



**MDAC's Written Comments
on the Draft Protocol to the African Charter on Human and Peoples' Rights
on the Rights of Persons with Disabilities in Africa**

10 February 2016

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MDAC is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. Our 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.

Contents

I. Introduction: interest and expertise	3
II. General comments.....	5
III. Specific comments.....	8
IV. Conclusion	22

I. Introduction: interest and expertise

1. 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.
2. As an international non-governmental organisation, MDAC submitted an application for Observer Status with the African Commission on Human and Peoples’ Rights (“the Commission”) in October 2015, pursuant to ACHPR/Res.33(XXV)98, which will be considered at the upcoming 58th Ordinary Session. MDAC also holds observer status with the UN Economic and Social Council (ECOSOC), and participatory status at the Council of Europe.
3. Established in 2002, MDAC began project work in collaboration with a number of partners in Africa in 2009. In furtherance of our strategic goals, MDAC has led on a number of projects in **Kenya, Uganda and Zambia**, including:
 - a. Research on the right to legal capacity for people with intellectual disabilities and people with psycho-social disabilities in Kenya in collaboration with Users and Survivors of Psychiatry Kenya (“USPK”) and the Kenyan Association of the Intellectually Handicapped (“KAIH”). This project, which involved user and survivor-led research, drew on interviews with people with disabilities, their family members and other community leaders across the country, and resulted in the publication of “The Right to Legal Capacity in Kenya” in April 2014.¹
 - b. Extensive research and human rights monitoring of the forms of ill-treatment and other human rights violations faced by people with psycho-social disabilities in Uganda, in collaboration with Mental Health Uganda (“MHU”), the largest national membership organisation of people with mental health issues on the African continent. The project resulted in the publication of two major reports in December 2014 entitled “‘They don’t consider me as a person’: Mental health and human rights in Ugandan communities” and “Psychiatric hospitals in Uganda: A human rights investigation”.²
 - c. A programme of monitoring and advocacy in relation to residential institutional settings for people with psycho-social disabilities in Zambia in collaboration with the Mental Health Users Network of Zambia (“MHUNZA”). As a result of this project, a detailed report of the findings entitled “Human rights and mental health in Zambia” was published in July 2014, and MDAC collaborated with MHUNZA, the Zambian Federation of Disability

¹ Available online at: www.mdac.org/kenya.

² Available online at: www.mdac.org/uganda.

Organizations (“ZAFOD”) and Disability Rights Watch (“DRW”) to organise a forum to bring together civil society and government representation to agree on targeted recommendations for reform to increase respect for human rights.³

4. MDAC has also collaborated on a number of international advocacy initiatives with our partners in Africa, particularly with regards to implementation of the UN Convention on the Rights of Persons with Disabilities (“CRPD”). Specific interventions have included the submission of alternative reports to the UN Committee on the Rights of Persons with Disabilities (“CRPD Committee”) relating to Kenya⁴ and Uganda.⁵
5. At the international level, MDAC was closely involved in the negotiations which lead to the adoption of the UN CRPD by the General Assembly of the United Nations.
6. With regards to the development of Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (“the Protocol”), MDAC made a submission in 2011 regarding the content of a draft which had been released in 2009. In that submission, MDAC raised a number of recommendations and concerns including, *inter alia*:
 - a. The risk of spending time replicating the provisions of the CRPD in an African Protocol, rather than focusing efforts on gaining concrete implementation of the former;
 - b. Ensuring that any future Protocol should address concrete issues specific to persons with disabilities on the African continent;
 - c. Calling for real involvement of persons with disabilities and their representative organisations in the development of the Protocol;
 - d. Elaborating regional benchmarks to ensure implementation of the rights set down in the CRPD;
 - e. Encouraging African Union (AU) Member States that had not yet done so to ratify the CRPD, and pushing for all Member States to ratify its Optional Protocol; and
 - f. Recommending that the AU consider whether it meets the definition of a “regional integration organization” for the purposes of Article 44 of the CRPD, enabling it to determine whether it could ratify that Convention and its Optional Protocol in its own right.

³ The report and outcome document from the forum are available online at: www.mdac.org/zambia.

⁴ See:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fKEN%2f19783&Lang=en (March 2015) and

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fKEN%2f21347&Lang=en (August 2015).

⁵ See:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICO%2fUGA%2f21584&Lang=en (August 2015).

