Joint response to the List of Issues on Kenya's report to the UN Committee on the Rights of Persons with Disabilities

For consideration at the 14th session of the Committee on the Rights of Persons with Disabilities, August-September 2015

Submitted by:

Mental Disability Advocacy Centre (MDAC)

Users and Survivors of Psychiatry Kenya (USPK)

Kenya Association of the Intellectually Handicapped (KAIH)

Herbert Smith Freehills (HSF)

Mburugu & Kanyonge Associates Advocates (M&KA)

I. Introduction

1. This joint report focuses on Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It also provides specific information on the interaction between this and other rights including access to justice (Article 13), protection of physical and mental integrity (Article 17), respect for family life (Article 23), access to healthcare (Article 25), and political participation (Article 29). Information is also provided in respect of Article 31 on statistics and data collection.

2. The Mental Disability Advocacy Centre (MDAC) is an international human rights organisation which uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC's vision is a world of equality where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person is fully respected; and where human rights are realised for all persons without discrimination of any form.

3. Users and Survivors of Psychiatry Kenya (USPK) is a national membership organisation whose major objective is to promote and advocate for the rights of people with mental health issues/conditions (people with psycho-social disabilities). USPK is affiliated with the World Network of Users and Survivors of Psychiatry (WNUSP) and the Pan-African Network of People with Psycho-social Disabilities (PANPEP).[1]

4. The Kenya Association of the Intellectually Handicapped (KAIH) is a national, family based organisation ofself-advocates who aimto empower people with intellectual disabilities. KAIH promotes their human rights within society through meaningful participation, education, advocacy, empowerment and information exchange. KAIH is a member of Inclusion International which is the global movement of people with intellectual disabilities and their families.

5. Herbert Smith Freehillsis a leading global law firm collaborating with MDAC and its Kenyan partners and providing pro bono legal assistance to support MDAC's "I'm a Person" campaign in Kenya. This three-year legal advocacy initiative seeks to ensure that: (a) courts recognise the right to legal capacity for people with intellectual disabilities and people with mental health issues, provide remedies in individual cases, and advance jurisprudence; and (b) governments are aware of human rights violations and take steps to ensure implementation of international human rights laws and standards in relation to legal capacity.

6. Mburugu & Kanyonge Associates Advocates is a private law firm in Kenya working in several fields, including public interest litigation and human rights. MDAC is currently

[1] Further information is available at http://www.uspkenya.com/.

discussing strategies with M&KA and how it can collaborate with MDAC's Kenyan partners in the "I'm a Person" campaign in Kenya.

II. Background

7. Article 12guarantees the right to equal recognition before the law for people with disabilities. In April 2014, MDAC, USPK and KAIH published a report entitled *The Right to Legal Capacity in Kenya*, the culmination of over three years of extensive field and desk-based research conducted with people with intellectual disabilities and people with mental health issues.[2] It analyses Kenya's laws, policies and practices on the exercise of the right to decide for people with mental disabilities, and puts forward 40 detailed testimonies from people with disabilities themselves, and their families and carers. It provides extensive information on their experiences in different areas of life including political participation, work and employment, health care, access to justice, marriage and divorce, issues associated with property and land. The report was annexed to our previous submission for the 3rd Pre-sessional Working Group.

8. This report provides further information based on list of issues adopted by the Committee on the Rights of Persons with Disabilities (CRPD Committee) on 22 May 2015.

III. Article 12: Equal recognition before the law

9. The CRPD Committee requested the Kenyan government to report on steps taken to repeal "legislation and practices that restrict legal capacity on the basis of impairment and to establish supported decision-making regimes to secure the right to exercise legal capacity, and the right to decide in all areas of life".[3]

10. The Kenyan government has noted that among duty bearers in Kenya, Article 12 of the CRPD is one of the most misunderstood provisions of the Convention.[4] These duty bearers include government officials from the legislative, executive andjudiciary. There have been few attempts to provide information to government officials about the core importance of Article 12. Those that have taken place have been organized by civil society, such as the event to launch "Legal Capacity in Kenya" in Nairobi in April 2014.Two Kenyan judges

[2] MDAC, USPK and KAIH, *The Right to Legal Capacity in Kenya*, (Nairobi and Budapest: MDAC, 2014), available online at www.mdac.org/Kenya.
[3] Committee on the Right of Persons with Disabilities, List of Issues of the Committee: Kenya, 22 May 2015, CRPD/C/KEN/Q/1, para. 11.
[4] Committee on the Rights of Persons with Disabilities, Replies to the List of Issues: Kenya, 10 July 2015, CRPD/C/KEN/Q/1Add.1.

from the High Court attended and collected copies of the report to distribute to their colleagues.

