabilities have equal and effective legal protection against discrimination on all grounds. The State plans to realise this objective by specifically including the principle of reasonable accommodation in legislation covering various spheres of life. The State as well will make persons with disabilities aware that they may under the Constitution seek judicial redress when they face discrimination, and provide capacities to judicial officers and lawyers on how to litigate or adjudicate cases of discrimination on the basis of disability.

1: Legislating and enforcing the principle of reasonable accommodation

The principle of reasonable accommodation requires that necessary and appropriate modifications and adjustments be made to ensure to an individual with disability the

³² Article 5 of the CRPD, supra.

enjoyment or exercise on an equal basis with others of all human rights and fundamental Freedoms. Such modifications and adjustments should not impose a disproportionate or undue burden to the responsible entity.³³ Reasonable accommodations therefore should be determined on a case by case basis and different individuals with disabilities may have different needs.

Neither the Constitution nor substantive statutes make explicit mention of the principle of reasonable accommodation. Despite concerted advocacy during the constitutional negotiations process, the Constitution failed to provide specifically for the principle of reasonable accommodation. A holistic reading of the Constitution though leaves the clear inference that this principle is anticipated in the law. The Constitution for example includes the following elements whose implementation entails application of the principle of reasonable accommodation:

1. Reasonable access to all places, public transport and information by persons with disabilities;
2. Their use of Sign Language, Braille or other appropriate means of communication; and
3. That they access materials and devices to overcome constraints arising from their disability.³⁴

A notable challenge in this regard is the fact that reasonable accommodation has been legislated in regulations rather than in substantive law. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations require every institution of education to ensure that students with disabilities are reasonably accommodated, and to provide students with disabilities with the appropriate core services necessary to ensure equal access, covering: Sign Language; oral and tactile interpreter services or other technological alternatives; textbooks and other educational materials in alternative media; access to adaptive equipment; and release of syllabi, study guides and other appropriate

³³ Article 2 of the CRPD, *supra*.

³⁴ Article 54 (c), (d) and (e) of the Constitution, *supra*.

instructor-produced materials in advance of general distribution, and access beyond the regular classroom session to slides, films, overheads and other media and taping of lectures.³⁵

Stakeholders must in this respect support the State's plans to undertake policy and statutory changes to ensure explicit recognition of the provision of reasonable accommodations. Stakeholders should make representations to the Salaries and Remuneration Commission which is in the process of preparing policy guidelines in this area. Preparation of these policy guidelines should not focus on salaries or allowances as a single issue since many other relevant issues arise that may relate to taxation, aids and infrastructure. Hence the integral involvement of the NCPD is called for. Stakeholders should ensure the State does not write or enforce policies which entail inherent discrimination of individuals with certain types of disabilities. Finally, some public institutions already have good practices which should be acknowledged and encouraged. The Teachers Service Commission (TSC) has for example in the past used flexible working hours as a reasonable accommodation measure to support a teacher with psychosocial disability who finding it difficult to teach earlier in the day was allowed to teach his classes later in the day.³⁶ The TSC also has had a commendable track record of providing a readers allowance for teachers who were blind.

2: Judicial litigation

The CRPD Committee recommended that Kenya should make persons with disabilities aware that they may under the Constitution seek judicial redress when they face discrimination, and provide capacities to judicial officers and lawyers on how to litigate or adjudicate cases of discrimination on the basis of disability.

³⁵ Regulation 8, *supra*.

³⁶ Anecdote by an official of an organisation of persons with psychosocial disabilities, notes on file with author.

The Constitution provides every person with the right to institute court proceedings where they deem that their rights or freedoms under the Bill of Rights have been infringed or are threatened.³⁷ Kenyans with disabilities have indeed sought judicial remedies where they have deemed that their rights have been violated. In *Frederick Gitau Kimani v Attorney General & 2 Others* (2012) eKLR,³⁸ the petitioner successfully argued that the State had discriminated him in violation of Article 27 of the Constitution by making him to retire from the Police Force at the age of 55 years instead of the age of 60 years which is the prescribed retirement age for persons with disabilities under Section 15 (6) of the Persons with Disabilities Act. While awarding KSh 500,000.00 damages to the petitioner, the Court noted that: 'Discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by inter-alia "procedural fairness imposed" upon it.'³⁹ However, in *Duncan Otieno Waga v Attorney General* (2012) eKLR,⁴⁰ The High Court declined to issue orders against the Police Force in a matter where the petitioner had been retired on medical grounds after he had become visually impaired. The Court determined that the facts at issue happened before 27 August 2010 and the 2010 Constitution could not be applied retrospectively; and that Section 82 of the former Constitution did not protect persons with disabilities from discrimination. The Court also determined that Article 22 of the Constitution could only be used to enforce rights which were clearly within the ambit of the Bill of Rights and that rights established in international human rights instruments such as the CRPD and the Persons with Disabilities Act cannot be enforced in terms of Article 22 of the Constitution save to the extent such enforcement is incidental to enforcement of the rights contained in the Bill of Rights.

These judicial decisions highlight the need for stakeholders to continually engage judicial processes. Triable cases should be presented before the courts so as to develop jurisprudence on disability. It is however simply not practical to expect that most persons with disabilities will use judicial means to seek remedies against discrimination or indeed

³⁷ Article 22 of the Constitution, supra.

³⁸ *Frederick Gitau Kimani v Attorney General & 2 Others* (2012) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=89833343488462929839475

³⁹ Ibid.

⁴⁰ *Duncan Otieno Waga v Attorney General* (2012) eKLR, <http://kenyalaw.org/caselaw/cases/view/80433>

other human rights violations. The majority of Kenyans do not use judicial means for that purpose. Stakeholders therefore must work to ensure that policy and law provides multiple means and avenues of redress which persons with disabilities may use to settle grievances of discrimination. Stakeholders must make better use of the redress avenues presented by the three human rights, equality and governance institutions established pursuant to Article 59 of the Constitution: the KNCHR and NGEC, already mentioned in part III of the review, and the Commission for Administrative Justice.