II. General comments

7. The present submission relates to the June 2015 draft of the Protocol, and responds to the call for comments from stakeholders published on the website of the African Commission on Human and Peoples' Rights website on 7 December 2015.⁶
8. MDAC welcomes the further development of the draft Protocol in recent years, and the opportunity to submit comments on the present draft. In addition, MDAC commends the Working Group on the Rights of Older Persons and Persons with Disabilities ("Working Group") for its transparency and increased engagement with disabled person's organisations (DPOs) and wider civil society in this work.
9. This part of the present submission sets out a number of general observations and recommendations with respect to the Draft Protocol. The next part provides specific observations and recommendations on the proposed Preamble and Articles. Throughout our submission, wherever we have proposed the insertion of additional wording, we have underlined the newly proposed wording in the text, which has also been highlighted in green.
10. We commend the Working Group for inserting a proposed obligation on States to take "institutional and budgetary steps" to realise the rights of persons with disabilities (Article 2), as well as the obligations contained under Article 28(1)(b). These are precisely the sort of concrete obligations required to ensure that rights become reality for persons with disabilities in Africa, and will serve as a positive example internationally.
11. In response to representations and submissions of a number of civil society organisations, MDAC is pleased to see a far greater alignment between the Protocol and the standards set out in the UN CRPD, which continues to be the most widely-accepted and authoritative treaty enunciating the rights of persons with disabilities.
12. In this regard, we welcome the insertion of **Article 31(1)** into the text which reflects the principle of non-retrogression in international human rights law. However, MDAC submits that the current draft Article would be strengthened with a specific reference to the CRPD ~~in that article~~ in the following terms:

"Nothing in this Protocol shall affect any provisions that are more conducive or favourable to the realisation of the rights and fundamental freedoms of persons with disabilities contained in the law of a State Party, the UN Convention on the Rights of Persons with Disabilities or in any other international Convention or agreement in force in that State."

⁶ See: <http://www.achpr.org/news/2015/12/d203/>.

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13. To date, the CRPD has been ratified by 45 of the 54 Member States of the AU. Those Member States that have yet to ratify the CRPD are Botswana, Cameroon, Central African Republic, Chad, Equatorial Guinea, Eritrea, Libya, Somalia and South Sudan, representing a combined population of almost 77 million people. In addition, only 20 AU Member States have ratified the Optional Protocol to the CRPD.
14. MDAC strongly recommends that the AU encourage those Member States which have not yet ratified the CRPD to do so expeditiously. We further recommend that the AU calls on all Member States to ratify the Optional Protocol to the CRPD.
15. The Preamble to the current draft Protocol states that there is a need for a “substantive binding African legal and institutional framework for ensuring, protecting and promoting the rights of persons with disabilities”, and goes on to state that there is a “need to establish a firm legal continental framework”. MDAC welcomes the acknowledgment of the need for the Protocol to directly address Africa-specific issues in relation to the rights of persons with disabilities, and acknowledges merit in the argument that having an African regional instrument would enable stronger opportunities for litigating and lobbying for the rights of persons with disabilities.⁷
16. However, MDAC would recommend amending this wording in the Preamble to call for a greater level of commitment from Member States to “respect, protect, promote and fulfil” human rights:

“Recalling the lack of a substantive binding African legal and institutional framework for respecting, protecting, promoting and fulfilling the rights of persons with disabilities”

17. One of the main concerns which we raised in our previous submission, however, remains extant. Specifically, our view is that the draft Protocol proposes standards beneath those set in the CRPD or elsewhere, and we submit that these must be subjected to close scrutiny:

a. **Article 4 (‘Right to Life’):**

Although the title of this article refers to the right to life – a non-derogable right – the content of the proposed Article refers only to State obligations. We submit that there must be a clear and unequivocal recognition of the right to life itself, in conformity with Article 3 of the International Bill of Human Rights and Article 4 of the African Charter on Human and Peoples’ Rights.

b. **Article 1(e) (definition of ‘legal capacity’):**

The proposed definition offers a restrictive interpretation of this concept, which is widely regarded as being of foundational significance in international law, including in the

⁷ See, *inter alia*: Lawrence Mute, ‘Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa’ (August 2012).

CRPD. We acknowledge that draft Article 8 ('Equal recognition before the law') is much more closely aligned with CRPD standards – although note our specific comments on the drafting of this article below – but we remain concerned that a restrictive definition early in the Protocol is likely to limit the perspectives of Member States. So as to comply with the developing international jurisprudence regarding legal capacity, we propose that the Protocol **either**:

- i. Removes the definition, to avoid a restrictive approach; **or**
- ii. Adopts a definition more closely in conformity with that set out in General Comment 1 of the UN Committee on the Rights of Persons with Disabilities (CRPD/C/GC/1), acknowledging that “legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for all persons with disabilities on an equal basis with others” (at para. 8). Further, the key elements of the concept must at a minimum include possession of legal personality (at para. 11), the capacity to be a holder of rights (at para. 12), and recognition as an actor under the law with agency to engage in transactions and create, modify or end legal relationships (at para. 12).

c. **Article 5 ('Right to Security of Person')**:

Article 5(3), states that “...any deprivation of liberty shall be in accordance with law.” Although Article 5(1) makes reference to the principle of equality in ensuring the right to liberty and security of person, we submit that discriminatory and long-term detention is still common across the African continent, particularly with regards to people with psycho-social disabilities and often as a result of discriminatory mental health legislation. Strictly speaking, the ~~the~~ deprivation of liberty of persons with psycho-social disabilities is often argued by governments as being in compliance with a legal (albeit discriminatory) procedure. In our view, Article 14(2) of the CRPD sets a far higher standard of protection where it states that “if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.” Draft Article 5, therefore, must be carefully reconsidered.

d. **Article 22 ('Women with Disabilities')**:

We are concerned that this draft Article does not acknowledge that girls and women with disabilities frequently experience multiple and intersectional forms of discrimination which create greater barriers to their full enjoyment of human rights and fundamental freedoms. This problem is directly addressed in Article 6(1) of the CRPD, and the draft Article in the Protocol requires to be amended accordingly.

e. **Awareness-raising:**

We are disappointed to note that a comprehensive State obligation on awareness-raising regarding the rights and freedoms of persons with disabilities has not been covered in a separate Article, but is instead partially dealt with in a number of different places (i.e. Articles 6(2) – harmful practices; 9(3) – training law enforcement and justice personnel; 13(i) – health-care providers). Our view is that this is insufficient, particularly in light of the much broader obligation contained under Article 8 of the CRPD. Additionally, a consistent finding of our research and human rights monitoring in a number of African countries is that there is limited acknowledgement and understanding of the rights of persons with disabilities, and that increasing awareness at all levels – family, community, sub-regional, regional and national – are crucial in tackling stigma and discrimination. The Protocol should clearly set out a comprehensive Article in this area.

III. Specific comments

18. The following comments relate to the content, formulation and wording of specific paragraphs in the Preamble and proposed Articles.

19. **Preamble**

As to the perambulatory paragraph which states “*Recognising* the diversity of persons with disabilities”, we recommend expanding this in order to recognise the positive contributions of persons with disabilities to their societies:

“Recognising the diversity of persons with disabilities, and their value as full members of society, including their contributions to the overall well-being, inclusiveness and diversity of their communities and nations”

Regarding the paragraph which refers to “systemic institutional weakness”, we are unable to clearly interpret the meaning and would respectfully encourage the Working Group to provide a more concrete term. Our preference would be a recognition that persons with disabilities across Africa continue to face extreme poverty, a lack of community-based services to assist inclusion in their communities, and regularly experience *systemic discrimination*. We would respectfully propose the following to replace the current paragraph:

“Concerned also that persons with disabilities continue to face systemic discrimination, a lack of available and accessible services to aid their inclusion in the community and extreme poverty”

20. Article 1: Definitions

Please note our comments in paragraph 17(b) above with respect to the definition of legal capacity.

In addition, regarding the definition provided in **paragraph f** of “persons with disabilities”, we submit that this is drawn too narrowly and fails to reflect disability as dynamic concept which can further develop over time. Further, we are disappointed to note that persons with albinism would seemingly not be covered by the definition, despite increasing acknowledgement that they are often subjected to serious human rights violations and social segregation as a result of the interaction between a congenital impairment and social processes. We therefore propose the following wording to be inserted:

“Persons with disabilities’ include those who have physical, mental, intellectual, developmental, congenital or sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with other. The concept of disability is dynamic and can evolve over time.”

21. Article 2: General Obligations

Our view is that the formulation “respect, protect, promote and fulfil” should be used when describing State obligations to implement human rights. As such, we propose the following amended version of the **opening paragraph** to this draft Article:

“States Parties shall take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to respect, protect, promote and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability, including by: [...]”

In addition, in **paragraph (b)**, we welcome the reference to mainstreaming disability in, *inter alia*, “development plans”. We believe that this will serve as an important tool for Member States to explicitly address the rights of persons with disabilities in broader development programmes, and will be helpful in negotiating financial and technical assistance to achieve this with international development donors.

22. Article 3: Equality and Non-discrimination

We submit that the list of protected identity characteristics contained in the second sentence of **paragraph 1** is too restrictive, and fails to give recognition to other core characteristics such as sexual orientation, gender identity and marriage status. We therefore propose the following amended wording:

“States Parties shall ensure that persons with disabilities are not discriminated, on one or more grounds, including denial of reasonable accommodation, on the basis of birth, age, gender or gender identity, sex, sexual orientation, race or ethnicity, colour, nationality, economic, social or political status, marriage status, health or other status.”

We welcome the requirement for States, under **paragraph 3**, to take “effective and appropriate” measures against forms of discrimination faced by those persons associated with persons with disabilities. We submit that the class of persons should be widened as follows:

“States Parties shall take effective and appropriate measures to protect the parents, children, caregivers, relations, supporters, advocates, representatives, appointees or intermediaries of persons with disabilities from discrimination on the basis of their association with persons with disabilities.”

23. **Article 4: Right to Life**

Please note our comments on this draft Article in paragraph 17(a) above.

24. **Article 5: Right to Security of Person**

Please note our comments on this draft Article in paragraph 17(c) above.

In addition to the aforementioned, we recommend that **paragraph 1(d)** be broadened beyond protection from sterilisation, and that it should also refer to other invasive procedures, including termination of pregnancy, as follows:

“Are not, without their free, prior and informed consent, sterilised or subjected to any other invasive procedures, including termination of pregnancy.”

With regard to the problem of legislation ~~with which~~ discriminates on the basis of disability, such as mental health laws which mandate involuntary detention of persons with psycho-social disabilities, we submit that States should be obliged to review, modify or abolish such provisions. As such, we recommend that **paragraph 3** of this Article should be amended as follows.