11. The Kenya National Commission on Human Rights(KNCHR) organised a legal capacity briefing event and invited judges to this in March 2014. Judge Majanja, whose judgment in HCCR APPEAL No.17 of September 2014 in *Wilson Morara Siringi v. Republic of Kenya* is cited as a progressive understanding of Article 12 by Kenyan courts.[5] Justice Majanja participated in both events. In his judgment, Justice Majanja stated that "I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant [a woman with an intellectual disability] is an object of social project rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. The approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities…".[6] He also noted that labelling a person as "mentally retarded" represents "an affront to the right of dignity protected by Article 28 of the Kenyan Constitution".[7]

12. Such progressive judgments should be given due recognition, whilst recognising that such an approach is currently the exception rather than the rule. Even though the judgment did not expressly mention the need to provide access to decision making support for people with disabilities, or to help others understand their decisions, it is the obligation of the state to provide such support.

13. Formal guardianship through court or administrative processes occur less commonly than informal restrictions on decision-making by families, friends and communities, and based on paternalistic stereotypes about people with disabilities in Kenyan society.Wherea person has an impairment (particularly people with intellectual impairments, or those with mental health issues), decisions are commonly made for them on a substitute and informal basis by family and other community members.[8]To combat this problem, it is essential that the Government take steps to raise awareness of the decision-making rights of people with disabilities, and particularly those with intellectual disabilities or mental health issues, in line with Article 8, CRPD.

14. Kenyan legislation also allows for partial and full restriction of the right to legal capacity through a court process.[9] Section 107 of the Children's Act allows guardianship of a child to extend beyond the age of 18 years in cases where the child has a "mental or physical disability=or an illness what will render him incapable of maintaining themselves or property without the assistance of a guardian after his eighteenth birthday".[10]

15. A new Mental Health Bill published in 2014 states that "persons with mental illness shall enjoy legal capacity on an equal basis with others".[11] It also states that "the Government shall

[5] Judgment available online at: http://kenyalaw.org/caselaw/cases/view/101502/.
[6] Ibid., at para. 15.
[7] Ibid., at para. 16.
[8] Supra note 2, at p. 6.
[9] Mental Health Act 1991 (Cap 248), s.26.
[10] Children Act 2001 (Cap 141), s. 107(2).
[11] Mental Health Bill 2014, s. 17(1).

provide support to enable persons with mental illness to exercise their legal capacity."[12]Yet, it was concerning to note thatthe Bill continued to maintain the possibility for "persons with mental illness" to have their legal capacity restricted by a court process,[13] which would result in the appointment of a "personal representative to manage his or her affairs.[14]

16. The Bill was introduced to the National Assembly in June 2014 and we understand that it is currently under consideration by a National Assembly committee. Stakeholders in Kenya have also informed us that section 26 of the new Persons with Disability Bill 2015 will recognise the right to legal capacity.While the Kenyan Government's response to the list of issues has not mentioned these steps, the Kenyan government should ensure that any future legislative amendmentsfully and expressly recognise the right to legal capacity for people with disabilities as well as theirright to access support to exercise their legal capacity. Substitute decision-making mechanisms, such as the personal representative scheme mentioned above, should be removed where they fail to give effect to the will and preferences of persons with disabilities.

Recommendations (Article 12)

i. **Repeal s. 26 of Mental Treatment Act 1989 and s. 107 of the Children's Act 2001 which allows for deprivation of legal capacity. Ensure that any future mental health or disability legislation providesequal recognition of the right to legal capacity to all people with disabilities. People with intellectual disabilities and people with mental health issues must be closely consulted and involved in future law reform.**

ii. **Both the national Government and the county authorities should conduct regular community awareness-raising on the right to decide for people with intellectual disabilities and people with mental health issues.**

iii. **The Government should roll out nationwide training and capacity building forjudicial and executive officers on the right to legal capacity,particularly in relation to people with intellectual disabilities and people with mental health issues.**

iv. **The Government should invest in supported decision making pilot projects in communities in Kenya, with the close involvement of people with disabilities and their representative organisations.**

IV. Article 13: Access to justice

[12] Ibid, s. 17(2).
[13] Ibid, s. 17(3).
[14] Ibid, s. 17(4).

