

NATIONAL UNIVERSITY OF LESOTHO

Bureau of Projects, Training and Consultancy [NUL-CONSULS]

**RESEARCH REPORT ON THE COVERAGE AND INCLUSION OF DISABILITY
SPECIFIC ISSUES IN THE LAWS OF LESOTHO**

Submitted to

The Lesotho National Federation of Disabled (LNFOD)

22 Mabile Road Old Europa Maseru

December 2011

Table of Contents

LIST OF ABBREVIATIONS	i
INTRODUCTION	1
1 Background of the research	1
1.1 Defining Disability.....	1
1.2 Socio-legal implications of disability	3
1.3 Objectives of the study.....	4
1.3.1 General Objective	4
1.3.2 Specific Objectives	5
1.4 Research Methodology	5
1.4.1 Data Collection	5
1.4.2 Data analysis	6
PART 2.....	6
2. INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION OF PWDs ..6	
2.1 Introduction	6
2.2 The United Nations System	7
2.3 The African Human Rights System.....	12
2.4 Protocol to the African Charter on the Rights of Women	14
2.5 African Charter on the Rights and Welfare of the Child.....	15
2.6 The Southern African Development Community (SADC).....	16
2.7 Conclusion.....	17
PART 3.....	18
DOMESTIC LEGAL FRAMEWORK FOR PROTECTION OF PWDs	18

3.1	Introduction	18
3.2	Non-Discrimination.....	20
3.3	Education	21
3.4	Health	25
3.5	Social Inclusion	29
3.5.1	Habilitation and rehabilitation	30
3.5.2	Work and Employment.....	32
3.5.3	Access to physical environment	36
3.5.4	Adequate standard of living and social protection	37
3.5.5	Participation in political and public life.....	38
3.5.6	PWDs in the Criminal Justice System	38
3.6	Participation in cultural life, recreation, leisure and sport.	40
3.6.1	Participation in cultural activities	40
3.6.2	Recreation, leisure and sport.....	41
PART 4	.....	43
4.	CONCLUSIONS AND RECOMMENDATIONS	43
BIBLIOGRAPHY	.....	46
Acts	.....	46
Articles	.....	46
International instruments	.....	47
Reports, Comments, Recommendations and Guidelines	.....	48
Policies, Programmes and Strategies	.....	49
Books	.....	49

Cases	50
Websites	50

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ARI	Agreement on Rehabilitation Institutions
ART	Anti Retroviral Treatment
AU	African Union
BEDCO	Basotho Enterprizes Development Corporation
BOS	Bureau of Statistics
CBR	Community Based Rehabilitation
CEDAW	Convention on Elimination of all forms of Discrimination Against
CERD	Convention on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with disabilities
GOL	Government of Lesotho
HTC	HIV Testing and Counseling
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of functioning, disability and health
ILO	International Labour Organisation
IVRC	Ithuseng Vocational Rehabilitation Center
LCO	Labour Code Order
LNDC	Lesotho National Development Corporation
LNFOOD	Lesotho National Federation of Organisations of Disabled
MI Principles	Principles for the Protection of Persons with mental illness and the Improvement of mental health care 1991
MOET	Ministry of Education and Training
MOHSW	Ministry of Health and Social Welfare
NAC	National Aids Commission

OAU	Organization of African Unity
PMTCT	Prevention of Mother to Child Transmission
PWDs	Persons With Disabilities
SADC	Southern African Development Community
SAFOD	Southern African Federation of Organizations of Disabled
SEN	Special Education Needs
SEU	Special Education Unit
STI	Sexually Transmitted Infections
TSC	Teaching Service Commission
UDHR	Universal Declaration of Human Rights
UCT	Universal Counseling and Testing
UN	United Nations
UNDP	United Nations Development Programme
UN GA	United Nations General Assembly
VCT	Voluntary Counseling and Testing
WHO	World Health Organization
WPA	World Programme of Action Concerning Disability

PART 1

INTRODUCTION

1 Background of the research

1.1 Defining Disability

There are many different definitions of disability which are influenced by different historical perspectives of disability. Historically disability was understood in mythological or religious terms;¹ e.g. people with disabilities were considered to be possessed by devils or spirits; disability was also often seen as a punishment for past wrongdoing.² In the nineteenth and twentieth centuries, developments in science and medicine helped to create an understanding that disability has a biological or medical basis, with impairments in body function and structure being associated with different health conditions.³ This medical model views disability as a problem of the individual and is primarily focused on cure and the provision of medical care by professionals.

Later, in the 1960s and 1970s, the individual and medical view of disability was challenged and a range of social approaches were developed, e.g. the social model of disability. These approaches shifted attention away from the medical aspects of disability and instead focused on the social barriers and discrimination that people with disabilities face. Disability was redefined as a societal problem rather than an individual

¹ CBR Guidelines p15.

² As above.

³ As above.

problem and solutions became focused on removing barriers and social change, not just medical cure.⁴

It is on the basis of these social perspectives or approaches to disability that the United Nations General Assembly adopted a definition of disability as a condition caused by an accident, trauma, genetics or disease, which may limit a person's mobility, hearing, vision, speech or mental function.⁵ The Convention on the Rights of Persons with Disabilities, defines disability as an evolving concept that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”⁶ The International Classification of Functioning, Disability and Health (ICF), also defines disability as an “umbrella term for impairments, activity limitations or participation restrictions,” which result from the interaction between the person with a health condition and environmental factors (e.g. the physical environment, attitudes), and personal factors (e.g. age or gender).⁷

The term “handicap” is also often used when referring to disability.⁸ The use of this term is however discouraged because of negative connotations that it carries. Many people believe that the term "handicapped" was first used in relation to individuals who have disabilities when Civil War veterans whose injuries prevented them from working were begging on the streets with "cap in hand."⁹ Standard references do not support this

⁴ As above.

⁵ UN General Assembly 48th session.

⁶ *Convention on the Rights of Persons with Disabilities*. New York, United Nations, 2006 (www.un.org/esa/socdev/enable/rights/convtexte.htm, accessed 16 June 2010).

⁷ *International classification of functioning, disability and health (ICF)*. Geneva, World Health Organization, 2005 (www.who.int/classifications/icf/en/, accessed 12 October 2011).

⁸ For instance, section 2 of the Education Act 2010.

⁹ Accessibility tools *Disabled or handicapped? Which term should be used?* MTDC facilities tool box

story. But because the story has become legend and begging for a living is degrading, describing people with disabilities as "handicapped" is offensive.¹⁰ Oxford Advanced Learners' Dictionary defines handicap as a thing that makes progress difficult; a disadvantage.¹¹ Therefore, for purposes of this research, the term disability means disability as defined in the CRPD. The term "persons with disabilities" (PWDs), is used to refer to persons who have long-term physical, mental, intellectual or sensory impairment.¹²

1.2 Socio-legal implications of disability

PWDs make up an estimated 15% of the world's population. Almost one-fifth of the estimated global total of PWDs (between 110 - 190 million) encounter significant disadvantages in their societies and are often subjected to stigma and discrimination, largely marginalized, disproportionately poorer, frequently unemployed and have higher rates of mortality.¹³

This statement sums up the plight of PWDs worldwide and Lesotho is no exception. The majority of persons with disabilities live in less developed countries where people lack essential services such as health care.¹⁴ This number is increasing every year due to factors such as war and destruction, unhealthy living conditions, or the absence of knowledge about disability, its causes, prevention and treatment.¹⁵

¹⁰ As above.

¹¹ Oxford Advanced Learners' Dictionary 1995 Oxford University Press.

¹² As defined in Article 2 of the Convention on the Rights of Persons with Disabilities 2006.

¹³ Department of Economic and Social Affairs (DESA) Economic Social and Cultural Council (ECOSOC) December 2011 (www.social.un.org accessed 7 December 2011).

¹⁴ Chitereka C, "People with disabilities and the role of social workers in Lesotho", (2010) Social Work and Society International online journal vol. 8, no.1.

¹⁵ Chitereka (note 14 above).