B: Accessibility, and freedom of expression and opinion

The CRPD requires Kenya to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications and to other facilities and services open or provided to the public.⁴¹ The Convention also requires Kenya to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion on an equal basis with others and through all forms of communication of their choice.⁴² The State has in its Plan of Action set itself the objective of ensuring to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, and to other facilities and services open or provided to the public, both in rural and urban areas. It will also ensure persons with disabilities can exercise the right to freedom of expression and opinion on an equal basis with others and through forms of communication of their choice.

⁴¹ Article 9 of the CRPD, *supra*.

⁴² Article 21 of the CRPD, *ibid*.

1: National Action Plan on Accessibility and Disability Rights in Kenya

As part of implementing its objective on accessibility, the State has pledged to implement the National Action Plan on Accessibility and Disability Rights in Kenya⁴³ (Accessibility Plan). This Accessibility Plan was prepared collaboratively by the then Ministry of Labour, Social Security and Services, the NCPD and other stakeholders including DPOs. The Accessibility Plan was an outcome of the June 2012 National Conference on Accessibility and Disability Rights.

The overall goal of the Accessibility Plan is to spark action at the national and county levels and to carry out Kenya's international, regional and national obligations on accessibility and enhance the quality of lives persons with disabilities. The Plan identifies 13 strategic objectives to be realised through awareness-raising, mobilisation of commitments and the allocation and management of resources to address disability matters.

Stakeholders will need to contend with the challenges which have stalked the Accessibility Plan. While the Plan was intended to dovetail into and influence the 2013-2017 Medium Term Plan of the Kenya 2030 Vision, the Plan had still not been rolled out as of April 2016. The Plan seems to have suffered the fate of many disability policy and legal initiatives which have become mired in the consultative stages for years either through lack of leadership or resources. The Plan therefore is in grave danger of either becoming dated or indeed being overtaken by other initiatives. The most current discussion raises concerns about whether it is still necessary to pursue the Plan while many of the objectives and activities anticipated in that Plan are also now incorporated into the National Plan of Action to Implement the Recommendations of the Committee on the Rights of Persons with Disabilities.

⁴³ National Council for Persons with Disabilities, National Action Plan on Accessibility and Disability Rights in Kenya, December 2015.

2: Adjustment orders

The Persons with Disabilities Act empowers the Council to serve an adjustment order to the owner of a premise or provider of a service or amenity when the Council considers such premise, service or amenity is inaccessible to persons with disabilities by reason of structural, physical, administrative or other impediment. Such an order would require the owner or provider to take specified steps to secure reasonable access by persons with disabilities to the premise, service or amenity. Adjustment orders unfortunately may not be served upon public health or educational institutions without the consent of the relevant minister.⁴⁴

Kenyan stakeholders informed the Committee on the Rights of Persons with Disabilities that while the Persons with Disabilities Act provides for the issuance of adjustment orders against non-accessible public buildings, the NCPD has not issued such orders.⁴⁵ This is a key let-down for persons with disabilities since a more accessible environment would have been an obvious marker of the progress they were gaining.

The NCPD's approach to the issuance of adjustment orders is feeble and unclear. The Council has from time to time issued regulations towards enforcement of the Persons with Disabilities Act;⁴⁶ yet Kenyans generally and persons with disabilities do not know about these regulations and how to engage around them. Issued regulations on accessibility include The Persons with Disabilities (Access to Employment, Services and Facilities)

⁴⁴ Section 24 of the Persons with Disabilities Act. Also see Sections 21, 23, 24 and 26 of the Act.

⁴⁵ Supra note 5.

⁴⁶ Issued regulations include:

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

Regulations, 2009. These Regulations establish clear albeit paper stipulations. Pursuant to them, relevant State agencies are required:

- To ensure installation of auditory signals at red lights in the public roads for the benefit of persons who are visually impaired; to make kerb cuts and slopes in pavements for the easy access of wheel chair users; engrave on the surface of pedestrians crossings and the edges of railway platforms for persons who are visually impaired; and post appropriate symbols of disability.
- To provide suitable ramps in public buildings; to adapt all public toilets for wheel chair users and other persons with disability; to provide Braille symbols and auditory signals in elevators or lifts; to provide ramps in hospitals, health centres and other medical care and rehabilitation institutions.

Submissions before the Committee urged it to recommend that the State should put in place an enforcement plan for adjustment orders within a specified timeframe. The Council must indeed take more robust and concerted actions to use its adjustment orders powers. The National Council must be cognisant that its adjustment orders statutory role gives it quasi-judicial powers and it must exercise those powers on the basis of clearly set out regulations and with due consistency and fairness. This will among others negate the need for parties to seek nugatory orders from the High Court. As an example, it is not clear what the Council did following its issuance of a 45-day notice requiring proprietors/owners of public and private buildings, operators of public vehicles and providers of other services ordinarily provided to the general public to submit to the Council: ‘... their complete and comprehensive adjusted/re-adjusted built environment plans that allow persons with disabilities to carry out their duties without being at a disadvantaged position compared to persons without disabilities.’⁴⁷ The Council warned that failure or refusal to comply with

⁴⁷ Gazette Notice No. 2998, the Persons with Disabilities Act, No. 14 of 2002, ‘Public Notice to Issue Appropriate Adjustment Order(s) to Proprietor(s)/Owner(s) of Public and Private Buildings of Private Nature, Built Environment, Operators of Public Vehicles and Providers of Any Services or Amenities Ordinarily Provided to Members of the General Public Pursuant to Sections 21, 22, 23, 24 and 26 of the Persons with Disabilities Act No. 14 of 2003 Chapter 133 Laws of Kenya (the Act)’,

the public notice and the Persons with Disabilities Act would be a proper legal basis for the Council to issue and confirm appropriate adjustment orders. The Council must avoid using the law to sabre-rattle when it either does not intend or it does not have the teeth to enforce its directives.

Stakeholders should assist the Council in this regard through a number of means. The Council should as a matter of urgency be assisted to review and rewrite its regulations on adjustment orders. Stakeholders should also assist in the review of adjustment order provisions in the Persons with Disabilities Act to ensure their enforceability. Then, the Council needs to be challenged to take actions on its own motion. Complaints also need to be lodged with the Council.

