



**Submission of the International Commission of Jurists**

on

**Discussion Paper 163, Project 148: Domestication of the United Nations  
Convention on the Rights of Persons with Disabilities**

of the

**SOUTH AFRICAN LAW REFORM COMMISSION**

Submitted on 30 April 2025

*Composed of 60 leading jurists and lawyers from all regions of the world, the International Commission of Jurists (ICJ) works for the promotion and protection of human rights and the rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession*

1. The ICJ welcomes the invitation by the South African Law Reform Commission ("Commission"),<sup>1</sup> an independent body established under the South African Law Reform Commission Act 19 of 1973,<sup>2</sup> to stakeholders to make input and assist in guiding the process of drafting a disability law to incorporate the provisions of the Convention on the Rights of Persons with Disabilities (CRPD) into domestic law. Under "Project 148", the Commission, through an Advisory Committee composed of experts drawn from various stakeholders, developed an issue paper that informed the drafting of a draft Bill ("Bill"), which is the subject of this submission.<sup>3</sup>
2. In this submission, the ICJ comments on several of the provisions provided in the draft Bill ("Bill") and thereafter makes specific recommendations to the Commission in its consideration of revision and finalization of the Bill.

### **African Disability Protocol**

3. Neither the issue paper nor the Bill make any reference to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa ("Protocol"),<sup>4</sup> signed by South Africa on 29 April 2019 and ratified on 1 February 2023. The Protocol came into force on 3 May 2024.<sup>5</sup> The African Commission on Human and People's Rights has since adopted a resolution calling on States parties, "in consultation with persons with disabilities...", to take concrete steps to fulfil their obligations under the Protocol[ ]".<sup>6</sup>
4. The development of the issue paper and the Bill took place while the Protocol was being signed and ratified. While the Protocol and the CRPD are distinct treaties which provide for separate and sometimes differing obligations on South Africa, it would seem sensible and appropriate that any legislation that is adopted to give domestic effect to the CRPD simultaneously does so for the Protocol given the significant overlap between the Protocol and the CRPD.
5. Failure to do this would result in dual and duplicative processes which would unnecessarily increase the time it takes – and the resources required by South Africa – to ensure compliance with these two essential treaties in giving effect to the rights of persons with disabilities.

### **Recommendation:**

- The Bill should seek to domesticate the Africa Disability Protocol in addition to the CRPD.

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<sup>1</sup> <https://www.justice.gov.za/salrc/media/20250131-ms-DiscussionPaper163-Extension.pdf>

<sup>2</sup>

[https://www.justice.gov.za/salrc/docs\\_gen/1973\\_19\\_South%20African%20Law%20Reform%20Commission%20Act.pdf](https://www.justice.gov.za/salrc/docs_gen/1973_19_South%20African%20Law%20Reform%20Commission%20Act.pdf)

<sup>3</sup> <https://www.justice.gov.za/salrc/dpapers/dp163-prj148-UNCRPD.pdf>

<sup>4</sup> [https://au.int/sites/default/files/treaties/36440-treaty-protocol-to-the-achpr-on-the-rights-of-persons-with-disabilities-in-africa\\_e.pdf](https://au.int/sites/default/files/treaties/36440-treaty-protocol-to-the-achpr-on-the-rights-of-persons-with-disabilities-in-africa_e.pdf)

<sup>5</sup> <https://achpr.au.int/en/news/press-releases/2024-06-09/entry-force-protocol-persons-disabilities>

<sup>6</sup> <https://achpr.au.int/en/adopted-resolutions/617-implementation-protocols-rights-rights-older-persons>

- The provisions of the Africa Disability Protocol should be comprehensively reviewed and taken into account in the revision of the Bill and the amendment of its provisions, with a view to furthering compliance with both treaties.

### **African Model Law on Disability**

6. Neither the issue paper nor the Bill make any reference to the African Model Law on Disability published by the Pan-African Parliament in consultation with persons with disabilities and their representative organizations,<sup>7</sup> with an objective to “Promote national policies, programmes and best practices that encourage the full participation of persons with disabilities”.<sup>8</sup> Though this model law is not legally binding on South Africa, it would have been advisable for the drafters of the Bill to take this model law into account and consider using it as a baseline reference. Several key provisions omitted from the Bill or present in the Bill that are inconsistent with South Africa’s international obligations would have been remedied by ensuring broad alignment between the Bill and the Model Law.