According to the Ministry of Health and Social Welfare's National Disability and Rehabilitation Policy (2011), Lesotho has very limited coordinated disability database to provide statistics of people with disabilities. More importantly, there is no comprehensive national disability survey that has been undertaken in the country. However, the results of the national census conducted by the Bureau of Statistics (BOS) indicate that about 3.7% of the population of Lesotho has some form of disability or another.¹⁶ According to these statistics, 2.1% constitute males while 1.6% constitutes females. The 2001 census indicates that for all types of disability except for blindness, disability ratios are almost twice as high for males as opposed to females. Disability rates for each disability are considerably higher in rural than in urban areas.¹⁷

Over and above the general lack of resources, persons with disabilities in Lesotho suffer from discrimination, stigmatization and are often viewed as charity cases by other members of society. This is so because Basotho have historically imposed barriers that subject persons with disabilities to isolation and exclusion from the society and extreme dependency on their families and the society at large.¹⁸ In addition, they often do not enjoy the same opportunities as other people because of the lack of access to essential services.¹⁹ As a result, most of their fundamental human rights including right to equality before the law, freedom from discrimination, right to equal opportunity, the right to independent living and full integration within the society are often violated.

1.3 Objectives of the study

1.3.1 General Objective

The general objective of the research is to determine the level of coverage and inclusion of disability specific issues in the laws and policies of Lesotho. This includes

¹⁶ Lesotho demographic survey 2006

¹⁷ Chitereka (note 14 above).

¹⁸ LNFOD study on the living conditions of persons with disabilities 2010.

¹⁹ Living Conditions Study (note 18 above).

examination of both the substance and implementation of national laws and policies relating to education, health, livelihood, empowerment and social protection.

1.3.2 Specific Objectives

- (a) To determine a legal framework appropriate for protection of PWDs in Lesotho
- (b) To identify and analyze all international instruments that promote the rights of people with disability;
- (c) To review national laws and policies in Lesotho and the extent to which they cover or include disability specific issues;
- (d) To assess the extent to which Lesotho has implemented its international obligations to respect, fulfill, promote and protect the rights of people with disability.

1.4 Research Methodology

1.4.1 Data Collection

In order to achieve the objectives stated above, a number of data collection methods have been used. These include:

- i. Desktop research:** this involved the identification and collection of international instruments, national policies, pieces of legislation and decided cases relating to education, health, employment and others.
- ii. Content analysis** of the collected materials in order to determine the extent to which they include or fail to include disability issues.

1.4.2 Data analysis

The data collected by LNFOD in other studies such as *the living condition of PWDs in Lesotho* was analyzed and translated into findings as to whether in theory and in practice the legal system of Lesotho adequately protects the rights of PWDs.

PART 2

2. INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION OF PWDs

2.1 Introduction

Generally, protection of human rights operates at two different levels; the international and the national levels. Viewed from the perspective of the state, international legal framework comprises the global, regional and sub-regional arrangements or agreements meant for protection of human rights. Therefore, based on this perspective, this part of the report discusses instruments adopted for protection of the rights of PWDs at the international level which is made up of; United Nations which is the global level of protection, the African Union, which is the regional level of protection as well as the Southern African Development Community, which is the sub-regional level of protection while the national protection will be analyzed in Part 3.

Human rights instruments are intended to extend protection of human rights to all. Their provisions may take a form of principles of equality and non – discrimination or offer more specific protection on a range of civil, political, economic, social or cultural rights. International legal instruments are adopted in two forms; those that are legally binding and those that are merely persuasive and not binding. A legally binding international

human rights instrument is referred to as a treaty (also called agreement, convention, or protocol) and it binds the contracting states to the negotiated terms. A non-binding international instrument is referred to as a declaration or resolution and imposes no legal obligation on the States Parties thereto.

The *binding treaties* can be used to force governments to respect the treaty provisions that are relevant for the human rights of PWDs. The *non-binding instruments*, such as declarations and resolutions, can be used in relevant situations to embarrass/shame governments by negative public exposure. As a result, governments that care about their international image may consequently adapt their policies to comply with international instruments to which they are parties, whether they are in the form of treaties, declarations or resolutions. These instruments are discussed below and the discussion is divided according to the three different levels of human rights protection referred to above.

2.2 The United Nations System

The starting point for any consideration of the content of modern international human rights law is the Universal Declaration of Human Rights (UDHR).²⁰ In its expression of general human rights principles the UDHR emphasizes its applicability to all people, underscoring that “all human beings are born free and equal in dignity and rights ...”²¹ and that “all are equal before the law and are entitled without any discrimination to equal protection of the law.”²² Further, Article 25 of the UDHR provides for the right to adequate standard of living. Disability is explicitly referred to as one of the grounds for “the right to security” in order to preserve an adequate standard of living. Although the

²⁰ Adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

²¹ Article 1 of the UDHR.

²² Article 7 UDHR.

UDHR is a declaration and not a treaty, due to its recognition by the international community, it has attained the status of customary international law.²³ It therefore has the same binding legal force and effect as an international treaty.

Adoption of the UDHR was followed by the drafting of two international treaties; the International Covenant on Civil and Political Rights (ICCPR)²⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁵ These two instruments, together with the UDHR comprise the International Bill of Human Rights which is the core of modern international human rights law.²⁶

Like the UDHR, both the ICCPR and ICESCR are based on the principles of equality and non – discrimination. In terms of these Conventions, all people are entitled without discrimination to all the rights for which they provide.²⁷ It must be noted however that disability is not listed as a prohibited ground of discrimination in the non-discrimination provisions of article 2 of the UDHR, the ICCPR and the ICESCR. However, despite this omission, protection of PWDs may be inferred from the term “other status” used in these provisions.²⁸ This inference is reinforced by the General Recommendation of the Committee on Economic, Social and Cultural Rights (the ESCR Committee) in which the Committee said:

By virtue of article 2(2) and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of **physical or**

²³ Dugard J., 2005, International Law, 27.

²⁴ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

²⁵ Adopted by the UN General Assembly Resolution in note 24 above.

²⁶ Viljoen F, 2007, International Human Rights Law in Africa, 317.

²⁷ Article 3 UDHR, Art 2 ICCPR and Article 2 ICESCR.

²⁸ Article 2 UDHR.

mental disability... which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health...²⁹

Over and above protection of human rights through the international Bill of Rights, it was discovered that additional legal measures were required to address human rights abuses experienced throughout the world by individuals belonging to particular social, ethnic, religious and other groups. As a result, several specific international human rights instruments were adopted. These treaties create legal protections that address in concrete terms, the social, political and cultural circumstances that impact the human rights conditions of the populations they seek to protect. These group-specific human rights instruments also have a bearing on the rights of PWDs in as much as there are PWDs within the specific groups that they seek to protect.

The United Nations Convention on Elimination of all forms of Discrimination Against Women (CEDAW),³⁰ was adopted with the objective of eliminating discrimination against women. In its General Recommendations, the Committee on the Elimination of Discrimination Against Women, (the monitoring body of CEDAW), stressed that disabled women suffer from double discrimination and are a particularly vulnerable group. CEDAW Committee recommended that governments should provide information on disabled women in their periodic reports and on special measures that governments have taken to ensure that women with disabilities "have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life."³¹

²⁹ General Comment no.14 of 2000 paragraph 18 adopted by the Committee in its 22nd Session in 2000.

³⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 Of 18 December 1979.

³¹ General Recommendation 18 adopted by the Committee in its 10th Session in 1991 document A/46/38.

The Convention on the Rights of the Child (CRC)³² lists disability as one of the prohibited grounds of discrimination. It explicitly states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's ... disability...³³

In addition, article 23 directly addresses the rights of children with disabilities stating that they are entitled to a "full and decent life" of dignity and participation in the community. It places obligations on States Parties, to provide within available resources, special care and assistance to disabled children and those responsible for such children.³⁴

The international bill of rights, CEDAW and CRC are not specifically meant for PWDs but are general human rights instruments which also include PWDs. Despite the existence of these instruments it was soon realized that PWDs suffer specific human rights abuses that are peculiar to them as members of a group. Hence efforts were made to introduce disability specific standards within the UN system. However, until 2006, all efforts made were in the form of declarations and principles (soft law) with no binding force and effect. The first efforts at the UN level were adoption of Declaration on the Rights of Mentally Retarded Persons 1971³⁵ and Declaration on the Rights of Disabled Persons 1975;³⁶ followed by the Declaration on the Rights of Deaf-Blind Persons 1979. The three declarations were however criticized for their expression of outmoded medical and charity models of disability.

³² Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990

³³ Article 2(1) CRC.

³⁴ Article 23 (1) and (2) CRC.

³⁵ GA Res. 2856 (XXVI) 26 UN GAOR Supp (No.29) UN Doc A/8429 (1971).