17. Article 13 of the CRPD guarantees people with disabilities effective access to justice on an equal basis with others. They should be able to benefit from procedural and age-appropriate modifications or adjustments to facilitate their participation in any legal proceedings (criminal, civil, administrative, regardless of the trial stage) as victims, witnesses, plaintiffs or defendants. The CRPD Committee has stressed that people with disabilities should be enabled to participate in proceedings as subjects of rights and not objects of protection.[15]

18. The Kenyan Civil Procedure Act and Civil Procedure Rules objectify people considered to be of "unsound mind" by requiring them to bring legal actionsthrough a next friend, or to defend such actions through a *guardian ad litem*.[16]

19. Kenya's Constitution guaranteed the right to access justice (Article 48), fair trial and public hearing (Article 50 and Article 50(m)) and protects the right for citizens to initiate court proceedings when their rights are violated or threatened(Article 22(1) and 22(3)(b)). However, people with intellectual disabilities and people with mental health issues (including those labelled as being of "unsound mind" or "mentally infirm") have no effective way to receive direct access to justice. In addition there are no specific legal safeguards in place to ensure that such persons are protected against unsolicited interference from family members or others who prevent them from seeking justice. Very little or no support is available to people with intellectual disabilities and people with mental health issues to access justice.

20. The Kenyan Governmenthas stated that the few people with intellectual disabilities or mental health issues who access courts as victims and/or witnesses in criminal cases facea number of barriers, including procedural hurdles to accepting as valid the testimony or evidence submitted by them. They state that: "[t]heir evidence is considered to lack credibility usually leading to dismissal of cases".[17] The Government has promised to address this challenge through the Evidence Act 2012 (Revised 2014). The Revised Act states that "[a] mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the question put to him and giving rational answers to them".[18]

21. This provision allows for the evidence of people with intellectual disabilities and people with mental health issues to be discredited, or not given appropriate weight. No additional measures of support are envisaged to enable people with disabilities to provide valid

[15] CRPD Committee, Concluding Observation of the Committee: China, 15 October 2012, CRPD/C/CHN/CO/1.
[16]MDAC, USPK and KAIH, *The Right to Legal Capacity in Kenya*, (Budapest and Nairobi: MDAC, 2014), p. 47. The Civil Procedure Act 2012 (Cap 21) at s. 93 states that: "In all suits which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the court by the next friend or guardian for the suit, have the same force and effect as if such persons were under no disability and had given consent or made such agreement." Order 32 of the Civil Procedure Rules 2012 treats "persons of unsound mind or mental infirmity" in the same way as minors who are a party to civil suits (Order 32, rule 15). The rules state that "[w]here a suit is instituted by or on behalf of a minor [or person of unsound mind or mental infirmity] without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented" (Order 32, rule 2(1)). The court is also empowered to appoint a guardian *ad litem* on behalf of such persons (Order 32, rule 3(1)).
[17] Committee on the Rights of Persons with Disabilities, Replies to the List of Issues: Kenya, 10 July 2015, CRPD/C/KEN/Q/1Add.1, para. 128.
[18] Kenya Revised Evidence Act 2012, s. 125(2).

evidence, nor are there provisions for procedural, age-appropriateor reasonable accommodations in courts.

22. MDAC discussion with East African Lawyers show that lawyers and judges rarely ensure that court procedures are adapted, for example through the modification of questioning. Lawyers, especially during cross examination, often pose multiple, negative and leading questions which have the effect of confusing witnesses, or creating anxiety to witnesses with intellectual disabilities or mental health issues.[19] Research shows that this is also common in other jurisdictions.[20]

23. Kenyan Courts should recognise the capacityof people with disabilities to give evidence. Where there are difficulties with communication, the court should allow the witness to give evidence by alternative means where this is possible. The court could perhaps orderfor a witness to be assisted by a 'support person'of their choice, unless the judge is of the opinion that such order would prejudice the proper administration of justice. The court could also allow witnesses with disabilities to testify outside of the court room or behind a screen which wouldensure that they do not come into contact with the accused.[21]In the United Kingdom, judges have a wide variety of "special measures" which can be ordered during criminal trials to accommodate witnesseswith'mental disorders' or impaired mental or emotional capacity. Such orders may involve using screens, evidence given in camera, and removal of wigs and gowns. An order can be made by a judge or on the motion of one of the parties, but full reasons for its acceptance or refusal must be given in open court.[22] Also, alternatives to oral evidence such as video evidence should be considered as valid methods for providing testimony.