“The existence of a disability shall in no case justify deprivation of liberty. Any deprivation of liberty of persons with disabilities shall be in accordance with the law. States Parties shall take specific measures to review, modify or abolish legislation which allows for deprivation of liberty on the basis of disability alone or in combination with any other factor.”

We recognise that the issue of involuntary psychiatric detention poses a number of challenges to governments around the world and that international standards and jurisprudence are in a state of

flux and development. As such, MDAC would welcome the opportunity to engage closely with the Working Group and Honourable Commissioners further on the matter.

25. Article 6: Harmful Practices

We commend the Working Group for tackling this complex and sensitive set of issues, and for proposing a non-exhaustive definition of the concept in draft **Article 1(d)**. In so doing, we believe that **Article 6**, with some amendments, has the potential to be a strong, context-specific approach to tackling some unacceptable practices to which persons with disabilities are frequently subjected and which remain prevalent across Africa.

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As to the specifics, we propose three amendments to **paragraph 1**. *First*, a reference to “exploitation, violence and abuse” should be included, this being a term which captures a broader range of abuses faced by persons with disabilities and is specified in Article 16 of the CRPD. *Second*, and drawing on our research in Kenya, Uganda and Zambia, we submit that harmful practices may also violate numerous other human rights and freedoms including (but not limited to) land and property rights, sexual and reproductive rights, the right to choose where and with whom to live, health, freedom of association, freedom of movement, the right to work and employment, right to a family life, right to education, etc. As such, we strongly recommend amending the paragraph to refer to “human rights violations” which can be interpreted to cover any of the aforementioned issues. *And third*, we believe it is unfortunate and problematic that the current draft seems to suggest that harmful practices may be able to be ‘modified’. It is clear to us that all harmful practices must be combatted and sanctioned, not modified. As such, we propose new wording for the paragraph as follows, which takes account of our three comments:

“States Parties shall take appropriate measures to combat, through legal sanctions, education and advocacy campaigns, harmful practices which result in human rights violations against persons with disabilities. Such practices may include, but are not limited to, killing, abandonment, exploitation, violence or abuse, chaining and other forms of restraint, and deprivation of food, water, air or light.”

With respect to **paragraph 3**, our view is that “support and assistance” are necessary but not sufficient to remedy human rights violations. We therefore propose the following additional wording:

“States Parties shall offer appropriate support and assistance, including legal remedies and access to free legal assistance, to victims of harmful practices.”

Particularly with respect to the research we have conducted in Kenya and Uganda, we have found that one of the main reasons for human rights violations at the family and community level is the lack of detection and monitoring systems. This was an issue that also concerned the drafters of the UN CRPD, resulting in the adoption of Article 16(3) in the final Convention. Our view is that the

Protocol should include a similar mechanism, the purpose of which would be to prevent exploitation, violence and abuse, with appropriate modification to the specific conditions in African countries. We would propose a **new paragraph 4** under this Article as follows:

“In order to prevent the occurrence of human rights violations against persons with disabilities as a result of harmful practices, States Parties shall ensure regular and systematic monitoring by independent bodies of all facilities and programmes designed to serve persons with disabilities, and all other settings where persons with disabilities may be subjected to human rights violations. Such settings shall include, but are not limited to, religious institutions, conventional health or social care services, traditional healing camps, chambers or surgeries of conventional or African doctors or those of spiritual healers, police stations, prisons, refugee camps, etc.”

26. **Article 8: Equal Recognition before the Law**

Please note our comments on the definition of legal capacity in paragraph 17(b) above.

At present, we believe that the **first paragraph** of this Article been framed purely in terms of State obligations as opposed to explicitly enunciating enforceable human rights. As such, we recommend including the following sentence at the beginning of the paragraph, before setting out the State obligations:

“Persons with disabilities have the right to legal capacity on an equal basis to others, including the right to receive support in the exercise of their legal capacity. States Parties shall recognise that persons with disabilities [...]”

Our view is that **paragraph b** of this Article could be strengthened along similar lines through explicitly stating a right, and further through including a definition of “substituted decision-making”. Based on our research in Kenya, we found that the vast majority of persons with psychosocial disabilities and persons with intellectual disabilities we interviewed had experience^d informal restrictions on their autonomy and *de facto* guardianship through family or community-level processes. The concluding observations of the CRPD Committee following Kenya’s periodic review last year recommended that the State should “eliminate all forms of formal and informal substituted decision-making regimes”.⁸ It could be that the definition of “substituted decision-making” would be better inserted under **Article 1**, and we respectfully leave such considerations to the Working Group. The amendments we are proposing are as follows:

“Persons with disabilities have the right to the support they may require in enjoying their legal capacity. States Parties will ensure that such support is provided free of cost, and that such support

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⁸ Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Kenya’, CRPD/C/KEN/CO/1, 30 September 2015, at para 24(a), available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/223/37/PDF/G1522337.pdf?OpenElement>.

always respects the rights, will and preferences of persons with disabilities and does not amount to substituted decision-making.

Substitute decision-making can include formal or informal regimes or practices which have the purpose or effect of restricting the legal capacity of persons with disabilities, whether in full or in part, including through denial of the provision of support to exercise legal capacity or reasonable accommodations.