³⁶ GA Res. 3447 (XXX) 30 UN GAOR Supp (No. 34) UN Doc A/10034 (1975).

Due to the intensity of criticism that was leveled against these, further progress was made in that the UN marked 1981 as the International Year of the Disabled and the period between 1982 and 1993 as the UN Decade of Disabled Persons. During this period, the World Programme of Action Concerning Disability (WPA) 1982 and two new international human rights instruments concerning disability were adopted. The two instruments were the Principles for the Protection of Persons with Mental Illnesses and Improvement of Mental Health Care (MI Principles) 1991 and the UN standard Rules on Equalization of Opportunities for Persons with disabilities 1993.

Although the foregoing declarations, rules and principles added content to general human rights provisions, they are however not legally binding. Hence civil society organizations and movements of PWDs strongly lobbied for adoption of a disability specific binding international human rights instrument. As a result in 2006, the UN General Assembly adopted the Convention on the Rights of People with Disabilities (CRPD) hereinafter referred to as the Convention.³⁷

The Convention marks a paradigm shift in attitudes and approaches to PWDs. It takes to a new height the movement from viewing PWDs as "objects" of charity, medical treatment and social protection towards viewing PWDs as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.³⁸

Unlike the other general human rights instruments, the Convention is a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of PWDs and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms without discrimination.³⁹ It clarifies and qualifies how all categories of rights apply to PWDs. It identifies areas where

³⁷ Adopted with its Optional Protocol by the Un General Assembly on 13 December 2006, opened for signature on 30 March 2007 and entered into force on 3 May 2008.

³⁸ United Nations Enable (www.un.org/disabilities/default.asp?=#150 accessed 12 October 2010).

³⁹ Paragraph (c), Preamble of the CRPD.

adaptations have to be made for PWDs to effectively exercise their rights. It also identifies areas where their rights have been violated, and where protection of those rights must be reinforced.

There are eight guiding principles that underlie the Convention and each one of its specific articles. These principles are stipulated in article 3 of the Convention and include respect for inherent dignity, non-discrimination; full and effective participation and inclusion in society and others. The Convention has about fifty (50) articles. It provides for specific socio-economic, civil and political rights of PWDs as well as obligations and responsibilities of States Parties to ensure full realization of those rights.

2.3 The African Human Rights System

There are three regional human rights systems established to implement and enforce human rights instruments in Europe, the Americas and Africa. For purposes of this research only the African human rights system will be considered for its relevance to Lesotho.

Human Rights instruments adopted in the African human rights system which are relevant for this research are the African Charter on the Human and Peoples' Rights (African Charter) 1981,⁴⁰ the OAU Agreement on Rehabilitation Institutions (ARI) 1985,⁴¹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights

⁴⁰ Also referred to as the 'Banjul Charter' Adopted in Nairobi Kenya on 27 June 1981 and entered into force on 21 October 1986.

⁴¹(www.africa-union.org/root/au/documents/treaties/Text/Africa_Rehabilitation_institute.pdf accessed 12 October 2010).

of Women (Maputo Protocol)⁴² and African Charter on the Rights and Welfare of the Child.⁴³

The African Charter contains a list of prerogatives and obligations and a list of organs responsible for protection and defense of the values for which it provides. It places special emphasis on the rights and duties of the community, especially the family, society and the nation. Article 2 of the Charter prohibits discrimination on the grounds of “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *or any status*.” That is, although disability is not specifically listed in the prohibited grounds of discrimination, it can be inferred from the phrase “...any status” in Article 2 of the Charter.

Article 18 (4) provides that the disabled have a right to special measures of protection in keeping with their physical and moral needs. Although the article does not specify the measures to which PWDs are entitled, it however places an obligation on States Parties to ensure that such measures of protection enable PWDs to keep with their physical and moral needs.

Article 16 (1) provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. An elaborate interpretation of this article was made in the case of *Purohit and others v The Gambia*,⁴⁴ which will be discussed in due course.

Protection of human rights in the African system is vested in the African Commission on Human and Peoples’ Rights which is established under article 30 of the African Charter.

⁴² Adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005.

⁴³ Adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999.

⁴⁴ (2003) African Human Rights Law Reports, 96.

The mandate of the African Commission is two pronged: promotion⁴⁵ and protection⁴⁶ of human rights. The protective mandate of the Commission consists mainly of the consideration of complaints (also referred to as communications) and on-site missions.⁴⁷ The promotional mandate consists of examination of State Party reports and other activities such as appointment of Special Rapporteurs and adoption of resolutions.

In respect of the African Commission's mandate to protect human rights, to date only one communication involving the rights of PWDs has been brought before the Commission. This is the *Purohit's* case referred to above. This case was brought against the government of The Gambia with regard to conditions of detention in the Gambian mental health institution. The Commission held that Gambia had violated the provisions of Article 18 and 16 of the African Charter. It emphasized that enjoyment of the right to health is crucial to the realization of other fundamental rights and freedoms and should be accorded to all without discrimination. It went on to state that mental health patients should be accorded special treatment to enable them to attain their optimum level of independence and performance in line with article 18(4) of the African Charter as well as the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (MI Principles).

2.4 Protocol to the African Charter on the Rights of Women

Adoption of this Protocol was based on article 18 of the African Charter in terms of which States Parties are called upon to eliminate every discrimination against women and to ensure the protection of the rights of women.⁴⁸ Article 23 of the Protocol specifically provides for protection of the rights of women with disabilities. In terms of

⁴⁵ Article 45(1) ACHPR.

⁴⁶ Article 45(2) ACHPR.

⁴⁷ Viljoen (note 26 above).

⁴⁸ Article 18(3).

this article States Parties undertake to ensure protection of women with disabilities and to take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.⁴⁹ States Parties further undertake to ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.⁵⁰

2.5 African Charter on the Rights and Welfare of the Child

Protection of children with disabilities under this Charter is guaranteed under article 13 of the Charter in the following terms:

Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.⁵¹

Article 13 also places an obligation on States Parties, subject to available resources, to ensure to children with disabilities and those responsible for their care, assistance, for which application is made and appropriate to the child's condition. In particular they are mandated to ensure that children with disabilities have access to training, preparation for employment and recreation activities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.⁵² They are further mandated to use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled

⁴⁹ Article 23(a).

⁵⁰ Article 23(b).

⁵¹ Article 13 (1).

⁵² Article 13 (2).

person, to movement and access to public highways, buildings and other places to which PWDs may legitimately want to have access.⁵³

In comparison with the CRPD, the African human rights instruments adopt the same approach of inclusion in that the Women's protocol explicitly mandates inclusion of women with disabilities in decision making processes. The other advantage of the African human rights system is that the rights provided for in the African Charter are not categorized into civil and political rights and socio-economic rights and therefore all carry equal obligations vis-a- vis the states.

However, there is no instrument in the African human rights instrument meant for specific protection of the rights of PWDs; the Agreement on ARI only focuses on establishment of a rehabilitation institute and does not refer to specific human rights. This may thus limit the effectiveness of the system in that the provisions in the African Charter, the Women's Protocol as well as the Children's protocol do not cover all issues related to specific needs of PWDs such as inclusive education system, provision of public interest information in accessible formats such as Braille and sign language as well as accessible physical environment. The other disadvantage in this system is the language used in the ARI agreement in article II (b) on the aims of the Agreement. The agreement uses the term "handicapped Africans" to refer to PWDs and as indicated in the disability definition section, this term is highly offensive when used to refer to PWDs.

2.6 The Southern African Development Community (SADC)

Lesotho became a State Party to the SADC Treaty which is the SADC founding document on the 26th August 1993. Article 6 (2) prohibits discrimination against any person on the ground of his or her disability. Article 6 (5) obliges states to accord the Treaty the force of national law.

⁵³ Article 13 (13.)

The SADC Parliamentary Forum Norms and Standards for Elections, adopted on the 25th March 2001 provide for a number of recommendations which include among others, provisions for PWDs to participate fully in the electoral process. Furthermore, the Principles and Guidelines Governing Democratic Elections which were adopted in 2004, requires member states to encourage participation of the disabled in all aspects of the electoral process in accordance with the national laws as stipulated in international declarations and conventions.⁵⁴

The SADC Social Charter, adopted on the 26 August 2003 and entered into force on the same day provides for the social rights of persons with disability; it obliges members to create an enabling environment such that all persons with disability shall be entitled to all concrete measures aimed at improving their social and professional integration.⁵⁵

2.7 Conclusion

From the discussion of different international human rights instruments to which Lesotho is a party, it is concluded that although most of them such as the UDHR, the ICCPR and the ICESCR have non-discrimination provisions, they however make minimal reference to the rights of PWDs. That is, most of them do not give provisions which cater for specific needs of PWDs or which lead to their protection against stigma, exclusion and discrimination that PWDs in most parts of the world deal with daily.