3: Use of Kenyan Sign Language and access to information and communications technology

The CRPD Committee recommended that Kenya should establish a mechanism to certify the quality of interpretation services and ensure that opportunities for continuous training are provided for interpreters in all public offices. As well, it should strengthen measures to grant persons with disabilities access to information and communications technology. In making these recommendations, the Committee must have taken account of the submission by stakeholders on the need for the development and implementation of a Sign Language policy within the public service, so that Sign Language interpretation services can be provided in all government ministries and departments and in all media broadcasts. The stakeholders also stressed that the State should bear the cost of interpretation services for the deaf.

The Constitution requires the State to promote the development and use of Kenyan Sign language, Braille and other communication formats and technologies accessible to persons

with disabilities.⁴⁸ The official languages of Parliament include Kenyan Sign Language in which parliamentary business too may be conducted.⁴⁹ Each person with disability is entitled to use Sign Language, Braille or other appropriate means of communication.⁵⁰ The Persons with Disabilities Act requires the Chief Justice to make rules inter alia covering the provision of free Sign Language interpretation, Braille services and physical guide assistants to persons with disabilities who attend court.⁵¹ All television stations shall provide Sign Language insets or subtitles in all newscasts and educational programmes, and in all programmes covering events of national significance.⁵² Finally, the Act requires all persons providing public telephone services to as far as possible install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.⁵³

Despite these constitutional and statutory provisions, the State's policy on Kenyan Sign Language remains unclear. A few public services, notably broadcasts of parliamentary proceedings on Kenya Broadcasting Corporation, use Kenyan Sign Language. At least one private television broadcaster also uses Kenyan Sign Language on some of its newscasts. Despite this, many public as well as private agencies providing public services continue to resist the use of Sign Language.

Stakeholders must make representations on the State to put in place policies covering the use of Sign Language. Stakeholders must seek judicial and administrative remedies to make relevant institutions to comply with Article 7 of the Constitution. Stakeholders, therefore, should demand from and assist the State to put in place and implement a clear policy on Sign Language in Kenya.

⁴⁸ Article 7 (3) (b) of the Constitution, *supra*.

⁴⁹ Article 120 (1) of the Constitution, *ibid*.

⁵⁰ Article 54 (1) (d) of the Constitution, *ibid*.

⁵¹ Section 38 (2) (b) of the Persons with Disabilities Act, *supra*.

⁵² Section 39 of the Persons with Disabilities Act, *ibid*.

⁵³ Section 40 of the Persons with Disabilities Act, *ibid*.

Additionally, policy on the use of other formats accessible to persons with disabilities should be put in place. Kenyan stakeholders have until now focused on deaf persons and persons who are blind. It is necessary that accessibility for persons with other disabilities is also included in policy. The State should be enabled to determine measures appropriate to ensure that persons with intellectual disabilities and those with psychosocial disabilities as well as multiple or severe disabilities can communicate in accessible formats. Policy should focus on persons who have difficulties in cognition or verbalisation or who have difficulties in expressing concepts. Policy-making and implementation in this area should be guided by the CRPD which defines language as including spoken and signed languages and other forms of non spoken languages.⁵⁴

Stakeholders should encourage and support the State to put in place a policy framework for ensuring that persons with visual impairments or with other print disabilities may access published works without the number of such works being limited by copyright protection. Kenya should in particular become party to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.⁵⁵

The Feedback and Validation Workshop made the following further recommendations:

1. It was imperative that the policy on Sign Language be prepared and effected urgently since deaf persons were not enjoying rights accorded to them by the Constitution.
2. The training and registration of Sign Language interpreters should be regulated.
3. Agencies with functions to regulate proper mobility and accessibility in the built environment should undertake their roles more effectively. Such regulators include the National Construction Authority and the National Transport and Safety Authority.

⁵⁴ Article 2 of the CRPD, *supra*.

⁵⁵ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted on 27 June 2013, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301016

4. The State should recognise and train its agencies about the white-cane as a symbol of blindness.

C: Right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment

The Convention requires Kenya to take all necessary measures to ensure the effective enjoyment of the right to life by persons with disabilities on an equal basis with others.⁵⁶ The State is also required to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.⁵⁷

The Plan of Action has in this regard set Kenya the objectives of ensuring protection of the right to life of persons with albinism; and ensuring that persons with disabilities are not subjected to torture or cruel, inhuman or degrading treatment or punishment.

1: The right to life for persons with albinism

The CRPD Committee recommended that Kenya should investigate cases of violence against persons with albinism; create safe spaces and redress services for victims of attacks, including health care, counselling and free legal aid; and undertake advocacy and awareness-raising on the rights and dignity of persons with albinism.

Some Kenyan stakeholders have expressed concern that the Committee's recommendations on the right to life focused solely on persons with albinism. On this point, stakeholders should realise that the specificity of the recommendations which the Committee made does not stop the State from dealing with other matters of concern in

⁵⁶ Article 10 of the CRPD, *supra*.

⁵⁷ Article 15 of the CRPD, *ibid*.

relation to the right to life for persons with disabilities. Yet, the danger to life and limb which persons with albinism continue to face in Kenya is very real, as illustrated in 2015 when a 56-year old man with albinism from Vihiga County died a few days after being attacked by a gang of unknown people. He had sustained injuries on his head, neck and hand, with his kin saying the attackers had sought his body parts to sell in Tanzania.⁵⁸

The Independent Expert on the Enjoyment of Human Rights by Persons with Albinism has noted that persons with albinism face obstacles, including human rights violations such as attacks, desecration of graves, trafficking of body parts, displacement, discrimination as well as human rights violations based on disabilities, and challenges in the right to the highest attainable standard of health and the right to education.⁵⁹ The Independent Expert notes that persons with albinism are hunted and physically attacked due to prevailing myths such as the misbelief that their body parts, when used in witchcraft rituals and potions or amulets, will induce wealth, good luck and political success. Other dangerous myths that facilitate the perpetration of attacks are those linked to perceptions of their appearance, including misbeliefs and myths that persons with albinism are not human beings, but ghosts, that they are subhuman and that they do not die, but disappear.⁶⁰ These attacks and related issues violate the right to life, the right to security of person and the prohibition of torture and ill-treatment.⁶¹ Indeed, the African Commission on Human and Peoples' Rights has urged African States to:

1. Take all measures necessary to ensure the effective protection of persons with albinism and members of their families;
2. Ensure accountability through the conduct of impartial, speedy and effective investigations into attacks against persons with albinism, the prosecution of those responsible, and by ensuring that victims and members of their families have access to appropriate remedies; and

⁵⁸ 'Albino Earlier Attacked by Unknown People in Vihiga Dies', Nation-On-Line, Tuesday September 22 2015, <http://www.nation.co.ke/counties/albino-Vihiga-dies/-/1107872/2880190/-/xris7bz/-/index.html>

⁵⁹ A/HRC/31/63, Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, 18 January 2016, Para. 14.