Recommendations (Article 13)

i. **Fully recognise the legal capacity of people with mental disabilities (particularly people with intellectual disabilities and people with mental health issues) to sue and be sued in their own capacity and through their freely chosen support persons or representatives. Abolish discriminatory rules of court which have the effect of denying people with disabilities direct access to justice.**

ii. **Provide age-appropriate, procedural and reasonable accommodationsto facilitate the participation of people with disabilities in court cases, including throughaccepting alternatives to oral testimony.**

[19] MDAC training for lawyers in Uganda, August 2014. MDAC discussion with two Kenyan Lawyers in June 2015.
[20] Mark R Kebbell, Christopher Hatton and Shane, "Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?", (December 2010), p. 31-2.
Mark R Kebbell, Christopher Hatton and Shane, "
Witnesses with intellectual disabilities in court: What questio

iii. Provide training on legal capacity and access to justice to all officials in the justice system, including police, courts, lawyers and probation and prison officials.

V. Article 17:Physical and mental integrity

24. The CRPD Committee askedthe Kenyan Government to indicate measures taken to prohibit and prevent forced sterilisation of women and girls with disabilities in law and practice.[23] The Government responded that "sterilization only takes place with the consent of the woman. No forced sterilisation is carried on those with disabilities as they are protected by the law and the health law prohibits cutting of any organ without a medical reason".[24]

25. The government's response isinaccurate, as it fails to address the gap between law and practice. Women, in particular women with intellectual disabilities and women with mental health issues are vulnerable to being coerced into sterilisation procedures.

26. MDAC, USPK and KAIH's legal capacity research revealed that women and girls with intellectual disabilitiesin Kenya experience intersectional discrimination on basis of their disability and gender. A number of people interviewed for the research told researchers about abuses they had faced, including women who had been forcefully sterilised by private individuals, entities and sometimes in government-run facilities. One woman who lived in a missionary centre told our researchers:

> "I don't think I would get children. I will tell you something, you see here [lifts up the blouse and reveals a scar on her stomach] here I was made an operation. This is contraceptive, *all of us had been done like this*, we cannot get children. Nobody asked me. They should have asked me, because I love children […]. I feel bad, but what can I do now?"[25] [emphasis added]

27. In 2014, two petitions were lodged before the Constitutional and Human Rights Divisions of the High Court in Nairobi bywomen living with HIV who, without informed consent,weresterilised.[26]The two petitioners allege that their non-consensual sterilisation was

ns are asked and what influence do they have?", (December 2010), p. 31-2.
he Committee: Kenya, 22 May 2015, CRPD/C/KEN/Q/1, para. 16.
[24] Committee on the Rights of Persons with Disabilities, Replies to the List of Issues: Kenya, 10 July 2015, CRPD/C/KEN/Q/1/Add.1, at para. 50.
[25] MDAC, USPK and KAIH, *The right to Legal Capacity in Kenya* (Nairobi and Budapest: MDAC, 2014), pp. 46, 66. A full testimony from this interviewee is contained in the report.
[26]See Petition 605 of 2014 and Petition 606 of 2014 to the High Court of Kenya at Nairobi, Constitutional and Human Rights Division.Both petitions were made with the assistance of the Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN) and the African Gender and Media Initiative Trust (GEM).

unconstitutional and violates their reproductive rights. The Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), one of the two organisations that took up these cases, informed MDAC that another female with a visual impairment, who had also been a victim of forced sterilisation,didn't want to take her case forward through the courts.[27]

28. The African Gender and Media Initiative Trust (GEM)undertook a study with approximately 40 women living with HIV (including the two KELIN petitioners).[28]The study highlighted that women were coerced to accept permanent sterilisation in health care facilities under the threat that of withholding food and mild for their babies.