27. **Article 9: Right to Access Justice**

MDAC recognises the important role that can be played by traditional forms of justice in ensuring that persons with disabilities can access justice on an equal basis with others. We further acknowledge, however, that there are instances where traditional forms of justice do in fact instead become barriers to accessing justice, often due to reasons of procedure, practice or discriminatory attitudes. We also hold the view that such problems are not unique to traditional forms of justice, but that similar concerns can clearly be identified in conventional forms of justice too. As such, we do not think the correct approach is to target traditional forms of justice specifically, as has been proposed in **paragraph 2**. MDAC proposes deletion of this paragraph, and instead amending **paragraph 1** to include a reference to traditional forms of justice, as follows:

“States Parties shall take all appropriate and effective measures to ensure that persons with disabilities have access to justice on an equal basis with others including through the provision of procedural and age appropriate accommodation measures, in order to facilitate their effective roles as participants in all legal proceedings. This obligation shall extend to States Parties taking similarly appropriate and effective measures to ensure equal access to justice for persons with disabilities where traditional forms of justice are recognised and operate according to the law.”

In September last year, MDAC conducted a specific piece of research and developed targeted recommendations on improving the right to access courts for persons with disabilities in Uganda. The project resulted in two reports which were entitled “Access to Courts and Reasonable Accommodations for People with Mental Disabilities in Uganda”⁹ and “Justice for People with Mental Disabilities in Uganda: A Proposal for Reform of Rules of Court”.¹⁰ We submit that some of the findings and recommendations are of wider significance in Africa and beyond, and warrant consideration in light of the present draft Protocol. Of particular note were the following recommendations:

- a. Ensuring that Rules of Court give full recognition to the legal capacity of all persons with disabilities;

⁹ Available online here: http://www.mdac.org/sites/mdac.info/files/access_to_courts_in_uganda.pdf.

¹⁰ Available online here: http://www.mdac.org/sites/mdac.info/files/uganda_rules_of_court_proposal.pdf.

- b. Legal recognition of the capacity to testify, including through alternative and augmented communication methods;
- c. A need to codify and implement procedural accommodations relevant to persons with a variety of impairments;
- d. Adjustments needed to the way in which court hearings take place and how testimonies are admitted, in order to reduce feelings of fear and threat which are commonly experienced by persons with disabilities during legal processes;
- e. Removing discriminatory terminology from court rules, forms and processes, and indirectly discriminatory provisions requiring, for instance, that testimonies be sworn on the basis of being of “sound mind”; and
- f. Allowing for evidence to be provided through interpreters, support persons, via video link and through other alternative non-verbal means.

It may be that such recommendations and obligations are beyond the envisaged scope and general applicability of the proposed Protocol, however we would invite careful consideration of the details to consider either how to strengthen the present draft Article, or to lay the ground work for a future ‘resolution’ or ‘declaration’ by the “Implementation and Monitoring Committee” proposed under **Article 29** of the draft Protocol.

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Finally with respect to this Article, we would recommend that further consideration be given to **paragraph 4**. At present, a number of AU Member States have limited or no legal aid or assistance schemes available to the general public. Yet, given the specific forms of discrimination and human rights violations faced by persons with disabilities, we recommend that States should be under a specific obligation to ensure legal aid and assistance in certain circumstances. We would welcome the opportunity to discuss this issue with members of the Working Group and Honourable Commissioners in more detail.

28. **Article 10: Living in the Community**

Our first observation regarding this draft article relates to the title. Our submission would be that it should instead be formulated as “*The Right to Independent Living in the Community*”.

As to our second comment, we respectfully recommend that the State obligation to fulfil the right to independent living in the community will be achieved where governments make maximum use of available resources and seek to achieve independent living within a reasonable time. We therefore propose inserting wording in the **second sentence** of the first paragraph as follows:

“[...] States Parties shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of these rights within a reasonable time and through maximum use of available resources, including by ensuring that: [...]”

We also wish to register our full support for **paragraph f**, which gives recognition to the role of

community living centres organised or established by persons with disabilities. We believe that peer support networks can be a strong and practical way of ensuring social empowerment and inclusion, and the recognition of these in the draft Protocol is very welcome.

29. Article 12: Right to Education

With regard to **paragraph 1**, we believe that it should be made clear (as is then further elaborated in paragraphs 2 and 3) that the right to education can only be regarded as such if it is of sufficient quality and is inclusive. We would propose the insertion of these terms in the first sentence in the following way:

“States Parties shall ensure to persons with disabilities the right to a quality and inclusive education on an equal basis with others.”

Under **paragraph 2**, MDAC welcomes the value placed on fostering respect for human diversity, human rights and freedoms and the provisions of African human rights instruments, laws and declarations, as well as the preservation and strengthening of positive African morals, values and cultures. We would also suggest a similar acknowledgment of the value of the rule of law.