⁶⁰ Ibid, para. 16.

⁶¹ Ibid, para. 17.

3. Take effective measures to eliminate all forms of discrimination against persons with albinism, and to increase education and public awareness-raising activities.⁶²

Stakeholders therefore should assist the State in determining the best approach to ensure protection of persons with albinism from the scourge of attackers wishing to harvest their organs. While vigilance by law and order agencies must be demanded and while they must be given necessary capacities and facilities, this menace will not be stemmed until communities are made conscious that persons with albinism are human beings with full dignity and members of the community should participate wholesomely in their protection.

2: Torture and ill-treatment

For an act of torture to have taken place, four elements must be present. Severe pain or suffering, whether physical or psychological, must be inflicted on a person. That pain or suffering must be inflicted on the person intentionally. The purposes of inflicting such pain or suffering must, in relation to a person or third party, relate to obtaining information or confession, punishment for an act or suspected act, intimidation or coercion, or for any reason based on discrimination. Finally, such pain or suffering must be inflicted by, at the instigation of or with the consent or acquiescence of a public official or other official acting in an official capacity.⁶³ Where an act does not amount to torture because one or more of the four elements cannot be proved, then such act could amount to cruel, inhuman or degrading treatment (ill-treatment) which is prohibited under the Convention against Torture.⁶⁴

The use of solitary confinement against a person on the mere basis of disability may amount to torture or ill-treatment. As well, poor conditions of confinement for persons

⁶² ACHPR, 263: Resolution on the Prevention of Attacks and Discrimination Against Persons with Albinism,

⁶³ Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, entered into force on 26 June 1987, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

⁶⁴ Article 16 of the Convention Against Torture, *ibid.*

with disabilities may amount to ill-treatment – for example where a person is held in an orphanage, psychiatric facility or prison with inadequate food, running water, access to toilets, privacy or any form of meaningful activity.⁶⁵ The Special Rapporteur of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has noted that the treatment of a person with disability against their will or without their free and informed consent may also amount to torture or ill-treatment. Non-consensual medical experimentation and intrusive and irreversible medical procedures performed on persons with disabilities may also amount to torture or ill-treatment. Such procedures may include sterilisation, abortion and interventions aiming to correct or alleviate a disability such as electroshock therapy and mind altering drugs.⁶⁶

Torture or ill-treatment continues to be perpetrated in Kenya on persons with disabilities in institutional settings such as psychiatric facilities and prisons. Various laws establish circumstances under which persons with disabilities may be detained including through the use of physical and medical restraints. The Mental Health Act (Cap. 248) permits a husband, wife or other relative to seek the involuntary detention of a person suffering from a mental disorder who is incapable of stating their will in a mental hospital.⁶⁷ The Criminal Procedure Code (Cap. 75) empowers the President to direct that an accused deemed of unsound mind in the course of judicial criminal proceedings be detained in a mental hospital until such time as that person is certified capable of making their defence.⁶⁸

Stakeholders should support the State to ensure the total eradication of torture or ill-treatment of persons with disabilities in a number of regards. Persons with disabilities must not without their free and informed consent undergo the procedures of abortion or sterilisation. Similarly, electroconvulsive therapy must not be used without the free and

⁶⁵ Eric Rosenthal and Laurie Ahern, 'When Treatment is Torture: Protecting People with Disabilities Detained in Institutions', Human Rights Brief 19, No. 2 (2012), 13-17.

⁶⁶ A/63/150, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

⁶⁷ Section 14 of the Mental Health Act (Cap. 248),
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.248>

⁶⁸ Sections 162 and 163 of the Criminal Procedure Code (Cap. 75),
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.75>

informed consent of the individual with disability. Forced psychiatric treatment including through the administration of mind altering drugs should not be used without the free and informed consent of the individual. Laws which allow involuntary commitment to psychiatric institutions should be repealed. Persons with disabilities, and in particular children and women with disabilities, must be protected from violence including sexual violence such as defilement and rape. Stakeholders should participate in reviewing and advocating on relevant bills to ensure they establish full protection of persons with disabilities from torture or ill-treatment. Notable such bills which have been navigating the parliamentary process are the Prevention of Torture Bill (2014) and the Mental Health Bill (2014).

The Feedback and Validation Workshop made the following further recommendations:

1. Measures should be taken to protect women with disabilities from gender based and sexual violence.
2. Children with disabilities who are exploited for example by being turned into beggars should also be protected.

D: Equal recognition before the law, access to justice and security of person

The CRPD requires Kenya to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.⁶⁹ Kenya is also required to ensure effective access to justice for persons with disabilities on an equal basis with others.⁷⁰ The Convention also requires Kenya to ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security of person, and are not deprived of their liberty unlawfully or arbitrarily.⁷¹

⁶⁹ Article 12 of the CRPD, *supra*.

⁷⁰ Article 13 of the CRPD, *supra*.

⁷¹ Article 14 (1) of the CRPD, *supra*.

Regarding these three interrelated issues, Kenya has set itself the objective of adopting and implementing a policy, legislative and administrative framework to replace all forms of substituted decision-making regimes or other deprivation of legal capacity on the basis of impairment with an appropriate system of supported decision-making. It will also establish or strengthen measures for ensuring that all persons with disabilities have access to justice. Finally, it will repeal or amend legislation which undermines the liberty or security of person of persons with disabilities.