It is concluded therefore, that the CRPD is the most comprehensive as it covers all aspects relating to economic, social and cultural rights as well as civil and political rights of PWDs. It is on this basis that this Convention is used in the next part of this research, as the yardstick against which the laws and policies in Lesotho relating to health, education and social inclusion are measured.

⁵⁴ Article 79 of the principles.

⁵⁵ Article 9.

PART 3

DOMESTIC LEGAL FRAMEWORK FOR PROTECTION OF PWDs

3.1 Introduction

Civil and Political rights are provided for as fundamental rights and freedoms in Chapter 2 of the Constitution of Lesotho. Economic, social and cultural rights such as education, work and healthcare services which form the basis of guarantees essential for all persons to enjoy a decent livelihood are not recognized as rights but as directive principles of state policy (DPSPs) provided for in chapter 3 of the Constitution. Section 25 of the Constitution provides that these principles shall form part of the public policy of Lesotho but shall not be justiciable in any court of law. That means despite their being provided for in the Constitution, the Government of Lesotho (GOL) cannot be taken to any court of law for having failed to fulfill them.⁵⁶ Section 25 provides further that the authorities and agencies of Lesotho and other public authorities, shall in the performance of their functions be guided by these principles. However, the extent of realization of these principles shall depend on the economic capacity and development of Lesotho and shall be achieved progressively by legislation or otherwise.

Lesotho is a state party to the CRPD, but has not yet domesticated its provisions. In order to determine how the CRPD may be domesticated in Lesotho, this part of the research attempts to investigate the extent to which the laws and policies in Lesotho cover disability specific issues relating to education, health and social inclusion in line with the international obligations discussed in part 2.

⁵⁶ This was expressed by the Court of Appeal in *Khathang-tema Baitsokoli v Maseru City Council and ors*.

In order to effectively implement the provisions of the CRPD, Community-based rehabilitation (CBR) Guidelines become very handy. The CBR was first initiated by the World Health Organization (WHO) following the International Conference on Primary Health Care in 1978 and the resulting Declaration of Alma-Ata.⁵⁷ CBR was seen as a strategy to improve access to rehabilitation services for people with disabilities in developing countries.⁵⁸ In 2003, an International consultation to review the CBR held in Helsinki made a number of key recommendations.⁵⁹ Subsequently, CBR was repositioned in a joint International Labour Organization (ILO)/United Nations Educational, Scientific and Cultural Organization (UNESCO)/WHO position paper, as a strategy within general community development for the rehabilitation, equalization of opportunities, poverty reduction and social inclusion of people with disabilities.⁶⁰ And in 2005, the World Health Assembly adopted a resolution on disability prevention and rehabilitation, urging Member States “to promote and strengthen community-based rehabilitation programmes...”⁶¹

⁵⁰ Declaration of Alma-Ata: *International Conference on primary healthcare*, Alma-Ata, USSR, 6-12 September 1978, Geneva, World Health Organization 1978 (www.who.int/hpr/NPH/docs/declaration_almaata-pdf, accessed 12 October 2010).

⁵⁸ CBR guidelines (note 1 above)

⁵⁹ *International consultation to review community-based rehabilitation (CBR)*. Geneva, World Health Organization, 2003 (http://whqlibdoc.who.int/hq/2003/who_dar_03.2.pdf, accessed 12 October 2010).

⁶⁰ International Labour Organization, United Nations Educational, Scientific and Cultural Organization, World Health Organization. *CBR: A strategy for rehabilitation, equalization of opportunities, poverty reduction and social inclusion of people with disabilities. Joint Position Paper 2004*. Geneva, World Health Organization, 2004 (www.who.int/disabilities/publications/cbr/en/index.html, accessed 12 October 2010).

⁶¹ Resolution WHA58.23. *Disability, including prevention, management and rehabilitation*. Fifty-eighth World Health Assembly, Geneva, 25 May 2005 (www.who.int/disabilities/publications/other/wha5823/en/index.html, accessed 12 October 2010).

The guidelines are strongly influenced by the CRPD and its Optional Protocol. One of the objectives of the guidelines is to provide guidance on how to develop and strengthen CBR programmes in line with the CBR Joint Position Paper and the CRPD.⁶² Therefore these guidelines are used throughout this part of the research as a yardstick against which Lesotho's compliance with the CRPD is measured.

The CRPD as well as domestic laws from other countries such as the United Kingdom, Kenya and South Africa are used for comparative purposes. The CRPD is selected because it is an international instrument while the South African, Kenya and United Kingdom laws are selected because they represent different approaches to disability laws.

3.2 Non-Discrimination

The right to equality and freedom from discrimination is provided for as a fundamental human right in section 18 of the Constitution which appears under chapter 2.⁶³ Section 18 provides that no law shall make any provision that is discriminatory, except on application of customary law on adoption, marriage, divorce, burial and devolution of property.

Section 18(3) defines "discriminatory" as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are

⁶² CBR Guidelines.

⁶³ Unlike directive principles of state policy, fundamental human rights and freedoms are justiciable as provided for in section 22 of the Constitution.

accorded privileges or advantages which are not accorded to persons of another such description.

As far as DPSPs are concerned, the general principle laid down in section 26 of the Constitution is that their enhancement shall be done without discrimination. It specifically provides that:

1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in the society to enable them to participate fully in all spheres of public life

Unlike Section 9 of the South African Constitution (normally referred to as the equality clause), both Sections 18 and 26 of the Lesotho Constitution do not list disability as a prohibited ground of discrimination. Over and above section 9, the South African Constitution specifically requires that enabling legislation be promulgated to further substantiate Section 9. In this regard, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA) was enacted. Section 9 of PEPUDA, prohibits unfair discrimination on the grounds of disability.

3.3 Education

Article 24 of the CRPD provides that States Parties recognize the right of PWDs to education which has to be provided without discrimination and on the basis of equal opportunity.⁶⁴ It further promotes an inclusive education system at all levels, which is directed to the full development of human potential and dignity amongst others.

⁶⁴ Article 24 CRPD.

At the national level, the Constitution does not regard education as a right but a mere principle of state policy.⁶⁵ In this regard, it provides that Lesotho shall endeavor to make education available to all and shall adopt policies aimed at securing that:

- (a) Education is directed to the full development of the human personality and sense of dignity and strengthening the respect for human rights and fundamental freedoms;
- (b) Primary education is compulsory and **available to all**;
- (c) Secondary education, including technical and vocational education, is made generally available and **accessible to all** by every appropriate means, and in particular, by the progressive introduction of free education;
- (d) Higher education is made equally **accessible to all**, on the basis of capacity, by every appropriate means, and in particular, by the progressive introduction of free education; and
- (e) Fundamental education is encouraged or intensified as far as possible for those persons who have not received or completed their primary education.⁶⁶

Apart from the general terms 'available and accessible to all,' the Section 28 does not refer to specific education of PWDs. This is however remedied by enactment of the Education Act 2010 which was enacted pursuant to section 28 of the Constitution.⁶⁷

Unlike the previous Education Acts which it repealed,⁶⁸ the 2010 Act specifically provides for inclusion of PWDs in the education system. It enjoins the Minister to take measures which are desirable to make provision for free primary education to all learners from the age of six, save in regard of independent schools.⁶⁹ Section 4(2) reinforces this obligation by specifically providing that the Minister, the Principal Secretary (PS), Teaching Service Commission (TSC), proprietors of schools, teachers and school boards are mandated to promote education of PWDs; in particular to ensure that the learner is :

⁶⁵ It is not included in Chapter 2 which provides for fundamental rights and freedoms but in Chapter 3 which provides for Directive Principles of State Policy.

⁶⁶ Section 28 of the 1993 Constitution.

⁶⁷ Section 3 Education Act 2010.

⁶⁸ Education Act of 1995 as amended by Education Act of 1995 and the Education Act of 2007.

⁶⁹ Section 4 (1)(a).

