

## **DISCUSSION POINTS FOR WORKSHOPS**

### **A. Mandate for Investigation**

1. The South African Law Reform Commission (the Commission) received a request to investigate the way in which the **United Nations Convention on the Rights of People with Disabilities** (UNCRPD) should be made a part of the law in South Africa, in May 2018, from the Department of Justice and Constitutional Development (DOJ&CD).

### **B. How does the UNCRPD become law in South Africa?**

2. There are a number of ways to make the UNCRPD part of our law, for example making one new law to cover all parts of the UNCRPD or by changing laws that are already in place to ensure that they recognise people with disabilities.

### **C. Process of the Commission**

3. The Commission does an investigation in three steps, which is an issue paper, discussion paper and a report. The reports mostly include draft law. Public consultation following the issue paper and discussion paper is an important part of the Commission process.

### **D. Legal measures necessary to get the UNCRPD to become law in South Africa**

#### **1. The social model of equality**

4. This model implies that people with disabilities are disabled because of societal, attitudinal, and physical barriers. Therefore, it is not because of having a disability that a person experiences being disabled but rather that society is not inclusive of them. Equality is therefore the ability to ensure that all people have equal access to opportunity. This is called substantive equality or equality of outcomes and is the preferred model for implementation of the UNCRPD.

## **2. Creating a definition of disability and reasonable accommodation**

5. A definition of disability is needed to define the recipients of different advantages in different contexts under the law. One context may seek to provide protection against individual discrimination or serve as a tool for the advancement of disadvantaged groups (affirmative action). Another context seeks to allocate benefits and achieve social protection or security. Reasonable accommodation is necessary to correct an unequal playing field for disadvantaged groups or individuals. Reasonable accommodation is present in The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and found in the White Paper on the Rights of Persons with Disabilities.

6. The UNCRPD also has a definition of disability. The definition makes the denial of reasonable accommodation discrimination. Articles 1- 5 of the UNCRPD are important.

## **E. The South African Constitution**

7. The Constitution of South Africa has the bill of rights that makes it possible for people to be treated equally. It makes provision for equality of outcomes. All rights are applicable to all persons except where they are confined to citizens like political rights. It makes provision for equality in section 9.

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

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

### **4. Equality according to PEPUDA**

9. PEPUDA assists in understanding the manner in which the right to equality is implemented in South Africa. PEPUDA states in section 6 thereof that "neither the state nor any person may discriminate unfairly against any other person." Prohibition of discrimination on the grounds of gender and disability exists. The act deals with disability in section 9.

10. PEPUDA also prohibits hate speech, harassment and the dissemination and publication of information that unfairly discriminates. (The provisions still have to be promulgated)

## **F. Why was the UNCRP developed?**

11. The UNCRPD provides for the protection and inclusion of the rights of persons with disabilities into society as well as the obligations of States party to the UNCRPD.

## **G. UNCRPD as an international instrument: reporting obligations and the concluding observations**

12. A state is bound to the provision of the UNCRPD once it becomes a party. Oversight is done by the Committee on the Rights of People with Disabilities through a report. The report is an indication of what the state has done in developing the UNCRPD. The Committee then delivers concluding observations to which a state must adhere. South Africa received comments on 26 articles in total.

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

13. South Africa has developed the following in an effort to domesticate the UNCRPD:
- a. Integrated National Disability Strategy White Paper Office of the President 1997 (INDS)
  - b. Baseline Country Report to The United Nations on the Implementation of The Convention on The Rights of Persons with Disabilities in South Africa (Baseline report) 2013
  - c. The White Paper on the Rights of Persons with Disabilities (WPRPD) 2015 and its Implementation Matrix
  - d. Twenty Year Review South Africa 1994-2014 Background Paper: Disability (Twenty Year Review)
  - e. The National Development Plan 2030 Persons with Disabilities as Equal Citizens (Equal citizens plan)
  - f. Medium Term Strategic Framework and Its 14 Outcomes (MTSF) 2014-2019

- g. National Disability Rights Machinery (NDRM)

## **I. Current development**

### **5. Institutional involvement**

14. The Department of Women, Youth and Persons with Disabilities is responsible for issues related to disability. All government departments, provincial legislatures and local authorities are involved. The Parliamentary Portfolio Committee on Women, Children and Persons with Disabilities is also involved. The Public Protector; the South African Human Rights Commission and the Presidential Working Group on Disability are relevant. Implementation includes the involvement of institutional organisations and organisations of persons with disabilities. The WPRPD describes the institutional cooperation that will be needed.

