



United Disabled Persons of Kenya

CDRA

Caucus on Disability Rights Advocacy

THE PERSONS WITH DISABILITIES BILL, 2021

PUBLIC PARTICIPATION MEMORANDUM BY ORGANISATIONS OF PERSONS WITH DISABILITIES

3/10/2022

NAIROBI MARCH 2022

1. INTRODUCTION

1. This memorandum is prepared by the Caucus on Disability Rights Advocacy (CDRA) and the United Disabled Persons of Kenya (UDPK).
2. UDPK is an umbrella organization of national and grassroots associations of persons with disabilities in Kenya, presently comprising 183 organizations with active presence in all the 47 counties.
3. CDRA is a coalition of organizations of and for persons with disabilities which seeks to promote the interests of persons with disabilities in terms of the Constitution of Kenya, 2010.
4. The memorandum is submitted in response to the National Assembly invitation for public participation in the legislative process on the Persons with Disabilities Bill, 2022.

2. PROPOSALS FOR THE IMPROVEMENT OF THE PERSONS WITH DISABILITIES BILL 2021

5. PREAMBLE:

Recommendation:

Delete the entire framing of the Preamble to the Bill and substitute therefor the following new framing:

“AN ACT of parliament to give effect to the Constitution, to re-establish the National Council for Persons with Disabilities and to provide for its functions and powers; to provide for the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities; and for connected purposes”

Rationale: The framing as in the Bill, by specifically citing Article 54, restricts and/or limits the scope of the gains on the rights and entitlements of Persons with Disabilities in the Constitution to that Article. The rights and entitlements of Persons with Disabilities transcend the entire Constitution. The recommended framing is broad and covers the relevant components of the Bill clearly.

6. PART I - PRELIMINARY

Clause 2: Interpretation:

Definition of “Disability”

Recommendations:

2.1 Delete the definition of “**disability**” and substitute therefor the definition in Article 260 of the Constitution, namely –

“**disability**” includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long- term effect on an individual’s ability to carry out ordinary day-to-day activities”

Rationale: The definition in the Bill is not aligned with either the Constitution or the Convention on the Rights of Persons with Disabilities (UNCRPD)

2.2 Delete the word ‘permanent’ in the definition of “persons with disabilities” and substitute therefor the word ‘**long-term**’

Rationale: There is need for consistency in framing. The definition in the Bill is not aligned with either the Constitution or the Convention on the Rights of Persons with Disabilities (UNCRPD)

Clause 3. Guiding Principles

Recommendations:

3.1 Delete the word “**private**” in clause 3 (a) i.e. “*Respect for inherent dignity and individual autonomy including the freedom to make one’s own choices, and independence of all persons in the conduct of their private affairs*” so that the new framing reads -

“**Respect for inherent dignity and individual autonomy including the freedom to make one’s own choices, and independence of all persons in the conduct of their affairs**”

Rationale: The principle of independence is broad and should not be limited to conduct of private affairs.

3.2 Delete the word ‘**differences**’ in sub-clause (d) which reads “*Respect for differences and acceptance of persons with disabilities as part of human diversity and humanity*” and substitute therefore the word ‘**difference**’

Rationale: The framing connotes diversity and not ‘disagreements’

7. PART II: RIGHTS OF PERSONS WITH DISABILITIES

Clause 4 1a) Right to equality and non-discrimination.

Recommendation:

Delete sub-clause 1 (a) in its entirety and substitute therefor “**Every person with a disability is equal before and under the law and is entitled without any discrimination to protection and to equal benefit of the law**”

Rationale: Unnecessary phrasing. There are four critical elements which the new framing captures; namely ‘under, before, protection and equality before the law’.

Clause 6: Right to have a family

Recommendation:

Delete the word ‘*sexuality*’ in sub-clause 6(2) and substitute therefor the word ‘**sexual**’

Rationale: ‘Sexual’ is the universally accepted referencing.

Clause 10(1) Youth with Disabilities

Recommendation:

Delete the phrase ‘*young person with disability*’ in sub-clause 10 (1) and substitute therefor the phrase ‘**youth with disability**’.

Rationale: The concept of ‘young’ person is ambiguous. Reference should be ‘youth with disabilities’ to avoid ambiguity.