- free from any form of discrimination in accessing education and availed all educational opportunities provided.⁷⁰
- given the special treatment, education and care required by his or her condition.⁷¹
- provided with opportunities and facilities to enable him or her to develop physically, mentally, morally, spiritually and socially, in a healthy, normal manner and in the conditions of freedom and dignity.⁷²

A similar obligation is found in the Child Protection and Welfare Act which provides that “a child with disability has a right to ... education and training to help him enjoy a full and decent life and achieve the greatest degree of self-reliance and social integration.”⁷³

Prohibition of discrimination and inclusion of PWDs may be further inferred from the Education Sector Strategic Plan 2005 – 2015. The Plan acknowledges Lesotho’s commitment to considering education as a basic human right which has to be afforded to all citizens to improve development in the country. The objectives in this regard are:

- Expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children. (Taking into account the history of disability in Lesotho, the terms ‘most vulnerable and disadvantaged children’ may be interpreted to include children with disabilities).
- Ensuring that by 2015 all children, particularly girls, children with difficult circumstances and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality. (‘children with difficult circumstances’ may also be interpreted to include children with disabilities)

⁷⁰ Section 4 (2)(c).

⁷¹ Section 4(2)(b).

⁷² Section 4(2)(a).

⁷³ Section 13 Child Protection and Welfare Act 2011.

- Ensuring that the learning needs of all young people and adults are met through equitable and appropriate learning and life – skills programmes.

The South African Schools Act of 1996 also provides for inclusion of learners with special educational needs. Public schools are required by law to admit all learners and provide the necessary educational requirements without discrimination and ensure their representation in the school's governing body.⁷⁴ Over and above this Act, South Africa also has a white paper which defines inclusive education and training as among others, 'acknowledging and respecting differences in learners, whether due to age, gender, ethnicity, language, class, **disability**, HIV or other infectious disease.'

However, some researchers into the South African education system argue that at the level of implementation, these laws and policies have experienced many difficulties. The most apparent are the lack of resources both financial as well as human, particularly in the form of trained educators. This has meant that children with disabilities are still not fully integrated into the public school system.⁷⁵

In comparison with the South African approach to education of PWDs, the Lesotho Education Act *prima facie* complies with the provisions of the CRPD albeit the following challenges:

1. The use of the term 'handicap' in some sections of the Education Act 2010 which is defined in the Act as 'physically or mentally disabled or both including sensory disabilities, whether singular or multiple.'⁷⁶ This is problematic because as explained in part one of this research carries negative connotations and is considered offensive.

⁷⁴ Sections 3 and 24 South African Schools Act no. 84 of 1996 respectively.

⁷⁵ McClain Charlotte Vuyiswa 2002 'Governance and Legislation in South Africa: a contemporary overview'(www.disabilityworld.org, accessed 17 October 2011).

⁷⁶ Section 2 Education Act 2010.

2. Lack of consultation with DPOs by the Ministry in their planning and construction of schools results in architectural designs which hinder access by physically disabled learners.⁷⁷
3. Lack of books and other teaching aids in Braille in order to accommodate learners with visual impairment.⁷⁸
4. Education system not compatible with deaf learners. That is, mainstream schools do not have teachers and/ or interpreters who understand sign language. As a result deaf learners are restricted to the few special schools in Lesotho and are still not included in the mainstream schools despite the provision of the Education Act.⁷⁹
5. Exclusion of PWDs in policy formulation makes it difficult for implementation of such policies.
6. Higher Education: Apart from the general prohibition of discrimination, disability is not included in Higher Education Act as a prohibited ground of discrimination and there is no other provision with explicit or implicit reference to the rights of PWDs in the Higher Education Act.⁸⁰
7. There is no law that caters for inclusion of children with disabilities in early childhood programmes.
8. There is no law that regulates non formal as well as lifelong learning for PWDs who are no longer of school-going age or those who cannot go into formal education.

3.4 Health

In terms of the CRPD, States Parties recognize that PWDs have the right to enjoyment of the highest attainable standard of health without discrimination on the basis of

⁷⁷ SAFOD Research Programme (SRP) LNFOD Country Report on www.safod.org

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ Section 31 Higher Education Act 2004.

disability.⁸¹ It mandates States Parties to provide PWDs with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes.⁸² It also mandates that health services needed by PWDs specifically because of their disabilities, including early identification and intervention, services designed to minimize and prevent further disabilities, should be provided.⁸³

In order to effectively implement this provision, the CBR guidelines' matrix lists five elements in the component of health. These elements are promotion, prevention, medical care, rehabilitation and provision of assistive devices.⁸⁴

As far as the first element of promotion is concerned, provision of healthcare is catered for in the Constitution of Lesotho. However, like many socio-economic rights, health does not appear under fundamental human rights and freedoms but in Chapter 3 of the Constitution as a Directive Principle of State Policy. The Constitution provides that Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens.⁸⁵

A further provision is made in the Child Protection and Welfare Act which provides that 'a child with disabilities has a right to... dignity, special care, medical treatment... to help him enjoy a full and decent life...'⁸⁶ The recently adopted National Disability and Rehabilitation Policy⁸⁷ provides that one of its objectives is to strengthen public health system to include PWDs and their families and to promote access to quality and

⁸¹ Article 25 CRPD.

⁸² Article 25 (a).

⁸³ Article 25 (b).

⁸⁴ CBR Guidelines (note 1 above).

⁸⁵ Section 27 of the Constitution.

⁸⁶ Section 13 Children's Protection and Welfare Act 2011.

⁸⁷ National Disability and rehabilitation Policy Ministry of Health and Social Welfare 2011.

essential healthcare. The strategies geared towards this objective include among others, to upgrade a fully fledged department of rehabilitation services to fully administer services for PWDs in all districts, to ensure that all public health services cater for PWDs and to facilitate involvement of PWDs or their proxy in various aspects of planning and provision of health services.⁸⁸ It must be noted that this policy has been recently adopted and does not have implementing guidelines yet.

As far as the second element of prevention is concerned, the National Disability and Rehabilitation Policy lists prevention, early identification and intervention as priority area number 1 whose objective is to facilitate the development of a coordinated system for the prevention, identification, intervention and reduction of secondary disabilities.⁸⁹ One of the strategies in this regard is to ‘advocate for the implementation of existing health laws and other laws related to disabilities.’ In as much as this policy is good-spirited, the major problem is that the current health legal system does not cater for PWDs, therefore, the best strategy would be to advocate for adoption of disability-related health laws because as of 2011 when this policy was adopted, such laws were non-existent.

Apart from prevention of disabilities, there is also a duty to prevent other communicable diseases amongst PWDs, such as HIV/AIDS. Statistics show that Lesotho is one of the countries worst hit by the HIV/AIDS epidemic. Studies go further to reflect that PWDs are at a higher risk of contracting HIV/ AIDS.⁹⁰ This has been attributed to the challenges PWDs especially deaf people and visually impaired experience. These challenges include poor access to information about HIV/AIDS and safe sex, inadequate treatment programs, and issues such as confidentiality within the

⁸⁸ As above.

⁸⁹ National Disability and rehabilitation policy (note 87 above).

⁹⁰ Monaghan L 2003 Maryland 2003 HIV infection statistics for hearing and deaf populations. Analysis and policy suggestions.

community, difficulty in getting information from the media⁹¹ and lack of prevention programs aimed specifically at them.⁹²

Lesotho has a National Aids Policy which was adopted after the Government recognized that HIV/AIDS is not only a health problem but a multi-sectoral development issue that has social, economic and cultural implications. The Policy has been updated in order to provide a framework for the formulation of plans to fight against the HIV and AIDS epidemic, by both governmental and non-governmental organizations. However, the policy does not provide for prevention mechanisms targeted specifically for PWDs.

In comparison with other jurisdictions such as Kenya, Lesotho's policy in relation to prevention of HIV amongst PWDs is lurking. In 2003 Kenya established the Nairobi Deaf VCT for deaf people, run by deaf counselors.⁹³

In relation to the third and fifth elements of medical care and provision of assistive devices, the Lesotho National Federation Of Disabled (LNFOD) study on living conditions of PWDs in Lesotho conducted in 2009-2010 indicate that only 13.6% of PWDs who need medical rehabilitation actually receive such while the majority of 82.5% do not receive the needed medical rehabilitation. That is, despite the constitutional protection of health, absence of laws and policies that give effect to such provision renders the provision ineffective. This is also evidenced by the fact that only 12.5% of PWDs who need assistive devices are provided with such while 81.3% does not. Over

⁹¹ As stated in the LNFOD country report to SAFOD, there are no sign language interpreters on television and there are no subtitles, therefore deaf people find it difficult to access information on issues that affect them such as prevention of HIV. Futhremore, even the newspapers or brochures on important information are not written in Braille and this makes it difficult for people with visual impairment to access information.