### **Recommendation:**

- During the review of the Bill, consider the content and framing of the African Model Law on Disability.

### **Definitions**

#### Disability/Persons with Disability

7. The draft Bill provides definitions for “disability” and “persons with disabilities” respectively. These definitions are as follows:

- **Disability:** “includes long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, hinder people’s full and effective participation in society on an equal basis with others”.
- **Persons with disabilities:** “means people who have long term or recurring physical, mental, intellectual or sensory impairments which, in interaction with various barriers hinder their full and effective participation and substantially limit their ability to function and advance in society on an equal basis with others”.

8. First, it is not clear why two different definitions are needed for “disability” and “persons with disabilities”. A dual definition does not seem to be necessary, and may cause confusion to those to whom the legislation is directed, such as policy makers, courts, lawyers and persons with disabilities themselves.

9. Second, the CRPD in its Preamble recognizes a disability as “an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” It is unclear why this characterization was not essentially reproduced verbatim in the Bill. This omission creates several problems and conflicts:

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<sup>7</sup> <https://pap.au.int/sites/default/files/files/2023-08/papen-theafricanmodellawondisability.pdf>

<sup>8</sup> See Article 2(c).

- a. The draft Bill adds a requirement of "long term" to both its definition of "disability" and "persons with disabilities", which is inconsistent with the CRPD. It appears that text from Article 1 of the CRPD, which does not provide a definition for the CRPD but its "purpose" has been incorrectly imported into this definition. To do so could result in exclusion of protection for individuals who require it, on the supposed basis that their disabilities are not "long term" and therefore not covered.
- b. The draft Bill's definition of persons with disabilities is in conflict with even this inappropriately imported Article 1. It says, "persons with disabilities **means**" instead of "persons with disabilities **include**," thus excluding persons whose disabilities are not among the listed categories of disabilities from the definition of "persons with disabilities". This is clearly in conflict with the CRPD and excludes protection from individuals who do not fit into the categories of "physical, mental, intellectual or sensory impairments".
- c. It would be preferable for the Bill to use the language of "psychosocial disability" instead of "mental disability". While the CRPD itself uses the term "mental disability", the Committee on the Rights of Persons with Disabilities refers to persons with psychosocial disabilities when interpreting the CRPD in its jurisprudence. The African Disability Protocol also uses this term. Psychosocial disability is also the more commonly used and accepted nomenclature among individuals with such disabilities.

### **Recommendation:**

- Replace the definitions of "disability" and "persons with disabilities" with a singular definition of "persons with disabilities" which is compliant with both the CRPD and the Protocol. ICJ submits that such a definition could read: "Persons with disabilities include those who have impairments which, in interaction with various barriers, hinder their full and effective participation in society on an equal basis with others."

### Discrimination based on disability

10. The definition of "discrimination based on disability" provided by the Bill is "means any distinction, exclusion or restriction based on disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". It therefore deliberately matches the CRPD's definition except for the last sentence, which it omits. This critical sentence in the CRPD is: "it [discrimination based on disability] includes all forms of discrimination, including denial of reasonable accommodation".
11. Failure to explicitly include "denial of reasonable accommodation" as a form of discrimination is inconsistent with both the CRPD, the Protocol and South African law. This includes both the Constitution and the Equality Act as interpreted by the Constitutional Court of South Africa. The Court, drawing on the CRPD, has affirmed that "the definition of 'discrimination on the basis of

disability' includes all forms of discrimination and disability. Paradoxically, denying reasonable accommodation is also discrimination".<sup>9</sup>

### **Recommendation:**

- Replace the definition of "discrimination based on disability" with a definition replicating that provided under the CRPD, as follows: "means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

### Reasonable accommodation and necessary accommodation

12. While providing an almost identical definition of "reasonable accommodation" to that in the CRPD, the Bill adds the additional element of "necessary accommodation", without any explanation in the issue paper. It defines "necessary accommodation" as meaning "in a particular case, the minimum needs, including modifications, adjustments and practices which must be accommodated to ensure to persons with disabilities their full participation in society".