10 (2)

Recommendation:

Delete the introductory framing in sub-clause 10 (2) and substitute therefor the framing:

“The relevant ministries, departments and agencies shall take policy, legislative, administrative and other measures subject to consultation with and oversight of the National Council for Persons with Disabilities to ensure that rights of youth with disabilities are fully respected, including by ... - “

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels. The currently framing in the Bill is likely to lead to conflict of mandates and unhealthy duplication.

Clause 13 Right to Life

Recommendation:

Introduce the following new substantive clause and re-number the subsequent clauses appropriately:

“Every person with disability has inherent right to life, and integrity and that right shall be respected and protected”

Rationale: Persons with Disabilities are human persons entitled to life and protection of that life as other human persons.

Clause 18: Right to education

Sub-clause 18(3):

Recommendation:

Delete sub-clause 18 (3) and substitute therefor the following:

“The relevant ministries, departments and agencies shall facilitate, subject to consultation with and oversight of the National Council for Persons with Disabilities, participation of persons with disabilities in accessible and adaptable continuing adult education programmes in both public and private institutions of learning on an equal basis with others”

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels.

Sub-clause 18 (4)

Recommendation:

Delete the framing in sub-clause 18 (4) and substitute therefor the following:

“The relevant ministries, departments and agencies shall subject to consultation with and oversight of the National Council for Persons with disabilities ensure that persons with disabilities have access to inclusive education without discrimination and on an equal basis with others at all levels”

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels.

Sub-clause 18(8)

Recommendation:

Delete the introduction to sub-clause 18 (8) and substitute therefor the following:

“The relevant ministries, departments and agencies shall subject to consultation with and oversight of the National Council for Persons with disabilities ensure that: - ...”

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels.

Sub-clause 18(8)(c)

Recommendation:

Delete the introduction to sub-clause 18 (8) (c) and substitute therefor the following:

“The relevant ministries, departments and agencies shall formulate, subject to consultation with and oversight of the National Council for Persons with disabilities, strategies to implement inclusive education through ... : -“

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels.

Sub-clause 18(8)(c)(ii)

Recommendation:

Delete the phrase *'development of a least restrictive environment by'* in 18 (8) (c) (ii) so that the sub-clause reads “... **adaptation and structural adjustments of all educational institutions to the needs of persons with disabilities**”

Rationale: deleted phrase is superfluous

Sub-clause 18(8)(c)(v)

Recommendation:

Delete the word *'adoptive'* and substitute therefor the word **'adaptive'**

Rationale: deleted word has the meaning of embracing. 'Adaptive' has the meaning of adjusting to fit in given circumstances.

Sub-clause 19 (1) Right to Work and employment for Persons with disabilities

Recommendation: delete the word *'qualified'*

Rationale: The deleted word is redundant since the law cannot require unqualified people to be employed.

Sub-clause 19(2)

Recommendations:

Delete the phrase *"Every employer"* in sub-clause 19 (2) and Introduce the following new paragraphs and re-number the sub-paragraphs appropriately –

“19 (2) (a) Every public employer shall reserve at least five percent direct employment opportunities for persons with disabilities to secure employment;”

“19 (2) (aa) Every private sector employer shall, subject to verifiable economic performance, reserve at least five percent direct employment opportunities for persons with disabilities to secure employment;”

Insert a new sub-clause 19 (2) (b) with the following framing and assign roman numerical to (b) to (e) in appropriate order:

“19 (2) (b) notwithstanding the provisions of paragraphs (a) and (aa) above, every employer shall - ...”

Rationale: Public employers are obligated to implement the 5% provision of the Constitution, with penalties for non-compliance. Private sector cannot be obligated to implement the 5% principle since their capacity to meet the constitutional threshold is predicated on their revenue generation which is dependent on the performance of the economy. However, a private sector entity that has demonstrable and verifiable revenue and wilfully fails to match the employment quota to revenue generated should be penalised for such an amount equal to wages that would ordinarily accrue to employees with disabilities in the unmet quota. Revenue accruing from such penalties would be put into a kitty to enhance employment of persons with disabilities. Where on the other hand a private sector employer meets the quota stipulated by statute, such employer should be entitled to incentives contemplated in the Persons with Disabilities Act, No. 14 of 2003.