1: Legal capacity

Legal capacity is what a human being can do within the framework of the legal system. It allows one to enjoy the right to access the civil and juridical system and the independence to speak on one's own behalf. Legal capacity means a capacity recognised by law which would make a person capable of having rights and obligations. In other words, it makes a person the subject of law. This subject of law enters into social relations which with the backing of law are transformed into legal relations.⁷²

Policies and laws continue to challenge or denigrate the legal capacity of persons with disabilities. Kenya's State Report to the CRPD Committee illustrated that policy makers and implementers have not understood the full implications of Article 12 of the Convention. Post-2010 as much as pre-2010 legislation fails to incorporate the principles of legal capacity established in Article 12 of the CRPD. Court decisions on cases that touch directly on Article 12 also fail to take the CRPD into consideration. A result of this is that persons with disabilities in Kenya still do not enjoy the benefit of being able to exercise their rights on an equal basis with other persons.⁷³

⁷² Lawrence Mute, 'Moving from the Norm to Practice: Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya', Equal Rights Review, www.equalrightstrust.org/ertdocumentbank/err9_mute.pdf

⁷³ Ibid.

The CRPD Committee asked the State to establish policy on supported decision-making and amend or repeal legislation allowing or condoning formal or informal substituted decision-making. Stakeholders should recognise that denial of legal capacity for persons with disabilities is at the heart of the systemic discrimination and inequalities which persons with disabilities face. Stakeholders therefore should assist and support the State to take a number of measures.

Efforts should be put towards implementation of proposals made by a joint KNCHR-DPO initiative which proposed a concerted approach for dealing with the question of legal capacity.⁷⁴ That initiative made multiple recommendations on how to ensure persons with disabilities may exercise their legal capacity on an equal basis with others. Stakeholders should engage with the State on a number of notable actions. Parliament should repeal legislation that undermines the legal capacity of persons with disabilities by expressly providing for guardianship. Such laws include: the Mental Health Act; the Civil Procedure Act (Cap. 21)⁷⁵ and the Civil Procedure Rules; and the Children Act (Cap. 141).⁷⁶ Second, it should amend various sections in various laws that contravene Article 12 of the CRPD. Such laws include: the Age of Majority Act (Cap. 33),⁷⁷ the Marriage Act (No. 4 of 2014),⁷⁸ the Sale of Goods Act (Cap. 31),⁷⁹ the Law of Succession Act (Cap. 160),⁸⁰ the Traffic Act (Cap. 403),⁸¹ the Penal Code (Cap. 63),⁸² the Criminal Procedure Act (Cap. 75),⁸³ the Sexual

⁷⁴ 'How to Implement Article 12 of Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper', Kenya National Commission on Human Rights and Open Society for Eastern Africa, 2013.

⁷⁵ Civil Procedure Act (Cap. 21), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.21>

⁷⁶ Children Act (Cap. 141), http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.141#part_II

⁷⁷ Age of Majority Act (Cap. 33), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.33>

⁷⁸ Marriage Act (No. 4 of 2014), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.4of2014>

⁷⁹ Sale of Goods Act (Cap. 31), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.31>

⁸⁰ Law of Succession Act (Cap. 160), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.160>

⁸¹ Traffic Act (Cap. 403), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.403>

⁸² Penal Code (Cap. 63), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.63>

⁸³ Criminal Procedure Act (Cap. 75), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.75>

Offences Act (Cap. 62A),⁸⁴ The Evidence Act (Cap. 80),⁸⁵ the Elections Act (Cap. 7),⁸⁶ the HIV and AIDS Prevention and Control Act (Cap. 246A),⁸⁷ and the Persons with Disabilities Act.

Some Kenyan organisations are in the forefront of exploring models of supported decision-making - how supported decision-making may work in the community. Organisations implementing notable work include the Users and Survivors of Psychiatry Kenya and the Kenya Association of the Intellectually Handicapped. These organisations should assist the State on the practical mechanics of modelling supported decision-making in the community.

The question of training officials on questions of legal capacity must not be understated and again this should be done collaboratively. The Judicial Training Institute has proved a valuable interlocutor in such training.

2: Access to justice

Many of the issues canvassed in the preceding paragraphs on legal capacity are relevant for purposes of ensuring access to justice for persons with disabilities. Stakeholders should make the State aware of the realities which persons with disabilities within the criminal or civil justice systems encounter – from the point when they face the police, when they are booked into custody or bonded, when they first appear before a court, when they are tried, convicted and sentenced, and when they are imprisoned; or when they file a civil suit or seek to proffer evidence as witnesses. That trail entails many possible hurdles where a person's disability may engender discrimination and other disadvantage.

⁸⁴ the Sexual Offences Act (Cap. 62A), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.62A>

⁸⁵ Evidence Act (Cap. 80), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.80>

⁸⁶ Elections Act (Cap. 7), <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.7>

⁸⁷ HIV and AIDS Prevention and Control Act (Cap. 246A),
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.246A>

Within the above context, stakeholders should participate wholesomely in the review and amendment of legislation to take account of the rights of persons with disabilities to access justice. The question of legal aid is again relevant here; as well as ensuring provision of reasonable accommodations for persons with disabilities within the criminal and civil justice system.

The Feedback and Validation Workshop made the following further recommendations:

1. Special focus should be placed on repealing or amending the Mental Health Act as well as the Marriage Act to protect persons with psychosocial disabilities from discrimination.
2. Stakeholders have opportunities to engage on legal capacity and access to justice issues with the Judiciary through the Judicial Training Institute as well as through the Court Users Committees. The National Committee on Administration of Justice too should be engaged.
3. The Chief Justice had just recently inaugurated the Judiciary Disability Policy and this should be rolled out for implementation.

E: Participation in political and public life

The Convention requires Kenya to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including the right and opportunity for persons with disabilities to vote and be elected.⁸⁸ In light of the recommendations made by the Committee on the Rights of Persons with Disabilities, Kenya set the objective of ensuring persons with disabilities have the opportunity to enjoy political rights on an equal basis with others.

⁸⁸ Article 29 of the CRPD, *supra*.