29. The Constitution of Kenya imposes a duty on the State to observe, respect, protect, promote and fulfil the rights and fundamental freedoms included in the Bill of Rights,[29] and obliges the State to take legislative, policy and other measures including setting of standards to implementthose rights.[30]

30. Kenyan legislation fails to address the issue of informed consent to sterilization, or provide sufficient safeguards to protect the rights of women with disabilities, particularly by ensuring that informed consent is a minimum requirement for invasive and irreversible procedures. The Mental Health Bill 2014 states that sterilisation is not to be regarded as an emergency treatment.[31]

31. The Kenya Disability Act 2003 makes no reproductive health rights or sterilisation, nor does it set out any requirement for informed consent to medical procedures.

32. Policies such as the National Planning Guidelines for Service Providers (NPGSPK) 2010[32] and the National Reproductive Health Policy 2007provide guidance to policy makers,

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[27] MDAC email correspondence with Allan Maleche, Executive Director, KELIN: 13 February 2015.
[28] African Gender and Media Initiative, *Robbed of Choice: Forced and Coerced Sterilisation Experiences of Women Living with HIV in Kenya,* (Nairobi: GEM, 2012).
[29] Constitution of Kenya, Article 21.
[30] Ibid, Article 21(2).
[31] At s. 34(1)(c). Other relevant Constitutional provisions include: Article 43(1) on the right to reproductive health care; Article 54(1)(a) on the right of persons with disabilities to be treated with dignity and respect; Article 54(1)(c) "reasonable access to… information"; Article 46(1)(a)-(c) the right to be given services of reasonable quality and necessary information for the protection of health; Article 29 on freedom and security of the person and the prohibition on violence, cruel, inhuman and degrading treatment; Article 27(4) prohibition of discrimination based on sex or disability; and Article 31(a) on the right to privacy.
[31] See the functions of the National Council for Persons with Disabilities, ss. 7(1)(b)(i) to 7(2)(d).
[32] Kenya Ministry of Public Health, *National Family Planning Guidelines for Service Providers*, (Nairobi: Ministry of Public Health and Sanitation, 2010), available online at https://www.k4health.org/sites/default/files/Kenya%20FP%20Guidelines%202010%20final%20signed_full%20text.pdf (last accessed 5 August 2015).

medical practitioners and service providers on sexual and reproductive rights.[33] The NPGSPK refers to the need to gain informed and voluntary consent prior to female surgical sterilisation.[34]The Guidelines also call forcaution when gaining consent from certain vulnerable people for irreversible contraceptive interventions, including "persons with mental health problems including depressive disorders".[35]It warns service providers against providing any incentives to women to accept contraception or in recruiting potential clients to perform surgical operations.[36] The National Reproductive Health Policy does not address the involuntary and forced sterilisation of womenexpressly, nor does it mention women with disabilities.[37]

33. There has been increasing awareness and denouncement by international and regional human rights instruments and enforcement bodies.[38]Forced sterilisation amounts to torture, inhumane and degrading treatment,[39] and constitutes violence against women.[40] Forced sterilisation violates rights of women with disabilities to retain their fertility and should never be a condition to access medical care or other benefits,[41] and must be based on free and informed consent.[42] States must ensure that in practice, there is no non-consensual sterilisation of women with intellectual disabilities and women with mental health issues,

[33]Kenya Ministry of Health, *National Reproductive Health Policy: Enhancing Reproductive Health Status for All Kenyans*, (Nairobi: Ministry of Health, October 2007), available online at:https://www.k4health.org/sites/default/files/National%20Reproductive%20Health%20Policy%20booklet_0.pdf (last accessed 5 August 2015).

[34]Supra note 32, page 173. The Guidelines state that "special care must be taken to ensure that every client who chooses this method does so voluntarily and is fully informed about the permanence of this method and the availability of alternative long-acting, highly effective methods." Ibid, p. 171.

[35] Ibid.

[36] Ibid.

[37]Supra note 33, Preamble, p. 1. Also relevant see, ss. 2(a)(i), 3.2.1(d), and 3.3.4(d).

[38]UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4 [at paragraph 8]; CEDAW Committee General Recommendations No. 19 and No. 24; Article 14 (1)(a)-(c) and Article 23 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women; UN Commission on Human Rights, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 11 February 2005, E/CN.4/2005/51 [at paragraphs 12 and 49]; UN Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, 3 August 2012, A/67/227, [at page 8] and UN Committee on the Rights of the Child (CRC), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13 [at paragraph 23(a)].