Sub-clause 19(2) (c)

Recommendations:

Delete the word '*solely*' in sub-clause 19 (2) (c)

Rationale: The current framing excludes other forms of discrimination against persons with disabilities

Sub-clause 19(5) (d), (e), (f)

Recommendation:

Delete the word '*qualified*'

Rationale: The deleted word is redundant since the law cannot require unqualified people to be employed.

Sub-clause 19(7) (c)(ii)

Recommendation:

Delete the framing in sub-clause 19 (7) (c) (ii) and substitute therefor '**denying opportunities to persons with disabilities**'

Rationale: Ambiguous framing

Sub-clause 19(7) (c) (iii)

Recommendation: Delete the phrase “for the known physical or mental limitations of an employee with disabilities”

Rationale: Superfluous

Clause: 20 No Dismissal of a person with disability

Recommendation: Delete the word ‘solely’

Rationale: The current framing excludes other forms of discrimination against persons with disabilities

Sub-clause 21(1) Incentive for private employer

Recommendation: Insert a coma immediately after the word ‘apply’ and insert the phrase “in prescribed form”

Rationale: Need for compliance with established uniform procedures

22. Right to Health

Recommendations:

Introduce the following new sub-clauses immediately after clause 22:

22 A “Persons with disabilities shall be entitled to be provided with health services as close as possible to their own communities”

22 B “Persons with disabilities shall be provided with care of the same quality as others, including on the basis of free and informed consent”

Rationale: Need for compliance with UN CRPD

Clause 23: Council to participate in health programmes

Sub-clause 23(1)

Recommendations:

Delete the intro to sub-clause 23 (1) and substitute therefor the following:

“Relevant ministries, departments and agencies shall, subject to consultation with and oversight of the Council, implement health programs for the purpose of’: -

Rationale: Good governance, disability mainstreaming and an inclusive approach to disability where each relevant ministry, department and agency must play a part in disability inclusion.

Clause 23A: Access to information and communication technology services

Recommendation:

Introduce a new Clause 23A and assign the current marginal note in Clause 24 to the new Clause 23A and insert the following phrase:

“Every person with disability has a right to access information and to use appropriate means of communication including Kenya Sign Language, display of text including Kenya Sign Language insets or subtitles and closed captioning on television programmes, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”

Rationale: Conformity with the Constitution and UN CRPD

Clause 24:

Recommendation:

Delete the current marginal note for Clause 24 and substitute therefor ‘Freedom of Expression’ and insert the following phrase:

“Every person with disability has the right to freedom of expression and opinion, including the freedom to seek receives and imparts information and ideas, and the right to access information on an equal basis with others in a timely manner and without additional costs”

Rationale: Freedom of expression is omitted in the Bill. It is a fundamental right which should accrue to persons with disabilities on equal basis with others

Clause 27: Accessibility

Sub-clause 27(4)

Recommendation:

Delete the current framing and substitute therefor the following:

“Every person with disability has a right to personal mobility, including the use of assistive devices of his or her choice and no person with disability shall be denied access to any place ordinary open to the public because of the nature of his or assistive devices”

Rationale: To remove ambiguity and have clarity

Clause 28 Adjustment Orders

Sub-clause 28(2)

Recommendation:

Delete the current framing and substitute therefor the following:

“If relevant ministries, departments and agencies, in consultation with and oversight of the National Council for persons with disabilities, considers that any premises, services or amenities are inaccessible to persons with disabilities by any structural, physical, administrative or other impediment to such access, the ministries, departments and agencies shall subject to this section, serve upon the proprietor of the premises, or provider of services or amenities concerned, an adjustment order ...;-“

Rationale: The mandate of the National Council for Persons with Disabilities largely advisory and oversight. It cannot take over the policy and statutory mandates of the various ministries, departments and agencies in the Executive Branch of Government at the County and National levels.

Clause 30: Living in the community

Recommendations:

30.1 Delete the marginal note for sub-clause 30 (1) and substitute therefor:

‘Living in the community’ and delete the phrase *“independent living”* in the text of the clause and substitute therefor **“living in the community”** with choices on an equal basis with others and including...”