### **6. Legislation**

15. Legislation is in existence in the following areas that deal with disability rights in a piece meal fashion:

transport, education, building, health, political rights, women and children, older persons, adequate standard of living and social protection, labour rights, insurance, copyright, legal capacity: civil and criminal law: assisted decision making and hate crimes, and provisions that deal with witchcraft, and trafficking of persons.

16. The common law crimes like murder, assault, and criminal defamation are also relevant. Also included is consumer protection and there is also talk about making sign-language the 12<sup>th</sup> official language. The law on disability rights is also regulated by the common law and case law.

## **J. Benchmarking in other divisions**

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

comparative study was done are Kenya, Malawi, Uganda, Canada, Germany, USA, Australia and the United Kingdom.

## **K. Benchmarking with international law**

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

19. The 2030 Sustainable Development Goals and a host of other UN Conventions are also applicable.

## **L. The process of domestication**

20. Section 231 of the Constitution defines the process of domestication (how to get the UNCRPD into South African law). Section 231(4) of the Constitution states that a convention has to be implemented by an act of parliament before it can be part of South African law.

## **M. Possible solutions**

- a. Create a general anti-discrimination act that regulates all discrimination grounds for example racial discrimination;
- b. Create individual laws dealing with each area of discrimination for example in employment and education law; or/and
- c. The creation of disability equality laws, which prohibits discrimination and addresses issues relating to persons with disabilities. Such legislation can deal with for example policies and bodies. Specific separate legislation might be needed to address areas that need regulating in detail.

## **N. Call for comment: questionnaire**

21. The SA Law Reform Commission (SALRC) has published its Issue Paper on the Domestication of the United Nations Convention on the Rights of Persons with Disabilities, which defines the current problems.
22. The SALRC requests you to give your comments and recommendations on what you think needs to be done to address and remedy the problems the SALRC has identified in the Issue Paper.
23. To guide your comments and recommendations, the SALRC has prepared the Questionnaire below, which focuses on key problems and how these might be addressed.
24. You are requested to give your inputs on either all of the questions in the Questionnaire below, or to just those that you feel most strongly about, or those you are more familiar with.
25. Before you comment, you might like to read more about the issues itself in specific parts of the SALRC Issue Paper that this Questionnaire is part of.
26. To make it easier for you to find information on the issue you want to comment on in the Issue Paper, the relevant chapters and pages are given in the Questionnaire.
27. Please follow the numbering used by the Questionnaire below so that the SALRC will know what specific issue/question you are responding to, and are most concerned about.
28. You are welcome to respond to any other issues related to disability that you feel should have been in the Issue Paper or in the Questionnaire below.
29. Your comments and inputs are valuable to the SALRC. Thank-you for your interest and concern and for taking the time to read and respond.

30. To ensure access and accessibility of all interested persons, this summary of the Issue Paper and Questionnaire are available on the website of the DOJCD and the SALRC at <http://salawreform.justice.gov.za>.

31. Please post / e-mail / fax your typed / written responses to the SALRC at:

The Secretary

South African Law Reform Commission

Private Bag X668

PRETORIA 0001

Tel: 012 622 6316

Fax: 0864841293/0866826894

Email: [disabilityresponse@justice.gov.za](mailto:disabilityresponse@justice.gov.za)

Attention: Ms T Prinsloo

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

### 1. Need for an Act

32. Why do you think an Act is necessary? (Chapter 2 p 10 – 45)

### 2. Scope of an Act

33. What areas of law should be reviewed? (Chapter 3 p 46 – 65; chapter 5 p 97 - 104 and chapter 6 p 105– 144)

### 3. Type of Act

34. The UNCRPD is divided into substantive law (provisions that need to be implemented) and organisational requirements. (chapter 10 p 193 - 195 ) To give effect to both of these in line with the UN Handbook suggestions (pages 192 - 198), which of the following are suitable:
- (a) A general anti-discrimination act that focuses on all disability-related Constitutional rights: equality and no unfair discrimination (section 9), dignity (section 10), and all relevant further rights in the Bill of Rights (sections 10 – 35)?
  - (b) A specific disability act dealing only with industry regulators and Chapter 9 state institutions charged with ensuring the protection of rights of persons with disabilities? or
  - (c) A form of legislation that
    - (i) deals with industry regulators and Chapter 9 institutions, but also
    - (ii) gives effect to the Constitutional rights of persons with disabilities to equality and no unfair discrimination, dignity, and all the relevant further rights in the Bill of Rights, focusing on their influence on disability rights,? and in addition is it necessary to,
  - (d) amend existing legislation to delete provisions that are unfair barriers / unfairly discriminate on the ground of disability, and to enact new provisions aligned to UNCRPD and Constitutional obligations?
  - (e) promulgate regulations, or publish helpful Codes of Good Practice under legislation to guide and support regulators and those with a duty to comply?