13. The concept of necessary accommodation has no basis in either domestic or international law. Further clarity on its content is not provided in the body of the Bill. There is a serious risk that, particularly without further clarification,<sup>10</sup> the introduction of this new unexplained element will lead to confusion about whether an individual is entitled to a "necessary accommodation" (styled as a

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<sup>9</sup> *Damons v City of Cape Town* (CCT 278/20) [2022] ZACC 13; [2022] 7 BLLR 585 (CC); (2022) 43 ILJ 1549 (CC); 2022 (10) BCLR 1202 (CC) (30 March 2022), para 56. See also: MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC) (5 October 2007), para 72, which reads:

"The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion. The Employment Equity Act defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment" and recognises making reasonable accommodation for designated groups as an affirmative action measure. **There is also specific mention of the concept in the Equality Act. It recognises that "failing to take steps to reasonably accommodate the needs" of people on the basis of race, gender or disability will amount to unfair discrimination.** The Equality Act places a duty on the state to "develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation" and permits courts to order that a group or class of persons be reasonably accommodated. Finally, section 14(3)(i)(ii) lists as a factor for the determination of fairness the question whether the applicant has taken reasonable steps to accommodate diversity." (Emphasis added)

<sup>10</sup> The only other reference to "necessary accommodation" in the Bill is section 9, which reads:

"9. **Necessary accommodation**

(1) Persons with disabilities must be given the bare minimum needs to optimise their physical and intellectual participation in public life.

(2) Necessary accommodation must be made available on request."

bare minimum needed) or a reasonable accommodation (understood as a right demanded by equality) applies in any given situation. Even if the intention is to provide protection to persons with disabilities *over and above* reasonable accommodations to which they are entitled, the Bill's failure to clarify this and give detail to the concept of "necessary accommodation" risks reducing protection of persons with disabilities rights significantly.

### **Recommendation:**

- Remove entirely the definition of "necessary accommodation" and the provision relating to "necessary accommodation provided" in section 9 of the Bill.

### Undue burden and undue hardship

14. While the Bill, consistently with the CRPD and ADP, limits the obligation to provide "reasonable accommodation" if in the circumstances it would result in a "disproportionate or undue burden", the substantive provisions of the Bill make no further reference to "undue burden". Instead, those provisions refer to "undue hardship," defined by the Bill as:

"modifications, adjustments and practices that will impose a disproportionate burden to provide reasonable accommodation to person with disabilities".

15. Although this definition is at least substantially similar to the meaning of "disproportionate or undue burden", the introduction of the concept of "undue hardship" is, at best, redundant. The Bill fails to explain the difference, if any, between "undue burden" and "undue hardship", and in the absence of a clear distinction between the two terms may lead to confusion as to whether an application within the meaning of the CRPD is intended.

### **Recommendation:**

- Remove the definition of "undue hardship" from the Bill and replace all references to undue hardship with references to "undue burden".

### **Purposes**

16. Section 2(3)(h) sets as one of the purposes of the Act "*reasonable accommodation* and affirmative measures to give effect to the principles above." "Affirmative measures" are often referred to as "affirmative action" measures and are described by the CRPD Committee as "specific measures".<sup>11</sup> The Committee stresses explicitly that reasonable accommodation and specific measures "should ... not be confused" with each other because:

"While both concepts aim at achieving de facto equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights."

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<sup>11</sup> General comment No. 6 (2018) on equality and non-discrimination, para 29.

17. Including both affirmative measures and reasonable accommodation within the purposes of the Bill is undoubtedly important. However, including both in a single purposes provision creates the possibility of confusing and conflating reasonable accommodation with affirmative measures, in contravention of the Committee's warning that these are distinct concepts with differing legal consequences.

**Recommendation:** To ensure consistency with the CRPD and avoid conflation of "specific measures" and "reasonable accommodation":

- Split section 2(3)(h) into two separate provisions, with one addressed to reasonable accommodation and the other to "specific measures".
- Replace the term "affirmative measures" with more precise terminology such as "specific measures," in line with the CRPD Committee's jurisprudence.