⁹² As above.

⁹³ Handbook on best practices regarding HIV and Aids for people with disabilities.

and above this, 77.6% of those in need of assistive devices are not even aware of provision of such services.⁹⁴

These statistics reflect that as far as health is concerned, there is a dire need for legal protection of PWDs and that our current legal framework dismally fails to protect PWDs' right to health in accordance with the CRPD and in line with the CBR guidelines. The loopholes in the legal system are worsened by the following factors:

1. Health is a DPSP and in terms of section 25 of the Constitution it is non-justiciable.
2. It is apparent from the provisions of section 27 that in as much as Lesotho aspires to ensure highest attainable standard of physical and mental health for its citizens, PWDs are not regarded as a special group in need of special healthcare services because of their disabilities. That is, s.27 is not in line with the obligation imposed by article 25(b) of the CRPD in terms of which States Parties are mandated to provide health services needed by PWDs specifically because of their disabilities.
3. Although the National HIV/AIDS Strategic Plan for 2006-2011, recognizes the presence of PWDs among the most vulnerable population groups to be taken care of beginning from 2007, the findings of this study show that there is still very little recognition of PWDs as a homogeneous group among service providers and therefore there are no deliberate specific policies targeting reduction of HIV infections amongst PWDs.

3.5 Social Inclusion

In order to ensure that PWDs are included in all social aspects of the community, the CRPD imposes a number of obligations on States Parties which include PWDs' right to habilitation and rehabilitation,⁹⁵ work and employment,⁹⁶ adequate standard of living

⁹⁴ LNFOD living conditions study 2011.

⁹⁵ Article 26.

and social protection,⁹⁷ participation in political and public life⁹⁸ and participation in cultural life, recreation, leisure and sport.⁹⁹ Pieces of legislation related to these provisions are discussed below and an enquiry is made as to whether they are at par with the CRPD.

3.5.1 Habilitation and rehabilitation

The CBR guidelines list rehabilitation as one of the elements in the health component. In this regard, the CRPD specifically provides that States Parties shall take effective and appropriate measures, including through peer support, to enable PWDs to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

In order to ensure successful implementation of his obligation, the CRPD mandates States Parties to promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services¹⁰⁰ and promote the availability, knowledge and use of assistive devices and technologies, designed for PWDs, as they relate to habilitation and rehabilitation.¹⁰¹

Section 33 of the Constitution of Lesotho provides for rehabilitation, training and social resettlement of PWDs. It also enjoins the state to facilitate access to employment for PWDs. Although this provision leans more towards affirmative action in favour of PWDs as provided for in the CRPD, it is not detailed as to what particular obligations it

⁹⁶ Article 27.

⁹⁷ Article 28.

⁹⁸ Article 29.

⁹⁹ Article 30.

¹⁰⁰ Article 26(3).

¹⁰¹ Article 26(3).

imposes and the relevant government departments to which such obligations are placed. Further, it is a non-justiciable principle of State Policy as stipulated in section 25 of the Constitution and there are no policies or programmes put in place to ensure its implementation. This thus limits its effectiveness.

Section 33 is also limited by the fact that is silent with regard to the obligation to promote the development of training of professionals working in habilitation and rehabilitation services as well as promoting the knowledge and use of assistive devices and technologies.

This notwithstanding, the National University of Lesotho through the Faculty of Education has included “special education” in its curriculum as an effort to train teachers who understand the special needs of learners with disabilities.¹⁰² The light is also seen in the Child Protection and Welfare Act which provides that a child with disability has a right to rehabilitation, family and personal integrity to help him achieve the greatest degree of self-reliance and social integration.¹⁰³

Despite section 33 not being specific as to how habilitation and rehabilitation should be done, the government in partnership with the International Labour Organization and the United Nations Development Programme, established the Ithuseng Vocational Rehabilitation Centre (IVRC) with the main objective of empowering PWDs so that they can contribute productively to economic development and their own personal well being and that of their families. The Centre gives support to adults and youth with any form of disability by providing vocational guidance and training, literacy and numeracy training, technical skills in metal work, leatherwork, carpentry, sewing and knitting, agriculture, general repair skills and basic training in business management. Other kinds of support

¹⁰² Stated in an interview with Dr. M. Molapo, Head of the Special Education Department within the Faculty of Education.

¹⁰³ Section 13.

include job placements but the emphasis of the training is to encourage self employment and partnership among the trainees to start their own businesses.¹⁰⁴

Establishment of the IVRC can be counted as one of the achievements. However, since there is no law or policy that governs it, its effectiveness as well as sustainability are a great challenge that Lesotho still faces in the area of rehabilitation.

3.5.2 Work and Employment

In terms of the CRPD, States Parties recognize the right of PWDs to work, on an equal basis with others. This includes the right to opportunity to make a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to PWDs. States parties are to ensure employment of PWDs in the public sector; promote employment of PWDs in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; ensure that reasonable accommodation is provided to PWDs in the workplace etc.

Sections 29 to 32 of the Constitution provide for opportunity to work, just and favourable conditions of work, protection of workers' rights as well as protection of children and young persons in the work environment. Section 29 provides that "Lesotho shall Endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts." The term "every person" in this section can be interpreted to include PWDs. Furthermore, as far as prohibition of discrimination concerning employment and remuneration is concerned, section 30 prohibits discrimination 'of any kind.' This may be inferred from the provisions of this section which provides that:

¹⁰⁴ Ministry of health (www.health.gov.ls).

Lesotho shall adopt policies aimed at securing just and favourable conditions of work and in particular policies directed to achieving -

- (a) remuneration which provides all workers, as a minimum with-
 - (i) fair wages and equal remuneration for work of equal value without ***distinction of any kind***, (own emphasis) and in particular, women being guaranteed conditions of work, including pension or retirement benefits, not inferior to those enjoyed by men, with equal pay for equal work; and
 - (ii) a decent living for themselves and their families.¹⁰⁵
- (b) safe and healthy working conditions.¹⁰⁶

In as much as the section seeks to protect all persons from discrimination in the workplace, it fails to take into account the specific prejudices that PWDs suffer in employment relationships; in particular in conditions of recruitment, hiring and employment as well as remuneration and continued employment or employment security. Some of these prejudices are highlighted in the statics in the living conditions study which indicate that only 5.7% of PWDs are employed in paid work, while 2.3% is self-employed and the remaining 68.9% is unemployed for health and other reasons.¹⁰⁷ It fails to take into account that due to challenges in education, most PWDs lack requisite qualifications and therefore do not compete on equal basis with others in the labour market.¹⁰⁸

Apart from general non-discrimination provisions of sections 4, 18 and 30 of the Constitution, discrimination in the workplace is also prohibited by section 5 of the Labour Code Order (Labour Code)¹⁰⁹ which provides as follows:

The application by any person of any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of this code.

¹⁰⁵ Section 30(a) (i) and (ii).

¹⁰⁶ Section 30 (b).

¹⁰⁷ Living Conditions of Persons with disabilities Study (note 18 above).

¹⁰⁸ LNFOD country report (note 83 above).

¹⁰⁹ Labour Code Order No 24 of 1992.

It is worth noting that just like sections 4, 18 and 30 of the Constitution, section 5 of the Labour Code lists prohibited grounds of discrimination and disability is not one of them. Moreover, unlike other non-discrimination provisions, section 5 does not leave room for other grounds of discrimination in that it does not have a phrase “other status” which could be interpreted to include other grounds such as disability. It therefore fails to take into account the fact that disability may ‘when there is no explicit prohibition’ be used as a basis to nullify or impair one’s opportunity to be employed or to be treated fairly when employed. According to

Section 5, the Labour Code also provides that there should be equal remuneration for work of equal value and healthy working conditions. However this provision focuses on elimination of discrimination between men and women and does not provide specifically for PWDs.

Furthermore, the Workman’s Compensation Act 13/1977 provides for compensation in case of permanent total incapacity,¹¹⁰ partial incapacity,¹¹¹ and temporary incapacity.¹¹² However, apart from compensation, the Act does not make any provision as to the protection of the rights of persons who end up with disabilities due to injury at the workplace but still continue to work.