1: Repealing constitutional and statutory provisions restricting persons from voting or standing for elective office on the basis of disability

Despite concerted lobbying by stakeholders prior to its adoption, the Constitution excludes persons with certain types of disabilities from voting in or standing for elective or appointive offices. The Constitution provides that every adult citizen has the right, without unreasonable restrictions, to be registered as a voter; to vote by secret ballot in any election or referendum; and to be a candidate for public office and, if elected, to hold office.⁸⁹ It then proceeds to provide that a person who is declared to be of unsound mind is not qualified for registration as a voter at elections or referenda;⁹⁰ or eligible for election as a member of Parliament⁹¹ or member of a County Assembly.⁹²

Stakeholders need to confront the reality that while removing this offending provision from the Constitution is a priority, amending the Constitution is not easy. Stakeholders should determine whether they wish to join any of the initiatives which in recent times have been advocating for constitutional review. In doing this, though, they should be wary that once constitutional provisions are reopened for negotiations, it is quite possible that even current gains may be eroded. Indeed, since the Constitution was adopted only six years ago, it may be too soon to begin amending it, and stakeholders could opt to use political means to ensure more effective representation of persons with disabilities. In any case, the National Action Plan has made commitments to review statutes which discriminate participation by persons in politics on the sole ground of disability. Notable such laws are: Section 9 of the Election Act and Section 40 of the County Government Act (No. 17 of 2012).⁹³

⁸⁹ Article 38 (3) of the Constitution, *supra*.

⁹⁰ Article 83 (1) of the Constitution, *ibid*.

⁹¹ Article 99 (2) of the Constitution, *ibid*.

⁹² Article 193 (2) of the Constitution, *ibid*.

⁹³ County Government Act (No. 17 of 2012), [http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.17 of 2012](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.17%20of%202012)

2: Representation of persons with disabilities

While the CRPD Committee did not make specific recommendations respecting the representation of persons with disabilities, stakeholders should review the challenges which candidates and voters with disabilities encountered during the last electoral cycle. The DCIC has in this regard made substantive proposals in the ongoing reviews of electoral laws in preparation for the 2017 general elections. Some recent bills have indeed taken account of proposals made by stakeholders in the sector. It is unfortunate though that the Two-Third Gender Rule Laws (Amendment) Bill, 2016, did not cover protection of the rights of persons with disabilities unlike the 2015 version of that Bill which included proposals on matters of disability. This area of work must continue.

The Feedback and Validation Workshop proposed the following further considerations for purposes of setting priorities on political participation by persons with disabilities:

1. Mechanisms should be put in place to ensure that politicians with disabilities are accountable to their constituency of persons with disabilities. This accountability should be framed so as not to undermine the accountability of such politicians to their political parties.
2. Stakeholders should engage better with their elected leaderships in national and county governments and parliaments. They should be capacitated on issues of concern to persons with disabilities. This may be done in one-on-one meetings or in workshops.

F: Education

The CRPD requires Kenya to recognise the right to education for persons with disabilities and to ensure an inclusive education system at all levels and lifelong learning.⁹⁴ Kenya's

⁹⁴ Article 24 of the CRPD, *supra*.

objective in this regard is to ensure persons with disabilities can exercise their right to education.

The CRPD Committee recommended that Kenya should review and amend policy and legislation as appropriate to provide for inclusive education. The State's approach to inclusive education has for some time now exhibited confusion and lack of clarity. On one hand, State rhetoric accepts the principle of inclusive education.⁹⁵ Yet even fairly recent statutes continue to entrench special education for children with disabilities. The guiding principles of basic education established in the Basic Education Act (No. 14 of 2013)⁹⁶ include positive principles such as protection against discrimination on any ground; non-discrimination; and encouragement and protection of the marginalised, persons with disabilities and those with special needs. At the same time, though, the Basic Education Act requires the State to establish and maintain public special schools.⁹⁷

Provisions on education in the Persons with Disabilities Act have remained of little consequence over the years. Sections 18-19 of the Persons with Disabilities Act provide that:

1. A person or learning institution shall not deny admission of a person with disability to any course of study by reason only of such disability: 'if the person has the ability to acquire substantial learning in that course'. This provision does not provide the criteria and circumstances on the basis of which it may be determined that a person with disability has no ability to acquire substantial learning in the course. Many pupils with disabilities continue to be discriminated as a consequence of this provision, for example with children with dyslexia being forced to leave schools which feel that their mean score is undermined by such pupils.
2. Learning institutions are required to take account of the learning needs of persons with disabilities respecting entry requirements, pass marks, curricula, examinations,

⁹⁵ For example see section 2.5 of The National Special Needs Policy Framework, Ministry of Education, July 2009.

⁹⁶ Basic Education Act, No. 14 of 2013, http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.14OF2013#part_VI

⁹⁷ Section 14 of the Basic Education Act, *ibid.*

auxiliary services, use of school facilities, class schedules or physical education requirements. While this provision is more positive, its execution has been wanting.

3. The Act also requires that special schools and institutions be established to cater for formal education, skills development and self-reliance. The Act even uses demeaning language when it makes reference to the mentally "retarded".
4. The Act also makes provisions which have never been effected when it requires the Council to work with other players so as to provide in all districts an integrated system of special and non-formal education for persons with all forms of disabilities and wherever possible to establish Braille and recorded libraries for persons with visual disabilities.

Stakeholders must support the State to determine the right balance between making the principle of inclusive education genuinely operational while at the same time not undermining the education of children with disabilities. The Committee indeed recommended that Kenya should put steps in place to manage the transition from segregated to inclusive education. The question of how and when to transit from segregated education remains relevant for a number of reasons. Children with disabilities must not be turned into guinea-pigs as they get moved from one type of institution to another when adequate facilities and services have not been put in place. Educating children in regular schools calls for investments to ensure necessary accommodations are in place and to train teachers on how to teach children with disabilities alongside other pupils. The impression that special schools will in due course be shut down also raises practical and emotional questions. The reality is that such schools which in many cases have a certain level of facilities could be turned into resource centres to continue servicing the education of children with disabilities.

The enrolment of children with disabilities into regular schools remains fraught with many practical difficulties. A framework for providing reasonable accommodations for such children is in many instances not in place. Public primary schools remain hugely under-

resourced even for non-disabled children, and the idea of free primary education has increased the numbers of children in school without dealing with questions of quality.