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

35. What should be the role of the South African Human Rights Commission (SAHRC), other chapter 9 institutions and provincial and local government?
36. How should the UNCRPD be monitored?
37. How do you feel the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which prohibits unfair discrimination (and will in future promote equality) on the ground of disability can support and fit into the broader disability discourse?
38. How could a possible future Act advance the National Action Plan (NAP) goal to combat racism, racial discrimination, xenophobia and related intolerances?
39. Would you like to refer us to examples of an Act regarding disability or discrimination or any other related topic?

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

40. Are there any other pieces of legislation that deal with disability or that create barriers to persons with disabilities that you are aware of besides those mentioned in this paper?
41. Do you have any critique or positive comments on any of the existing legislation? Please let us know your concerns.
42. Do you have proposals as to how to mainstream disability in the legislative framework?

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

43. Are you aware of the civil law remedies that persons with disabilities can use if their rights have been violated? Do you feel these civil law remedies are effective and adequate? Would you like to suggest others?
44. Are you aware of the criminal law offences that persons with disabilities can rely on to penalise, punish and prevent persons who act in a criminal manner toward persons with disabilities? Do you feel the criminal law offences are effective and adequate? Would you like to suggest others?
45. What acts or omissions would you consider to amount to criminal conduct, and how would you suggest that such acts should be regulated?
46. Do you have a concern around what the law says (Chapter 6 p 129 – 136 Par E – F) about the ability/capacity of a person with a disability to commit a crime, and about the state's ability to hold them responsible for it?
47. Do you have a concern about what the law says about the right of a person with a disability to make their own decisions? (Chapter 4 p 77 par 4.37 - p 79 par 4.43; chapter 6 p 121– 124)
48. Is there anything in terms of the impact of the criminal and civil aspects of the common law that deal with disability aspects that you want to see changed, improved or strengthened? If so, what?

**6. Harmful practices** (Chapter 4 p 73 par 4.24 – 4.25; p 76 – 77 par 4.34; chapter 6 p 140 par 6.141 – p143 par 6.148)

49. How do you suggest the process of the domestication of the UNCPRD deal with the impact of harmful practices, based on tradition, belief, culture, religion and the like-that are experienced by persons with disabilities?

50. Do you have concerns about human trafficking of persons with disabilities (page 141 section 5) and do you have suggestions in this regard?
51. Do you have concerns about mistreatment and abuse of persons with disabilities, with regard to for example chaining, imprisonment, isolation, segregation and trading in body parts of persons with disabilities? Do you have suggestions in this regard?

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

52. Do you feel that new types of specific criminal offences should be created if it is committed against a very vulnerable person that is subject to exploitation and abuse, due to a disability, and therefore should be entitled to greater protection against harm?
53. If you do, let us know what such an offence/s should look like and what the penalty on conviction should be (imprisonment, fine, community service or any other punishment).
54. What kinds of conduct of a criminal nature do you recommend should be covered? Should the conduct (either an act or omission, or both) be linked to breaches of constitutional rights alone, or be extended to ableism, hate crimes, hate speech, harassment and victimisation?
55. Do you feel that very serious conduct that persons with disabilities can be subjected to should be “criminalised” because of the vulnerability of the persons and the harm they suffer? For example, acts and omissions of harm and abuse arising from tradition, belief, culture, religion and the like relating to albinism, serious mental illness, intellectual disability, witchcraft, grave-robbing, chaining, imprisonment, isolation and segregation?
56. Criminalisation of specific conduct brings the rights and interest of the most vulnerable persons with disabilities into sharp focus. What further protection do you feel is needed or would be justified?

57. How should the law deal with unborn children that present with a disability in the womb?
58. Do you have comments or suggestions on each of the observations made by the UN in the *United Nations in South Africa Committee on the Rights of Persons with Disabilities: Concluding Observations on the Initial Report of South Africa*? You can read a summary of the UN observations in Chapter 4 at page 71 section D.
59. Do you agree with the observations? If you do not, let us know why not, and if you do let us know why you do.
60. Do you have any suggestions or recommendations on how to comply with the UN observations?