[39] UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak, 15 January 2008, A/HRC/7/3, paras. 38-9. CRPD Articles 15 and 16.

[40] Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, (55th Sess.), E/CN.4/1999/68/Add.4 (1999), at para. 51. It states: "*[F]orced sterilization is a method of medical control of a woman's fertility without the consent of a woman. Essentially involving the battery of a woman – violating her physical integrity and security – forced sterilization constitutes violence against women".*

[41] CRPD, Article 23.

[42] CRPD, Article 25.

including those have been fully or partially deprived of their legal capacity. Instead, they should provide the necessary support for women to decide whether to consent or not.[43]

Recommendations (Article 17)

i. **Promptly and independently investigate all claims of forced sterilisation of women with intellectual disabilitiesor women with mental health issues in public or private institutions, and release information on prevalence into the public domain.Initiate criminal proceedings against perpetrators of forced sterilisation and monitor the implementation of any future legislationaddressing forced sterilisation.**

ii. **The Kenyan Government should introduce a clear legislative ban on forced sterilisation, and place a specific emphasis on women and girls with disabilities. The law should be inline with international human rights standards.**

iii. **Develop guidelines and training for health care providers (including professionals such asdoctors, social workers, and gynecologists, etc.) to protect the sexual and reproductive rights of women with disabilities, with a specific focus on the requirements to gain informed consent.**

iv. **Conduct public awareness programmes about how and where to report cases of forced sterilisation and provide families of girls and women with disabilities support to access social, health, habilitationand rehabilitation services.**

VI. Article 23:Private and family life

34. The KenyanGovernmentwas asked toexplain measures being adopted to respect the right of people with disabilities, especially persons with psycho-social and intellectual disabilities, to marry and found a family.[44] The Kenyan Government's response has not specifically addressed this question,[45] but commits to eliminating discrimination against persons with disabilities in matters relating to marriage, family and personal relations.[46] The Constitution allows every Kenyan adult to marry a person of opposite sex (discriminatory on basis of

[43] Committee on the Elimination of Discrimination against Women, Committee's Concluding Observations: Belgium, 59th session 2014, CEDAW/C/BEL/CO/7, p. 9, para. 35.a.
[44] CRPD Committee, Kenya List of Issues, para. 21.
[45] Kenya Initial State Party Report to the CRPD Committee, para. 174. However, the Government noted that the family is regarded as the "foundation of society as it provides an environment of care, support and emotional security for any individual", ibid.
[46] Ibid.

sexual orientation) based on the free consent of the parties, and provides for equal rights during and after marriage.[47]Yet, negative social perceptions have made it difficult for people with disabilities to enjoy this right.[48]

35. Discriminatory perceptions against people with disabilities have been reinforced in recent amendments brought forward in the Marriage Act 2014. The Act consolidates existing marriage laws into a single Act. Section 11(1) states that a union is not a marriage if, at the time of the making of the union,"(a) the consent of either party has not been freely given."Section 11(2) states "Consent is not freely given where the party who purports to give it- (c) is suffering from any mental condition whether permanent or temporary, or is intoxicated, or is under the influence of drugs, so as not to appreciate the nature or purport of the ceremony". These provisions directly discriminate against Kenyans with disabilities.

36. Section 12 of the same Act states "…a marriage is voidable if- (a) at the date of the marriage… (ii) either party was or has ever since remained subject to recurrent acts of insanity".This provision is discriminatory in purpose and effect against people with disabilities, and particularly those with psycho-social disabilities. The legislation has been condemned by DPOs for entrenching discrimination against persons with psycho-social disabilities.[49]

37. The amendments mean that there is a high probability that the marriages of people with mental disabilities will be annulled in the future. Married people with disabilities often rely on the support of family members and their spouses.[50]Rather than promoting this form of support to people with disabilities, the new legislation threatensthe right for people with mental health issues to get married, renders current unions voidable and easily annulled on the basis of actual or perceived disability.