Children with some types of disabilities face particular discrimination. These include those with intellectual disabilities and those with multiple disabilities deaf-blind or deaf-mute. The CRPD Committee made specific recommendations in respect of deaf-blind children. While at least nine State institutions and a few private ones provide education to deaf-blind pupils in Kenya,⁹⁸ these schools have inadequate numbers of teachers, limited or inappropriate teaching and learning materials, and inaccessible school environments. Stakeholders should continue impressing on the State the need to take measures to ensure the education of deaf-blind pupils. Suggestions which have been made to improve the education of these pupils include: recognising pupils whose disability is def.-blindness explicitly instead of lumping them in the 'other disabilities' category; recognising and responding to the fact that combined impairment of hearing and vision exacerbates communication uniquely; and exploring required services and facilities and putting them in place.⁹⁹

Further recommendations made by the Feedback and Validation Workshop were the following:

1. Learners with disabilities within early childhood education should be accorded adequate and appropriate facilities and services for their education. This is important particularly since the function of early childhood education has been devolved from the national to county governments.
2. Early childhood education teachers should be trained on how to recognise developmental disabilities so that children with disabilities may be accorded appropriate interventions at the earliest possible.

⁹⁸ Email communication with J.M. Shiroko, Programme Coordinator, Brian Resource Centre, February 2016.

⁹⁹ Ibid.

3. Frameworks should be established and implemented to guide the transition of children with developmental disabilities from one to the next level of learning – for example from primary to secondary school.
4. Community or home-based education should be supported for children with severe disabilities, and teachers should be trained appropriately to offer necessary support.
5. The State should ensure that schools do not misuse or misapply the concept of inclusive education.

G: Health

The CRPD requires Kenya to take all appropriate measures to ensure that persons with disabilities have the right to the highest attainable standard of health.¹⁰⁰ The objective which the State set in this regard is to ensure persons with disabilities enjoy the right to the highest attainable standard of health without discrimination on the basis of disability.

Accessibility and by extension inclusion are important determinants of the extent to which persons with disabilities may exercise the highest attainable standard of health. The three health-related activities in the State's Implementation Plan focus on accessibility. First, Kenya plans to ensure that health policies, programmes and services, including on sexual and reproductive health and those related to HIV/AIDS, are fully accessible and incorporate a gender perspective. Second, it will adopt measures to establish accessible health-care facilities and technologies for persons with disabilities in urban and rural areas. Finally, it will develop a wide range of community-based services that respond to the needs of persons with disabilities and respect the person's autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health.

The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations provide that education and information dissemination on the rights of persons with

¹⁰⁰ Article 25 of the CRPD.

disabilities shall form part of health care services by healthcare providers.¹⁰¹ It is however unclear how responsibilities to achieve this end are shared and indeed who is responsible for monitoring implementation.

Stakeholders should seek to include their concerns in the Health Bill (2015) before it becomes law. The objectives of the Health Bill include ensuring the realisation of the health related rights and interests of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities and members of particular ethnic, religious or cultural communities. It further requires that in identifying research for health priorities, due regard should be had of the health needs of vulnerable groups including of persons with disabilities.

Stakeholders should highlight their awareness that certain populations face particular health concerns. An inquiry undertaken by KNCHR on reproductive health and sexual rights found that health workers performed medical procedures such as hysterectomies, caesarean sections and sterilisations on women with disabilities without first obtaining their informed consent.¹⁰²

The Feedback and Validation Workshop made the following further recommendations:

1. Persons with disabilities should access free health services to cover disability-related aspects of their health. Persons with albinism already access free health-care specific to their disability.
2. Genetic conditions that may amount to disability should also be taken account of for purposes of the registration of persons with disabilities in terms of the Persons with Disabilities Act by the NCPD.

¹⁰¹ Regulation 5, *supra*.

¹⁰² See: Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, Kenya National Commission on Human Rights, 2012, available at: <http://www.knchr.org/reproductivehealth.aspx>

3. The Clinical Policy and Guidelines on Developmental Disabilities for Autism and Cerebral Palsy being prepared by the Ministry of Health should be finalised and implemented.
4. Established policies should be implemented, a case in point being the School Policy and Guidelines which have not been implemented since 2009.

H: Work

The CRPD requires Kenya to safeguard and promote the realisation of the right to work for persons with disabilities on an equal basis with others.¹⁰³ The State's objective in this regard is to ensure the right of persons with disabilities to work on an equal basis with others.

The Persons with Disabilities Act protects the equal opportunity of persons with disabilities to be employed and to enjoy the same rights as other employees.¹⁰⁴ Taking their cue from these provisions, the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations establish requirements which would be significant if they were implemented. No public service establishment may dispense with, or reduce in rank, an employee merely on account of disability. An employee who becomes disabled and who is not suitable for the post he or she was holding before may be shifted to some other post with the same pay scale and service benefits, or such employee may be kept on a supernumerary post until a suitable post is available or he or she attains the age of superannuation. Promotion shall not be denied to a person merely on the ground of his or her disability.¹⁰⁵

Despite these provisions, opportunities for persons with disabilities to work remain extremely limited. Some individuals have been employed in public sector positions while

¹⁰³ Article 27 of the CRPD, *supra*.

¹⁰⁴ Section 12 of the Persons with Disabilities Act, *supra*.

¹⁰⁵ Regulation 11, *supra*.

others have been employed in the private sector, but these remain the exception rather than the rule.

Stakeholders need to grapple with a number of things. First, the Committee recommended that Kenya should adopt immediate measures to foster compliance with quotas for persons with disabilities in employment both in the public and the private sectors. Yet, the establishment of employment quotas for individuals with disabilities has by and large remained rhetorical, although it is true that more individuals with disabilities are employed in public institutions which before now did not employ any.

The last decade has witnessed a number of initiatives to generate work for individuals with disabilities in the private sector. But even where individuals with disabilities have been hired by companies such as Safaricom, performance targets have caused line managers to harass such employees so much that many have left.

The following further recommendations were made by the Feedback and Validation Workshop:

1. The operation of tax exemptions should be broadened to ensure mitigation of the financial consequences of disability on all persons with disabilities including those who operate within the informal sector. Presently tax exemptions apply only to individuals with formal salaried jobs. In this same vein, licence and such other fees charged to persons with disabilities should be reviewed.
2. Financial incentives for parents of children with disabilities should be considered.
3. Disciplined forces such as the Armed Forces and the National Youth Service should employ persons with disabilities. It should not be assumed that such persons cannot perform certain jobs in those services.
4. Reasonable accommodations for deaf teachers, including an allowance for Sign Language interpreters, should be put in place.