As to **paragraph 3(a)**, we recommend making an explicit reference to the obligation to ensure that children with disabilities can access free, quality and inclusive primary and secondary education. Our proposal would be to modify that paragraph in the following terms:

“Ensuring that children with disabilities can access free, quality and compulsory basic and secondary inclusive education in common learning environments with their peers with and without disabilities. Providing persons with disabilities [...]”

Moving to **paragraph 3(e)**, we have a concern that this appears to facilitate the creation of non-inclusive schools for children with disabilities, in particular with reference to an undefined standard of appropriateness. We respectfully submit that the appropriate schooling environments for persons with disabilities must be understood as general inclusive schools, and this must also exclude the possibility of disability-specific educational environments. This perspective draws on that which has been described under Article 24 of the CRPD. **We therefore respectfully propose deleting this paragraph as ~~it falls falling~~ beneath the standards of international law.**

Finally, we submit that teachers and educators are one of the most important resources of any education system. It follows that their training on a human rights-based approach to inclusive education is essential in order to achieve full inclusion for all children with disabilities. We therefore propose the following modifications to **paragraph 3(h)** to aid greater clarity:

“Training all education professionals, including persons with disabilities, on how to educate and interact with children with specific learning needs in inclusive educational environments, including”

through the use of techniques such as differentiation, project-based learning and peer-education approaches.”

30. **Article 13: Right to Highest Attainable Standard of Health**

Our experience and research shows that many people with disabilities in African societies have limited access to conventional health services, with large parts of the populations – particularly in rural or semi-urban settings – reliant upon alternatives such as informal health care providers, African traditional medicine practitioners, spiritual healers and faith healers, among others. We have also documented how these alternative ways of accessing health care, whilst sometimes helpful, can lead to harm including serious human rights violations, and are rarely effectively regulated by States.¹¹

As such, we submit that the present Article must acknowledge these “facts on the ground”, build on the potentially important contribution alternative health providers can make to ~~the~~ achieving the right to health for persons with disabilities, and set out a clear obligation and approach for States to adopt in regulating their activities in a human rights-compliant manner.

As we have proposed above, one critical element would be an obligation on States to establish a monitoring mechanism similar to the one envisaged under Article 16(3) of the CRPD, and to prevent against violations such as exploitation, violence and abuse. But our view is that this alone would not be sufficient to ensuring the highest attainable standard of health for persons with disabilities who interact with alternative health providers. A number of other elements should also be considered including:

- a. A requirement for alternative health providers to be registered and obliged to undertake training on a human rights-based approach;
- b. An obligation on States to investigate allegations of ill-treatment or other human rights violations;
- c. Enforcing the principle that all health interventions, including alternative medicines and practices, can only be provided on the base of free, prior and fully informed consent of the person concerned; and
- d. Promoting voluntary or compulsory codes of conduct which comply with the law.

We acknowledge that inclusion of these issues in the draft Protocol will not be without challenge, however we respectfully submit that this is a key area which has specific African dimensions. MDAC would be keen and willing to engage in further dialogue on this matter.

¹¹ See, in particular, MDAC’s report entitled “Mental health and human rights in Zambia” (2014), available online at: www.mdac.org/zambia.

31. Article 15: Right to Work

MDAC's investigations in Kenya and Uganda both uncovered testimonies from persons with mental disabilities that they had been denied the right to work either as a result of discriminatory restrictions on access to credit financing, ~~or~~ as a result of stigma, prejudice and discrimination in the work environment, and also due to the lack of provision or availability of reasonable accommodations.

As to the organisation of draft Article 5(1), we would propose that **paragraph f** and **paragraph g** are combined with **paragraph a**. This would strengthen the prohibition of discrimination on all work-related grounds and will include denial of reasonable accommodation in the general prohibition. As such, we would propose the following amended paragraph a, and deletion of paragraphs f and g:

"Prohibiting discrimination on the basis of disability with regard to all matters concerning all forms of employment, including employment opportunities, vocational training, conditions of recruitment, hiring and employment, continuance of employment, dismissal, career advancement, safe and healthy work conditions, or the provision of necessary reasonable accommodations"

With regards to proposed **Article 5(2)**, we submit that the purpose does not currently come across clearly. In addition, the principle of "equal pay for equal work" is highly problematic when considering the vast diversity and capabilities of persons with different disabilities. In our view, the more important consideration is the need for persons with disabilities to be able to access reasonable accommodations to ensure that they can have just and favourable work conditions which enable them to live with dignity.

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32. Article 16: Right to Adequate Standard of Living and Right to Social Protection

Paragraph **2(d)** refers to "assistants" and "augmentative supporters". Both of these terms, in our submission, require definition as they appear to be technical terms which may not be in common usage. We would also suggest the insertion of a reference to "personal assistance" into this draft Article, in the sense in which it is used in Article 19(b) of the CRPD.

33. Article 17: Right to Participate in Political and Public Life

We welcome the focus in **paragraph a** on facilitating civil engagement and democratic participation by persons with disabilities at all levels.

As to **paragraph b**, we recommend also including a reference to persons with intellectual disabilities in recognition of the fact that they continue to be a section of society who have historically been denied the opportunity to participate in the political and public life of many countries. Our proposed amendment would look as follows:

“Ensuring that persons with disabilities, including persons with psychosocial disabilities and persons with intellectual disabilities, on an equal basis with others, can effectively participate in political and public life [...]”