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

61. Do you identify any gaps between the 2015 *White Paper on the Rights of Persons with Disabilities* (see Chapter 1 page 35, Chapter 2 pages 46 – 50 and Chapter 5 pages 101 - 104) and the legislative framework (see pages 105-144)?
62. Do you have some recommendations for how these gaps need to be filled?
63. How do you envision the implementation of the White Paper?
64. As the White Paper states that it builds on the existing initiatives in terms of disability, how and where can the 1997 *Integrated National Disability Strategy White Paper* (see Chapter 3 pages 51 - 53) be used?
65. What is the link between the 2015 White Paper, *the National Development Plan 2030 Persons with Disabilities as Equal Citizens (Equal Citizens plan)* (Chapters 3 pages 46 – 53; 54 - 56) and the 1997 *Integrated National Disability Strategy*? (Chapter 3 page 51 section C)

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

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

67. What barriers can you identify that cause unfair discrimination on the ground of disability?
68. How should these barriers be identified, addressed and eradicated?
69. Can you think of any other pieces of legislation that directly or indirectly deal with disability or that create barriers to persons with disabilities besides those mentioned in this paper?
70. Do you feel that the common law (principles established in decisions of the Courts) may create-barriers for persons with disabilities? Let us know how you feel this can happen and how you feel it can be rectified?

**10. De-institutionalisation and Incarcerated Persons with Disabilities** (Chapter 4 page 73 – page 75 par 4.30; page 80 par 4.47 – page 88 par 4.60; Page 86 section 17)

71. What are your views and recommendations on the requirement of de-institutionalisation as indicated in the UNCRPD *Article 14: Liberty and Security of the Person*
72. What are your views and recommendations on the situation of persons with disabilities in institutions and places of detention and the monitoring of conditions in such places?

## **11. Insurance, Pensions, Workmans Compensation and Social Grants**

73. Is the current legislation relating to insurance coverage, eligibility, exclusions, underwriting and assessment of persons with disabilities fair, justifiable and sufficient? (chapter 6 p 111 par 6.23)
74. Is the current legislation relating to retirement funds and pensions that aim to afford a level of retirement security for persons with disabilities fair, justifiable and sufficient?
75. Is the current legislation relating to compensation for occupational injuries and diseases, which compensate employees disabled by occupational injuries and diseases fair, justifiable and sufficient? (Chapter 4 page 87 par 4.74; Chapter 6 page 113 par 6.31)
76. Are the current measures relating to social grants, that that aim to provide a level of social security to persons with disabilities fair, justifiable and sufficient? (Chapter 4 page 84 par 4.59; Chapter 6 page 110 – 111 par 6.21)

## **12. Gender based violence**

77. What do you feel are the problems surrounding gender-based violence against persons with disabilities? (Chapter 4 p 72 – 73 section 2; page 77 section 8 par 4.37 – 4.39; page 81 section 1 – page 83 section 13)

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

78. What principles and approaches that other African and Western countries (pages 151-188) followed would work well for South Africa?

**14. International law as a Guideline for Domestication** (Chapter 1 page 7 – 9; Chapter 7 p 144 – 148)

79. The 2018 *African Charter on Human and People's Right on the Rights of Persons with Disability in Africa* and 2019 *Pan African Model Law on Disability* are important.(Chapter 9 pages 168 – 170)

80. What weight should be given to these two African treaties when domesticating the UNCRPD?

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

**15. Security services** (Chapter 4 page 79 section 9 – page 83 section 12)

82. Are you concerned about the way in which members of the public and private security services interact with persons with disabilities? If you have concerns in this regard, please describe your concerns. Do you have thoughts and recommendations about how problems can be rectified?

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

**16. Asylum and refugees**

84. What are your concerns about the treatment of disabled refugees and asylum seekers in, for example, labour law, detention? (Chapter 2 p 14 par 2.19)

**17. Other**

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

86. What is your understanding of “on an equal basis with others” in relation to the UNCRPD?
87. What are your proposals for ensuring that articles 3 and 4 of the UNCRPD are included in the proposed legislation?
88. The SALRC has noticed that the following topics are of extreme importance in the discussion on the right of persons with disabilities and therefore it has been flagged for the purposes of eliciting comments that indicate whether the current situation in law are acceptable or whether you feel that law reform should take place in favour of persons with disabilities:
- a. Elder abuse especially when an elderly persons suffers from dementia;
  - b. Euthanasia;
  - c. The treatment in prison (remand detainees and convicted offenders) of mentally ill persons;
  - d. Abortion of a fetus on the grounds of the fetus having a disability;
  - e. Intellectually disabled children, persons with head injuries or sufferers from Down syndrome in terms of capability of giving evidence;
  - f. Liability for omissions (criminal and civil) (not acting when one should) when dealing with vulnerable persons and elderly vulnerable persons;
  - g. Insurance discrimination issues;
  - h. The Life Esidimeni Debacle; and
  - i. Any offensive language.