5. The rhetoric on the five per cent employment quota should be supported by genuine action. The State should put in place better initiatives towards the achievement of this statutory requirement.
6. A database of persons with disabilities capturing their qualifications, expertise and experience should be put in place.
7. A monitoring and evaluation framework of the extent to which the Youth and Women's Enterprise Funds reach persons with disabilities should be monitored.

I: Adequate standard of living and social protection

The CRPD requires Kenya to take appropriate steps to safeguard and promote the realisation of the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹⁰⁶ Following the Committee's recommendations to Kenya, the State has set for itself two objectives. First, it will ensure that persons with disabilities may without discrimination on the basis of disability exercise their right to an adequate standard of living for themselves and their families and to the continuous improvement of their living conditions. Second, it will ensure the enjoyment of the right to social protection by persons with disabilities without discrimination on the basis of disability.

One of the recommendations by the CRPD Committee was that Kenya should take urgent steps to extend the coverage of social protection schemes beyond persons with severe disabilities to ensure an adequate standard of living to all persons with disabilities who are not currently eligible for social protection schemes, and ensure that support services and social assistance for persons with disabilities are distributed on a regular basis and that progress in the living conditions of persons with disabilities is monitored. Kenya should also expand the coverage of the National Development Fund for Persons with Disabilities

¹⁰⁶ Article 28 of the CRPD.

and facilitate the involvement of organisations of persons with disabilities in the formulation of their goals and priorities.

Disability exacerbates poverty and poverty in turn engenders disability. Social assistance programmes are important to persons with disabilities since they mitigate the disadvantages occasioned by disability. Disability causes individuals to face social exclusion, discrimination and extra costs.¹⁰⁷

Stakeholders should assist and support the State as it reviews its approaches to the social protection of persons with disabilities. Present policy and law does not support the overall purposes of ensuring social protection for all persons with disabilities.

The Social Assistance Act (No. 24 of 2013) seeks to provide social assistance for persons in need, including: orphans and vulnerable children; poor elderly persons; unemployed persons; persons disabled by acute chronic illnesses; widows and widowers; and persons with disabilities.¹⁰⁸ The provisions of this law relating to persons with disabilities is however framed wrongly. The Act provides that A person with disability shall be eligible for social assistance if the person suffers from severe mental or physical disability; and if the person's disability renders them incapable of catering for their basic needs; and there is no known source of income or support for the person. Stakeholders should stress that disqualifying an applicant with disability on the basis they have an income fails to appreciate the fact that income can be inadequate in relation to a person's disability.

Current social assistance programmes include the Older Persons Cash Transfer Programme; the Orphaned and Vulnerable Children Cash Transfer Programme; the Persons with Severe Disabilities Cash Transfer Programme; the Hunger Safety Net Programme; and the Urban Food Subsidy Programme. The effective implementation of these programmes is

¹⁰⁷ Marguerite Schneider et al, 'Reflections on Including Disability in Social Protection Programmes',

¹⁰⁸ Section 17 of the Social Assistance Act (No. 24 of 2013),
<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.24OF2013>

constrained by challenges such as how to refine inclusion and exclusion criteria and how to determine appropriate transfer amounts.

Stakeholders should assist the State to ensure that social assistance programmes are implemented in an inclusive manner. Concerns have been raised on whether cash transfers for persons with disabilities should target households or whether they should target individuals. In this last regard, it is notable that the tax exemption programme initiated for persons with disabilities pursuant to the Persons with Disabilities Act¹⁰⁹ is effective only in respect of persons who are employed. This is despite the provisions of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations which set out support and reliefs for persons with disabilities pursuant to which a person with disability may apply for and obtain support and relief for: purchase and repair of personal technical auxiliary devices; purchase and adaptation of personal vehicle and adaptation of a parking place; tax relief for import or local purchase of a personal vehicle; restructuring of the home; and escorts and interpreters for people with impaired sight and hearing.¹¹⁰

J: Cross-cutting issues

The aim of this paper is not to list and discuss how the State should implement all the commitments it made in the National Action Plan. It is however important to recognise that a number of matters cut across the whole National Action Plan and as such stakeholders should be ready to engage with them. Notably, the rights of women with disabilities as well as those of children with disabilities should be core considerations whenever non-state stakeholders are engaging with the State. Similarly, questions of statistics and data collection relate to all spheres of the lives of persons with disabilities and should therefore be handled within all the thematic contexts.

¹⁰⁹ Section 35 of the Persons with Disabilities Act, *supra*, and the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010, http://www.kenyalaw.org/LegalNotices/pop_in.php?file=377

¹¹⁰ Regulation 7, *supra*.

The Feedback and Validation Workshop made the following other recommendations:

1. Specific steps should be taken to ensure that the national population and housing census of 2019 takes account of persons with disabilities.
2. Refugees with disabilities and internally displaced persons with disabilities should be afforded reasonable accommodations.
3. Protective measures should be put in place in respect of children with disabilities who despite having parents are put in children's homes.

V: Conclusion

The main promise of the Constitution and the CRPD for persons with disabilities is that they are individuals with full personhood and humanity. The State has made its intentions of turning this promise into reality clear. Yet Kenya has been slow to take actions that make a real difference to the child, woman and man in the village or the streets. Non-state stakeholders therefore should remain eternally vigilant to ensure the State implements its commitments to persons with disabilities. The next few years will be critical in moving discussions forward from policy and law-making to actual implementation.

Annex: List of Organisations Which Participated in the Feedback and Validation Workshop

1. Autism Society of Kenya
2. CPSK
3. DBOA
4. Ecumenical Disability Advocates Network
5. Glaucoma Society of Kenya
6. GPCG
7. Handicap International
8. Kenya National Association of the Deaf
9. Kenya Paraplegic Organisation
10. Kenya Society for Persons with Albinism
11. National Gender and Equality Commission
12. Nyeri County Assembly
13. Sense International
14. SLY
15. Society for Professionals with Visual Disabilities
16. United Disabled Persons of Kenya
17. Women Challenge to Challenge