With regards to **paragraph c**, and in a manner that is consistent with maintaining the secrecy of the ballot, we recommend inserting an entitlement for persons with disabilities to take an assistant into the polling booth with them should they so require, as is acknowledged under Article 29(a)(iii) of the CRPD. Consideration should also be given to the safeguards required to ensure that such assistance does not influence the will and preferences of the person concerned when exercising their political and democratic choices.

34. **Article 18: Self-representation**

MDAC warmly welcomes the inclusion of a specific article recognising the right of persons with disabilities to represent themselves in a manner that they chose, including through the formation of organisations, non-governmental organisations, self-advocacy and peer-support, and the right to engage in processes pertaining to law, policy and programmes ~~that~~ which affect their lives. We believe that self-advocacy can be a transformative form of self-empowerment for persons with disabilities and it is right that this should be recognised in the Protocol.

In relation to **paragraph b** specifically, we recommend a slight amendment of the wording to make clear that persons with disabilities can also form their own organisations and associations, including political parties and trades unions. We propose the following wording:

“Form and participate in the activities of other non-governmental organisations and associations, political parties and trades unions, etc.”

Whilst we support the principle behind **paragraph d**, we believe it is insufficient without ~~a~~ primary obligations being placed on States to proactively involve persons with disabilities in matters of law, public policy and programming, and to facilitate their involvement. We therefore suggest the insertion of a **new paragraph i under Article 2** on general obligations, which could be worded along the following lines:

“Putting in place mechanisms to ensure close consultation with and active participation of persons with disabilities, including children with disabilities and the representative organisations of persons with disabilities, in all matters pertaining to the development, implementation and monitoring of law, policies and programmes relating to persons with disabilities, and in other decision-making processes concerning their rights and interests”

35. Article 20: Right to Participate in Sports, Recreation and Culture

Our comment here relates to the role of mainstream and other forms of media in perpetuating negative stereotypes about persons with disabilities. We would recommend that the media be specifically mentioned under **paragraph g**:

“Discouraging negative representations and stereotyping of persons with disabilities in both traditional and modern cultural activities, and through the media”

36. Article 21: Right to Family

Our view is that the **first sentence** is unnecessarily restrictive in only referring to family, marriage and parenthood, and should recognise a broader range of relationships which persons with disabilities may choose to have. We propose the following insertion:

“States Parties shall take all necessary and appropriate measures to eliminate discrimination against persons with disabilities in all matters with regard to family, marriage, relationships and parenthood, on an equal basis with others [...]”

We also submit that **paragraph d** of the proposed Article creates familial obligations on persons with disabilities but fails to acknowledge the role of the State in providing appropriate assistance to ~~assist~~ them in the performance of such duties. This obligation is set out clearly in Article 23(3) of the CRPD and we recommend that the following modifications be made to paragraph d:

“A spouse with disability shall contribute to safeguarding the interests of the family on an equal basis with any other spouse, and States Parties shall render them with appropriate assistance in the performance of their familial obligations.”

37. Article 22: Women with Disabilities

Please see our comment in paragraph 17(d) above regarding this draft Article, which we believe falls beneath the standards previously set out in the CRPD. In addition, we think it would be helpful to expand the article to address girls with disabilities too.

38. Article 23: Children with Disabilities

With reference to **paragraph 4(c)** of this Article, we were highly surprised to see the terminology “to the maximum extent possible” used when referring to the right to life and survival of children with disabilities. We recommend removal of this, in recognition that the right to life is absolutely non-derogable under international law:

“Ensuring the survival, protection and development of children with disabilities”

In addition, under **paragraph 4(g)**, we advise against the use of “its” when referring to children with disabilities, and instead say “her or his” or “the child’s”:

“Protecting a child from being separated from her or his parents merely on the basis that either the child or the child’s parents have a disability”

39. **Article 24: Youth with Disabilities**

We recommend including the definition of “youth” in this Article in order to increase clarity, in compliance with the definition set out in the African Youth Charter.

40. **Article 25: Older Persons**

At present, we would humbly submit that the cross-reference to the Draft Protocol on the Rights of Older Persons in Africa should be removed until such point as it is formally adopted. MDAC continues to monitor the development of this specific Protocol and hopes to have an opportunity to provide detailed comments on its formulation at a later stage.

As to the specifics in the present draft Article, we note that accusations or perceptions of witchcraft as described under **paragraph e** are of grave concern, and further that such accusations or perceptions frequently affect other persons with disabilities too, especially persons with psychosocial disabilities and persons with intellectual disabilities. We would suggest that the protection against allegations of witchcraft proposed under this Article be extended to all persons with disabilities.

41. **Article 26: Duties**

We welcome the equal recognition of the duties which persons with disabilities have under the African Charter. Similarly to our previous comment under Article 21 on the Right to Family (see paragraph 36 above), we also think there should be acknowledgement here of the role that States should play in aiding the fulfilment of such duties by persons with disabilities, including through the provision of reasonable accommodations. We thus propose the following additions to the Article:

“States Parties shall recognise that persons with disabilities have duties on an equal basis with others as elaborated in the African Charter. States Parties shall ensure that persons with disabilities are rendered the forms of assistance, including reasonable accommodations, which they might require in performance of such duties.”