The Labour Code provides for the right to unionize generally and does not specify that right as it relates to PWDs. However, where prescribed procedures are followed, the Order does not prohibit such unionization.

According to section 122 of the Labour Code Order, employees have the right to technical and vocational training. Pursuant to this section, employees are often taken

¹¹⁰ Section 7 thereof.

¹¹¹ Section 8.

¹¹² Section 9.

for refresher courses and sometimes allowed to take study leaves to complete university degrees while still retaining their employment. This section however does not refer to granting of such opportunities to PWDs as a vulnerable group.

Section 20 of the Labour Code establishes an office of National Employment Service, which is charged with the duty of collecting information relating to vacancies for employment,¹¹³ facilitating the placement of unemployed persons,¹¹⁴ providing employment-related training¹¹⁵ and collecting information and statistics regarding the labour market, including information on labour requirements and labour supply, to be forwarded to the Labour Commissioner.¹¹⁶ The Labour Code does not place any obligation on the National Employment Service to assist PWDs in particular but does not exclude them when the prescribed procedures are followed.

Self-employment, entrepreneurship, the development of cooperatives and starting one's own business

Promotion of self-employment is found under the Lesotho National Development Corporation (LNDC) Order 1990 and the Basotho Enterprises Development Corporation (BEDCO) Act 9 of 1980. Section 4 of the LNDC Order states purposes of the Corporation as to initiate, promote and facilitate the development of manufacturing and processing industries, mining and commerce in a manner calculated to raise the level of income and employment in Lesotho. However, there is nothing explicit in the Order as far as inclusion of PWDs in these efforts are concerned.

¹¹³ Section 21 (1)(a).

¹¹⁴ Section 21(1)(b).

¹¹⁵ Section 21 (1)(d).

¹¹⁶ Section 21(1)(e).

In the same manner, the objectives of BEDCO are stipulated in section 4 of the BEDCO Act as establishment of Basotho-owned business enterprises, with particular emphasis on the promotion of indigenous entrepreneurial skills. The duties and powers of the Corporation are stipulated in Section 5 and include among others, to investigate, initiate, facilitate and encourage establishment of Basotho business undertakings and their expansion. The other is to promote, assist or finance any Basotho-owned business undertakings. The Act does not say anything about special inclusion of PWDS in the corporation's initiative.

Over and above these obligations, the CRPD also places an obligation on States Parties to ensure employment of PWDs in the public sector and promotion of the employment of PWDs in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures. It also mandates them to ensure that reasonable accommodation is provided to PWDs in the workplace. However, the Labour Code is silent as far as these obligations are concerned and in the absence of a specific mention of PWDs in the Labour laws and Policies, these obligations are almost impossible to enforce in a Court of law.

That is, PWDs protection of the right to work and employment is neither seen in the Constitution nor in other mainstream labour legislations despite the fact that Lesotho is a party to the International Labour Organisation's Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983.

3.5.3 Access to physical environment

The CRPD explicitly obliges state parties to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment.¹¹⁷ This obligation includes the identification and elimination of obstacles

¹¹⁷ Article 9.

and barriers to accessibility of buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces.

This obligation notwithstanding, the Buildings Control Act 1995 does not have any provisions which forces the architects and builders of public places to design buildings in a manner that makes them accessible to PWDs. As a result many public places such as hospitals, banks, schools and others are not easily accessible to PWDs, especially those with physical disabilities and those with visual impairments.

3.5.4 Adequate standard of living and social protection

States Parties to the CRPD recognize the right of PWDs 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, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of PWDs to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right.

Unlike South Africa, Lesotho does not have social security law.¹¹⁸ The task of looking after the living needs and social protection of PWDs is vested in the department of Social Welfare within the Ministry Of Health and Social Welfare. An attempt was made to obtain the Social Welfare Policy 2003 but all in vain as it was indicated that it is currently non-operational and subject to review.

People with disabilities in Lesotho do not have a special grant to cater for their welfare needs. They are only given public assistance of only one hundred Maluti a month by the Department of Social Welfare which is means-tested. One loti is equivalent to one

¹¹⁸ South African Social Security Agency Act no. 9 of 2004.

South African Rand and equivalent to eight US dollars. This money is barely adequate to cover all the needs of the poorer sections of the people with disabilities. Consequently, they are among the least nourished, healthy, educated, employed and the most poverty stricken in the country.¹¹⁹

3.5.5 Participation in political and public life

In terms of the CPRD, States Parties shall guarantee to PWDs political rights and the opportunity to enjoy them on an equal basis with others, and shall ensure that PWDs can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for PWDs to vote and be elected.

The electoral laws of Lesotho are general and do not make reference to specific needs of PWDs. As a result, PWDs rely on other people for guidance to polling stations and for assistance in the voting process.¹²⁰ Furthermore, the laws do not provide for affirmative action to cater for representation of PWDs as a group in parliament.

3.5.6 PWDs in the Criminal Justice System

This involves protection of the rights of PWDS and their participation as victims, witnesses and even perpetrators in prosecution of criminal offences.

PWDs as witnesses

The Criminal Procedure and Evidence Act of 1981 specifically provides that every person not expressly excluded by the Act from giving evidence is competent and

¹¹⁹ Chitereka (note 14 above).

¹²⁰ This was stated in an interview with one Mr. Matela, a male adult of Roma who has a visual disability.

compellable to give evidence in a criminal case in any court in Lesotho or before a Magistrate in a Preparatory Examination.¹²¹ Section 218 however, makes a proviso that it shall be competent for the court in which any criminal case is pending to decide upon all questions concerning the competency or compellability of any witness to give evidence. That is, according to these two sections, one cannot be regarded as incompetent to give evidence purely on the basis of their disability, except if the disability has a bearing on the reliability of the evidence he gives.

This is also reflected in section 219 which provides that no person appearing or proved to be afflicted with idiocy, lunacy, or inability or laboring under any imbecility arising from intoxication or otherwise.

PWDs as victims

The Sexual Offences Act provides that committing a sexual act with a person with disability is a criminal offence.¹²² Under this section, the Act does not specify circumstances under which such sexual act will be an offence. As a result although the spirit of the legislature was to protect PWDs from acts of sexual assault in which perpetrators take advantage of their disability, they however feel that the Act does not take into account that they have sexual needs and that they can engage in consensual sexual relationships.¹²³ Despite this vagueness in the Act, in an interview with Mr. Tshabalala, a Chief Prosecutor in the Maseru Magistrate Court, he indicated that since adoption of the Act, they have not had a case in which one had been accused of having committed consensual sexual act with a person with disability of any kind.

¹²¹ Section 215.

¹²² Section 3 Sexual Offences Act 2003.

¹²³ This was stated by one Tiisetso, a middle-aged woman with visual disability in a workshop organised by LNFOD for validation of this report.

As victims, PWDs also face interpretation of their evidence in court. In an unreported case in Mafeteng, a 32 year old man was charged with contravention of the Sexual Offences Act in that he had committed a sexual act with a 17year old girl who had a speech and hearing disability without her consent. As the first Prosecution Witness (PW1), the victim had to give evidence of how the accused forcefully had sexual intercourse with her. She could not communicate through sign language understood by official interpreters as she had not been trained in that regard. The only person who could understand her was her own sister. Without swearing her in, the court used her sister to record PW1's evidence. On the basis of this evidence, the accused was convicted and sentenced to ten years imprisonment.

The case was taken to the High Court for review. It was not opposed. Based on the accused's argument that the victim's sister was not a sworn interpreter, the conviction and sentence were set aside for procedural irregularity. This is but one example that shows how non-inclusion of disability specific issues in the criminal law can have a negative impact on our criminal justice system.

3.6 Participation in cultural life, recreation, leisure and sport.

3.6.1 Participation in cultural activities

States Parties recognize the right of PWDs to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that PWDs:

- (a) Enjoy access to cultural materials in accessible formats;
- (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
- (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

Section 35 of the Constitution provides for participation in cultural activities in the following terms:

- 1) Lesotho shall endeavour to ensure that every citizen has an opportunity to freely participate in the cultural life of the community and to share in the benefits of scientific advancement and its application.
- (2) Lesotho shall adopt policies designed to protect the interests of any citizen in any scientific, literary or artistic production of which he is the author.

That is, the section is silent as to the rights of PWDs in particular in removal of barriers that hinder their full participation in cultural life such as lack of access to information. On protection of the interests of authors of scientific or artistic production, the section is not elaborate. As a result, most PWDs find their artistic productions such as music abused by others. Neither this provision nor the Copyright Act adequately protect PWDs.