38. The Kenyan government must take effective and appropriate measures to eliminate discrimination by both public and private individualsagainst people with disabilities in all matters relating to marriage, family, parenthood, relationship and not to promote it.[51]

39. The CRPD Committee has raised concerns about disability-based restrictions on the right to marry.[52]

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[47] Kenya Constitution, Article 45(1) and 45(2).
[48] Kenya Initial State Party Report to the CRPD Committee, para. 174.
[49] Kenyan Star, 'How Kenyans living with mental health conditions lost the right to marry', 21 October 2014, available online at: http://www.the-star.co.ke/news/article-190888/how-kenyans-living-mental-health-conditions-lost-right-marry (last accessed 5 August 2015).
[50] See, for example, MDAC, USPK and KAIH, *Legal Capacity in Kenya*, (Budapest: MDAC, 2014), pp. 50-2.
[51]Several CRPD rights are at stake, including Article 5 (non-discrimination), Article 12 (legal capacity) and Article 23 (right to marry).

Recommendations (Article 23)

i. **Amend Sections 11(2) and 12 of the 2014 Marriage Act to ensure that any restriction or limitation is not disability-based and its purpose and effect should not be discriminatory against people with disabilities.**

ii. **Develop awareness raising campaigns,with people with disabilities, to combat negative perceptions that impact on the right to marry for Kenyans with disabilities.**

VII. Article 25: Health

40. The Kenyan Government was asked how its health service sector will scale up mental and psychosocial health-care and treatment services across the country.[53] Without answering those questions, the Government said it seeks to combat discrimination in healthcare provision on the basis of disability and that it will ensure that insurance companies do not discriminate against people with long-term mental health impairments.[54]

41. All Kenyans are guaranteed the highest attainable standard of health and health care services in the Constitution,[55] without discrimination on the basis of disability.[56] USPK has reported that mental health services are not fully integrated into primary health care, and that those that do exist are not available in rural areas. The scanty provision of mental health units are sometimes in a deplorable state with inhuman conditions, such as at Kisumu County Government Hospital.[57]

42. The issue is not only the insufficiency of mental health services in communities, but also the denial of health care choices. People are arbitrarily detained in mental health units because of their impairments, usually on the decision of relatives and carers, contrary to Article 14

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[52] UN CRPD Committee, Concluding Observation of the Committee: El Salvador, 8 October 2013, CRPD/C/SLV/CO/1, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSLV%2fCO%2f1&Lang=en. See also UN CRPD Committee, Concluding Observation of the Committee: Mexico, 27 October 2014, CRPD/C/MEX/CO/1, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMEX%2fCO%2f1&Lang=en

[53] CRPD Committee, Kenya List of Issues, para. 23.

[54] Committee on the Rights of Persons with Disabilities, Replies to the List of Issues: Kenya, 10 July 2015, CRPD/C/KEN/Q/1/Add.1, at para. 63.

[55] Article 43(a) of the Constitution.

[56] Persons with Disability Act 2013, s. 20.

[57] Daily Nation, 'For mentally ill patients in Kisumu it's a hard life', July 30 2015. Available online at: http://www.nation.co.ke/counties/kisumu/For-mentally-ill-patients-in-Kisumu/-/1954182/2814030/-/n9jxid/-/index.html (last accessed 31 July 2015).

CRPD, where they are forcefully medicated against their will. The two elements of the right to health, entitlement to services and freedom to decide are both violated.

43. States must adopt measures to ensure that all health care services provided to people with disabilities, including all mental health care and services, are provided on the basis of their free and informed consent,[58] and as close as possible to their communities.[59]

Recommendations (Article 25)

i. **Mental health services must be available as close as possible to peoples' communities and provided on the basis of free and informed consent.**

ii. **Laws permitting involuntary treatment and confinement, including upon the authorisation of a third party decision-maker such as family members or guardians, should be repealed.**

VIII. Article 29:Political participation

44. The Kenyan Government was asked about steps taken to amend Constitutional provisions inArticles 83(1)(b) and 99(2)(e) which disqualify a person from voting and being elected as a Member of Parliament if the person is of "unsound mind".[60]

45. The Government stated that the notion of "unsound mind" is yet to receive conclusive interpretation in relation to legal capacity and is a legal status declared by a court of competent jurisdiction based on assessment of a medical board appointed under the Mental Health Act.[61]Legal capacity is deprived when it is established that the person is incapable of understanding what they are doing.[62]

46. The delay in providing conclusive interpretation of the phrase "unsound mind" has resulted in laws, policies and practices being implemented in a manner that directly or indirectly discriminates and negatively impacts on people who are labelled, perceived or suspected to

[58]CRPD, Article 25(d).
[59]CRPD, Article 25(c).
[60] Committee on the Rights of Persons with Disabilities, Committees List of Issues: Kenya, 22 May 2015, CRPD/C/KEN/Q/1, para. 27.
[61] Committee on the Rights of Persons with Disabilities, Replies of Kenya to the List of Issues, 10 July 2015, CRPD/C/KEN/Q/1/Add.1, para. 78.
[62] Ibid.

have mental disabilities. The lack of clarity has resulted in the phrase "unsound mind", being arbitrarily interpreted as synonymous with intellectual or psycho-social disabilities.