42. Article 27: Statistics and Data

In general, we submit that the statistical and data collection obligations enshrined in the proposed Article are far more limited in scope and utility than similar obligations contained in Article 31 of the CRPD, which also refer to the need to collect and disseminate research data. Further, Article 32 of the CRPD sets out measures to promote international cooperation and knowledge-sharing to ensure implementation and realisation of the human rights of persons with disabilities. We submit that a similar approach should be adopted in the present Protocol. The need for creative solutions to specific African dimensions of the rights of persons with disabilities should not be underestimated, and we submit that it would be wise to encourage thematic analysis and knowledge-sharing across the continent in the text of the Protocol. We would be pleased to collaborate with the Working Group on further formulating such an additional element.

Further, and with specific reference to **paragraph a**, we would propose two additional dimensions of disaggregation where possible: impairment-type and type of support needs. Both dimensions, although technically challenging to collect, have wide practical importance for policy-makers in organising services for persons with disabilities, and the availability of such information in the future would increase the likelihood of successful implementation of the Protocol. The wording we propose is:

“Disaggregate statistics and data, as appropriate, on the basis of disability, impairment-type, support needs, gender and age and other relevant variables, including by ensuring that national population censuses capture data on disability”

43. Article 28: Implementation and Monitoring

We respectfully submit that for national mechanisms to properly monitor the implementation of the Protocol, there is a need for guarantees of their institutional and budgetary independence from government, competence to provide advice to government and a need for direct involvement of persons with disabilities, their representative organisations and broader civil society in monitoring activities. As such, we recommend that **paragraph 4** include a specific reference to the Paris Principles relating to the Status of National Institutions as adopted by the UN General Assembly Resolution 48/134 of 20 December 1993, which contains similar standards:

“States Parties shall establish or designate and use national mechanisms, including independent mechanisms, to monitor the implementation of the rights of persons with disabilities. Such mechanisms shall conform with the Paris Principles relating to the Status of National Institutions (A/RES/48/134) and will ensure the direct involvement of persons with disabilities, their representative organisations and other representatives of civil society.”

44. Article 29: Implementation and Monitoring Committee

We submit that it will be vital to ensure that the Committee as proposed has access to adequate resources in fulfilling its mandate. As such, we propose that **paragraph 3** is amended to ensure sufficient budgetary and human resources:

“The Commission will ensure that the Secretariat has the necessary competencies, human and financial resources required for fulfilment of the Committee’s mandate.”

In addition, we believe that persons with disabilities should play a key role on the Committee, either as Members or as experts. In any event, we propose that their role be clearly outlined in **paragraph 2** in the following terms:

“The Committee shall draw expertise from outside of the Commission for the effective fulfilment of its mandate, including through ensuring the direct involvement of persons with disabilities, their representative organisations and representatives of civil society. The Committee shall have the competence to create its own rules and procedures for ensuring the involvement of such persons in the work of the Committee.”

45. Article 30: Remedies

We welcome the reference to remedies for persons with disabilities who have their rights under the Protocol violated, including the cross-reference to Article 25 of the Maputo Protocol on the Rights of Women in Africa. To further enhance this obligation, we would propose some additional wording as follows:

“States Parties shall undertake to ensure that effective remedies are made available and accessible within competent national, sub-regional or continental legislative, judicial or administrative mechanisms, as appropriate, to persons with disabilities whose rights under this Protocol are violated.”

IV. Conclusion

46. MDAC warmly welcomes the assiduous work that has been undertaken thus far by members of the Working Group on the draft Protocol. The draft shows clear evidence of a promising, regional approach to advancing the human rights of persons with disabilities, and will hopefully prove to be a positive addition to Africa’s regional human rights structure. Regional codification of the rights of persons with disabilities is likely to increase practical implementation in Member States of the African Union and we encourage the Working Group to continue with its transparent and open approach to involving broader civil society.

47. Of course, there remains significant work to be done. We have stressed the need to ensure that the Protocol does nothing to undermine already-existing authoritative treaties related to the rights of persons with disabilities, most importantly the UN Convention on the Rights of Persons with Disabilities. MDAC reiterates, in this regard, our concerns with regard to articles that clearly breach the principle of non-retrogression, and which must now be revisited – specifically, the right to life, the definition of legal capacity, the right to security of person and the proposed Article on women with disabilities. Whilst we welcome Article 31 on interpretation, this is not a sufficient safeguard against the restrictive approach of some governments in determining their international legal obligations.
48. MDAC currently awaits a decision from the African Commission on Human and Peoples’ Rights with respect to our application for Observer Status. In the meantime, we express our willingness to support the ongoing work of the Working Group in further elaborating the Protocol, and would be pleased to provide further advice and technical assistance.
49. We wish the Working Group every success in its endeavours, and look forward to our ongoing engagement.

For further information, please contact:

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