3.6.2 Recreation, leisure and sport

The CRPD provides that with a view to enabling PWDs to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

- (a) To encourage and promote the participation, to the fullest extent possible, of PWDs in mainstream sporting activities at all levels and to ensure that PWDs have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources

Sporting is vital as it helps in integrating people with disabilities into mainstream society and it can be a component in the rehabilitation of people with disabilities. Yet, there is

no legal provision to ensure that people with disabilities participate in sports and have access to recreational facilities where they can go and spend their leisure time.¹²⁴

¹²⁴ Chitereka (note 14 above).

PART 4

4. CONCLUSIONS AND RECOMMENDATIONS

Having discussed Lesotho's obligations towards PWDs at the international level and having assessed the domestic laws relating to education, health and social inclusion, the following conclusions are made:

- Lesotho is a State Party to international human rights instruments that protect the rights of PWDs. These instruments include the Universal Declaration Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, Convention on Elimination of all forms of Discrimination Against Women, Convention on the Rights of the Child, African Charter on Human and Peoples' Rights, Protocol to the ACHPR on the Rights of Women, African Children's Charter and Convention on the Rights of People with Disabilities.
- In terms of these instruments, Lesotho is obliged to take measures, including legislations and policies to protect the rights of PWDs such as the right to health, education, social inclusion and empowerment.
- Legislative efforts taken by Lesotho to protect PWDs are limited to:
 - (1) the non-discrimination provisions (sections 4 and 18) of the Constitution of Lesotho;
 - (2) Section 33 of the Constitution which places an obligation on the government to adopt policies meant for protection of the rights of PWDs and
 - (3) Education Act of 2010.
 - (4) There is a national disability policy which is also meant for protection of the rights of PWDs.
- The above legislative measures notwithstanding, the following challenges have been identified:

- (1) The obligation placed by section 33 has not been fulfilled by the government. Notwithstanding section 25 which provides for progressive realization of the Directive Principles of State Policy, there is no law or policy on the ground that seeks to implement section 33 of the Constitution.
- (2) Despite enactment of the Education Act of 2010 which places an obligation on the Minister of Education, the Teaching Service Commission and the concerned schools to include children with disabilities into the mainstream education system, the following problems still exist:
- (i) Lack of accessible buildings, in particular the currently built double storey classrooms cannot be accessed by children with physical disabilities as they do not have escalators.
 - (ii) Lack of teachers trained for special needs of children with disabilities.
 - (iii) Lack of aids/tools to assist the learning of children with disabilities.
- As a result of these challenges, children with disabilities are forced to go to the few special education schools which are not available nationwide and also defeats the object of inclusion into the other sectors of society.
 - As far as protection of health is concerned, health is not recognized as a right in the Constitution of Lesotho but a non-justiciable principle of state policy. PWDs are recognized in neither laws nor policies as a homogeneous group in need of special health services because of their disability. That is, there are no laws or policies providing for PWDs, right to special health care. These include policies and programmes aimed at reduction of pandemics such as HIV/Aids amongst PWDs. Even methods used to make people aware of such pandemics and other health issues are not inclusive in as much as they do not accommodate PWDs, especially the deaf and those with visual disability
 - In relation to social inclusion, in particular habilitation and rehabilitation of PWDs, there are no laws and policies that guide service providers.
 - There are no laws and policies deliberately tailored to cater for special needs and challenges of PWDs in the work environment, to govern provision of services meant

for enhancement of PWDs standard of living and those meant for their political participation.

These challenges, therefore, probe a need for enactment of a disability specific legislation in line with the international instruments discussed in part 2 of this report.

BIBLIOGRAPHY

Acts

Basotho Enterprises Development Corporation (BEDCO) Act 9 of 1980.
Buildings Control Act 1995
Copyright Order 1989
Children's Protection and welfare Act 2011
Constitution of Lesotho 1993
Constitution of SA 1996
Criminal Procedure and Evidence Act 1981
Education Act of 1995 as amended by Education Act of 1996
Education Act of 2007
Education Act of 2010.
Higher Education Act 2004
Labour Code Order No 24 of 1992
Lesotho National Development Corporation (LNDC) Order 1990
Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa)
Sexual Offences Act 2003
Social Security Agency Act no. 9 of 2004 (South Africa)
South African Schools Act no. 84 of 1996

Articles

Chitereka C, "People with disabilities and the role of social workers in Lesotho", (2010)
Social Work and Society International online journal vol. 8, no.1.

McClain Charlotte Vuyiswa 2002 'Governance and Legislation in South Africa: a contemporary overview' www.disabilityworld.org

Monaghan L 2003 Maryland 2003 'HIV infection statistics for hearing and deaf populations: Analysis and policy suggestions.'

International instruments

African Charter on Human and Peoples' Rights 1981

African Charter on the Rights and Welfare of the Child 1999

Convention on Elimination of all forms of Discrimination Against Women 1979

Convention on the Rights of the Child 1981

Convention on the Rights of Persons with Disabilities 2006

Declaration on the Rights of Mentally Retarded Persons 1971

Declaration on the Rights of Disabled Persons 1975

Declaration on the Rights of Deaf-Blind Persons 1979

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

ILO Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983

Principles for the Protection of Persons with mental illness and the Improvement of mental health care 1991

OAU Agreement on Rehabilitation Institutions 1985

Protocol to the African Charter on the rights of Women 2003

Treaty of SADC

SADC Parliamentary Forum Norms and Standards for Elections 2001

SADC Social Charter 2003

United Nations Standard Rules on Equalisation of Opportunities for persons with disabilities 1993

Universal Declaration of Human Rights 1948

Reports, Comments, Recommendations and Guidelines

SAFOD Research Programme (SRP) LNFOD Country Report on www.safod.org

CBR Guidelines

UN General Assembly 48th session.

Lesotho demographic survey 2006

LNFOD study on the living conditions of persons with disabilities 2010.

General Comment no.14 of 2000 paragraph 18 adopted by the Committee in its 22nd Session in 2000.

General Recommendation 18 adopted by the Committee in its 10th Session in 1991 document A/46/38.

International consultation to review community-based rehabilitation (CBR). Geneva, World Health Organization, 2003 http://whqlibdoc.who.int/hq/2003/who_dar_03.2.pdf.

International Labour Organization, United Nations Educational, Scientific and Cultural Organization, World Health Organization. *CBR: A strategy for rehabilitation, equalization of opportunities, poverty reduction and social inclusion of people with disabilities. Joint Position Paper 2004*. Geneva, World Health Organization, 2004 (www.who.int/disabilities/publications/cbr/en/index.html, accessed 12 October 2010)

Resolution WHA58.23: *Disability, including prevention, management and rehabilitation*. Fifty-eighth World Health Assembly, Geneva, 25 May 2005 (www.who.int/disabilities/publications/other/wha5823/en/index.html)

Declaration of Alma-Ata: *International Conference on primary healthcare*, Alma-Ata, USSR, 6- 12 September 1978, Geneva, World Health Organization 1978 www.who.int/hpr/NPH/docs/declaration_almaata-pdf

Policies, Programmes and Strategies

National Disability and rehabilitation Policy: Ministry of Health and Social Welfare 2011.
National HIV/ AIDS Policy 2006
Education Sector Strategic Plan 2005 – 2015

Books

Dugard J., 2005, International Law.
Viljoen F, 2007, International Human Rights Law in Africa.
Oxford Advanced Learners' Dictionary 1995 Oxford University Press.

Handbook on best practices regarding HIV and Aids for people with disabilities

Cases

Purohit and ors v The Gambia (2003) African Human Rights Law Reports, 96.

Khathang-tema Baitsokoli v Maseru City Council and ors.

Websites

www.un.org/esa/socdev/enable/rights/convtexte.htm

www.who.int/classifications/icf/en

www.social.un.org

www.un.org/disabilities/default.asp?=150

www.africaunion.org/root/au/documents/treaties/Text/Africa_Rehabilitation_institute.pdf

www.who.int/hpr/NPH/docs/declaration_almaata-pdf

www.health.gov.ls

http://whqlibdoc.who.int/hq/2003/who_dar_03.2.pdf

www.who.int/hpr/NPH/docs/declaration_almaata-pdf

www.disabilityworld.org

www.who.int/disabilities/publications/cbr/en/index.html