47. In Kenya's 2013 general elections, people with all kinds of disabilities voted. This does not mean every adult with a disability who qualified and wanted to were able to vote. Those who were allowed to vote included those who could vote independently without needing support; those whoreceived support from their families or membership organisations to register and vote;and those who polling officers did not perceived as persons of unsound mind.[63] No plan was made for people in psychiatric hospitals to register or vote.[64] This is aviolation of the right to political participation.

48. The Government reported that through affirmative action, 5 people with disabilities became members of parliament whereas seven others have gone through the competitive process.[65] None of the 12 parliamentarians with disabilities is a person with mental health issues oran intellectual disability. Voting and standing for elections is a fundamental right for all Kenyans to exercise without any discriminatory restrictions.

Recommendations (Article 29)

i. **The Kenyan Parliament should immediatelytake steps to initiative amendments of Articles 83(1)(b) and 99(2)(e) of the Constitution that remove restrictions on the right to political participation for people with actual or perceived disabilities. Steps should be taken to remove terms from national legislation that have historically been used to discriminate against people with mental health issues and people with intellectual disabilities, such as "unsound mind" and "mental infirmity".**

ii. **Election information, communication, materials and polling stations must be made accessible, and reasonable accommodation and supportshould be provided to people with disabilities in order to exercise their political rights. The Independent Electoral and Boundaries Commission (IEBC) should ensure that adults with disabilities in psychiatric hospitalscanregister and vote in all upcoming national and county elections.**

iii. **The IEBC should explore alternative voting feasible optionsto ensure that people with disabilities can exercise their right to vote. This may includeallowing for the**

[63] Mental Disability Advocacy Centre, The Right to Legal Capacity in Kenya (Nairobi: MDAC, 2014) page 36.
[64] MDAC discussion with Users and Survivors of Psychiatric Kenya (USPK) before and after the August 2010 Kenya's Constitutional Referendum and the March 2013 general elections.
[65] Ibid, para. 79.

castingof secret ballots by telephone to a special and secure call centre, early (advance) voting, voting by post (mail), mobile polling station which visit locations such as psychiatric hospitals and peoples' residences, absentee voting which may not require a notary or medical certificate, and the provision of easy-to-read information.

iv. **Introduce support for people with intellectual disabilities and people with mental health issues to become members of parliaments (MPs). Support could include: awareness-raising campaigns; promotion of positive public attitudes towards people with disabilities; training and development opportunities targeting people with mental disabilities en route to political office; and establishing a fund for people with disabilities to stand for public office.**

IX. Article 31: Data and statistics

49. The Kenya National Bureau of Statistics and the National Council for Persons with Disabilitiesare obliged to collect statistical and research data to foster the implementation of the CRPD. However, as noted above, there is a lack of comprehensive, disaggregated and research data in Kenya on implementation of the Convention. Relevant statistics and research data are not publicly available.

Recommendations (Article 31)

i. **Collect appropriate and disaggregated information, including statistical and research data on, *inter alia*,the numbers of people with disabilities by broad categories of impairment; the numbers of people with disabilities who access support to exercise their legal capacity, and the form that this takes; statistics on the sexual and reproductive rights of women and girls, including collation of data on those who have experienced violations of these rights;number of people with mental disabilities who have exercised their right to voteand stood for election; and statistics on marriage.**

ii. **Disseminate data and research commissioned by the Government as well as disability-related research created by civil society.**

iii. **The Kenya National Commission on Human Rights, Gender and Equality (Article 33(2) body) should monitor health care and residential facilities both public and**

private in rural and urban areas, and publish the findings of such monitoring, including research and statistical data.

For further information, please contact:

Eyong Mbuen
Africa Project Manager, Mental Disability Advocacy Centre (MDAC)
Email: eyong@mdac.org, mdac@mdac.org, website: www.mdac.org.