Rationale: Contextualizing UN CRPD in Kenya

30.2 Sub-clause 30 (2)

Recommendations:

Delete sub-clause 30 (2) in its entirety and substitute therefor the following new marginal note and text:

‘Right to Adequate standard of living and social protection’

30 (2) “Every person with disability has a right to an adequate standard of living and for social protection”

Rationale: The current framing of sub-clause 30 (2) is misplaced and a misconception. Adequate standard of living is a human right entitlement for persons with disabilities. The new framing contextualizes UN CRPD in Kenya

Clause 31A: Disability Data and standards

Recommendations:

Introduce a new Clause 31A with the following marginal note and text:

‘Disability Data and standards’

“The National Council for Persons with Disabilities shall work with relevant ministries, depts and agencies, including the Kenya National Bureau of Statistics towards collection of accurate and timely data on persons with disabilities. This data shall be disaggregated including on the basis of gender, age, disability status and geographical location for use of disability inclusion, planning, programming implementation and monitoring”

Rationale: The Bill has omitted the aspect of data which is a key component in disability inclusion sensitive development planning and resource allocation

8. PART III – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES

Sub-clause 34 (2)

Recommendation:

Delete sub-clause 34 (2) and substitute therefor:

“The Council shall establish its offices and decentralize its services to every county and to any other parts of the country as it considers necessary in accordance with Article 6 (3) of the Constitution”

Rationale: Need to acknowledge Devolution

Sub-clause 35 (1) (a)

Recommendation:

Delete sub-clause 35 (1) (a) and substitute therefor the following:

“The Council shall advice, supervise, and monitor all relevant ministries, departments and agencies for accessibility of information, goods, and services and built environment for persons with disabilities and for provision of reasonable accommodation for effective participation of persons with disabilities in society”

Rationale: The role of the Council is largely oversight and advisory

Sub-clause 35(1)(c)

Recommendation:

Delete the word *‘Facilitate’* and substitute therefor the word **‘Advice’**

Rationale: The role of the Council is to advice the relevant ministries, departments and agencies collect relevant and timely data on persons with disabilities and disaggregate this data into including gender, disability and age

Sub-clause 38 (1) (d) (ii)

Recommendation:

Delete the phrase *“parents of persons with mental disabilities”* and substitute therefor the phrase **“parents of children with disabilities”**

Rationale: Acknowledgment of vulnerability of children with disabilities and the multiple burdens put on parents.

9. PART IV – RELIEFS AND INCENTIVES

Sub-clause 53(3)

Recommendation:

Delete the phrase *“specially designed”* and the phrase immediately after the words *“value added tax”* and substitute therefor **“which would in not in any way lead to increased costs so as to disadvantage persons with disabilities’**.

Rationale: The intention contemplated in the Persons with Disabilities Act No. 14 of 2003 is imported here in conformity with the globally established dictum that a right enjoyed over a period of time may not be derogated from without grant of a similar or higher entitlement or benefit

Sub-clause 53 (4)

Recommendation:

Insert a comma immediately after the words “value added tax” and insert the following phrase followed by another comma “**which would in any way defeat the purposes of or increase the costs of such donations ...**”

Rationale: Multiple taxes on donation inhibit access to such donations by persons with disabilities

Sub-clause 53 (5)

Recommendation:

Insert a comma immediately after the words “value added tax” and insert the following phrase followed by another comma “**which would in any way defeat the purposes of or increase the costs of such donations ...**”

Rationale: Multiple taxes inhibit access to such purchase, importations, transfers, gifts and health equipment by persons with disabilities

Sub-clause 56 (1) (b)

Recommendation:

Delete the phrase “*to meet the special needs of*” and substitute therefor: “**for accessibility of**”

Rationale: The term ‘*special needs*’ is restrictive

10.PART V – RELATIONSHIP BETWEEN THE NATIONAL GOVERNMENT AND COUNTY GOVERNMENTS ON MATTERS OF DISABILITY

Sub-clause 59(2)

Recommendation:

Delete the word “*only*”

Rationale: Superfluous

Sub-clause 60 (1)

Recommendation:

Delete the word “*only*”

Rationale: Superfluous

Sub-clause 60 (2) (c)

Recommendation:

Delete the word '*cultural*' immediately after the word '**Harmful**'

Rationale: Harmful practices are broad to include cultural, religious

Sub-clause 61 (1)

Recommendation:

Delete the word '*knowingly*'

Rationale: Superfluous

Sub-clause 62

Recommendation:

Delete the word '*knowingly*'

Rationale: Superfluous

Sub-clause 63

Recommendation:

Delete the words '*voluntarily*' and '*knowingly*'

Rationale: Superfluous

Sub-clause 64 (4)

Recommendation:

Delete the phrase '*who causes disability of another person or*' immediately after 'medical practitioner and substitute therefor the phrase '**any person including doctors**'.

Rationale: The Bill concerns persons without disabilities and not for 'other persons'

11.PART VI – NATIONAL DEVELOPMENT FUND FOR PERSONS WITH DISABILITIES

Recommendation:

Introduce a new Part VI - National Development Fund for Persons with Disabilities with the following marginal notes and provisions and re-number the Bill as appropriate:

Establishment of the Fund

Sub-clause 65 (1) There is established a Fund to be known as the National Development Fund for Persons with Disabilities

(2) The Fund shall be established as a permanent fund and the income therefrom shall be used for the benefit of persons with disabilities in Kenya.

(3) The Fund shall be administered by the Council through a board of trustees established under clause 66.

Sources of and Payments from Fund

Sub-clause 66 (1) The sources of the Fund shall be—

- (a) such moneys as may be appropriated thereto by Parliament;
- (b) income generated by investments made by the trustees; and
- (c) any other donations which the Council may receive for purposes of the Fund.

Trustees to manage Fund

Clause 66 (1) The Fund shall be managed by a Board of Trustees which shall consist of—

- (a) the Chairman of the Council;
- (b) the Director of the Council who shall be the secretary to the Board;
- (c) a representative of the Minister appointed by the Minister;
- (d) a representative of the Ministry responsible for finance appointed by the Minister responsible for finance;
- (e) four representatives appointed by the Council consisting of—
 - (i) one representative nominated by organizations of persons with visual disabilities;
 - (ii) one representative nominated by organizations of persons with hearing disabilities;
 - (iii) one representative nominated by organizations for persons with mental disabilities; and

- (iv) one representative nominated by organizations for persons with physical disabilities
- (f) not more than three persons co-opted by the Council to represent the donors that in its opinion have substantially supported the welfare of persons with disabilities.

(2) The Minister shall appoint one of the persons appointed under subsection (1) (e) to be the treasurer to the Fund.

(3) The Board shall conduct its affairs in accordance with regulations prescribed by the Council subject to any law relating to trustees.

Application of the Fund

Sub-clause 67 Without limiting the generality of sub-clause 65 (2), the Board of Trustees may, out of the Fund—

- (a) contribute to the expenses, including capital expenses, of organizations of or for persons with disabilities;
- (b) contribute to the expenses, including capital expenses, of institutions that train persons in the care of persons with disabilities;
- (c) contribute to the capital expenses of projects undertaken by the Government for the benefit of persons with disabilities;
- (d) provide or contribute to the cost of assistive devices and services;
- (e) pay allowances to persons with disabilities falling in the following categories and who have no other source of income—
 - (i) persons with severe disabilities and who are therefore not trainable in any skills;
 - (ii) aged persons with disabilities; and
 - (iii) single parents with children with disabilities and who cannot therefore seek employment;
- (g) make payments or contributions for such purposes as may be prescribed by the Council.

Rationale: The intention contemplated in the Persons with Disabilities Act No. 14 of 2003 establishing the Fund is imported here in conformity with the globally established dictum that a right enjoyed over a period of time may not

be derogated from without grant of a similar or higher entitlement or benefit. When established under Section 24 of the Public Finance Management Act, 2012, the transition to the enabling Act shall not derogate, disrupt or in any way take away the continuing benefits accruing to persons with disabilities and may only enhance the scope and scale of such benefits. Furthermore, any such transition shall be seamless and expeditious without inordinate delays.

/END/11/03/2022