### **Interpretation**

18. Section 39(1) of the Constitution provides that courts "must consider international law" in interpreting rights in the Bill of Rights. Section 39(2) of the Constitution provides that courts must, when interpreting legislation, "promote the spirit, purport and objects of the Bill of Rights". Section 233 of the Constitution provides that courts must, when interpreting legislation, "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

19. These provisions have consistently been interpreted by South African Courts to require the consideration of both binding and "non-binding" sources of international human rights law in the interpretation of legislation. It must be emphasized that these constitutional provisions on international law neither prescribe nor limit which sources of international law should be considered and applied. The Constitution requires the courts to consider the ambit of both binding and "non-binding" international law as appropriate under the circumstances. This is in line with the consistent jurisprudence of the Constitutional Court.<sup>12</sup>

20. The Bill's text acknowledges these constitutional principles by requiring the provisions of the Bill to be interpreted consistently with the CRPD, its Optional Protocol, and only two other UN treaties, namely the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.<sup>13</sup> However, the explicit mention of just these two treaties is unduly restrictive. For instance, and critically, the Africa Disability Protocol has been omitted from these enumerated treaties, as have several other core UN treaties.

### **Recommendations:**

- Revise the interpretation section of the Bill to ensure the explicit inclusion of the African Disability Protocol in section 3(b).

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<sup>12</sup> [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at para 35; 2011 (3) SA 347 (CC) at para 187.

<sup>13</sup> Section 3(b), (d).

- Other than the recommended direct references to the CRPD and the African Disability Protocol, retain a generalized provision requiring that other core international human rights treaties as well as other international standards are to be considered in interpreting the Bill. The mention of only two treaties section 3(d) should either be removed entirely, or else the full range of human rights treaties to which South Africa is party should be listed.

## **Application**

21. The Bill contemplates the possibility of conflicts between the Bill and other laws by providing that:

“If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail, unless the provisions of the other law are more conducive to the realization of the rights of persons with disabilities.”

22. This provision may also cause interpretative confusion in respect of whether provisions of another law are in fact “more conducive to the realization of the rights of persons with disabilities”. It is not clear the law that would be deemed to be “more conducive”, might necessarily be the law that provides greater protection or protection that is more consistent with the South Africa’s CRPD obligations. Conflicts between disability legislation and other legislation, for example, mental health laws, are not uncommon. Indeed, in other countries, courts have, at times, considered laws that implement the CRPD to be impractical or not conducive even where they provide greater protection to persons with disabilities.

23. It should be noted that while international law leaves room for states to determine exactly how to implement their treaty obligations, States are not permitted to use domestic laws as an excuse for the non-implementation of their international obligations.<sup>14</sup>

## **Recommendation:**

- Revise the provision on application to clarify that, in the circumstance of a conflict between the Bill and other laws, the law that better protects the rights of persons with disabilities and better complies with South Africa’s obligations in terms of international law and standards prevails.

## **Access to Justice**

24. The Bill contains a specific provision on access to justice which restates the right to access to justice “on an equal basis with others,” including through provision of procedural accommodations. It specifically provides for access to justice with the support of “trained personnel working in the administration of justice, and police and correctional services”.

25. While these provisions are welcome, there is a paucity of specificity in the provision, leaving a gap which should be filled. The ICJ submits, for example, that this provision should be specified in at least the following respects:

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<sup>14</sup> Vienna Convention on the Law of Treaties, Article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

- **Judicial Rules:** Following on from the example provided by the Lesotho Person's with Disability Equity Act,<sup>15</sup> the Bill should mandate the Chief Justice to make Rules to give effect to this right in the context of legal proceedings. In the absence of such Rules, judicial officers are unlikely to be able to give full effect to the general provisions of the Act and improve access to justice for persons with disabilities.
- **Support Persons:** The identity of support persons required within the administration of justice to ensure equal access to justice for persons with disabilities is not specified. This is problematic because the Bill should not assume that the full range of posts for appropriate support persons currently exist within the current legal system in South Africa. For example, justice intermediaries, are critical to ensuring persons with intellectual and/or psychosocial disabilities can effectively participate in legal proceedings and communicate with justice actors.<sup>16</sup> While a recent amendment of the Criminal Procedure Act does similarly allow for participation in legal proceedings with the communication assistance of an intermediary,<sup>17</sup> it remains unclear whether such posts are provided by the Department of Justice and freely available to those requiring such intermediary support.
- **Training:** The ubiquitous inadequacy of training of justice actors, including judicial officers, lawyers, police, necessitates a more deliberate and targeted intervention than the oblique reference to "trained personnel" in the Bill.
- **Legal Aid:** The Bill misses an opportunity, consistently with South Africa's obligations in terms of the Africa Disability Protocol, to provide for the right to free legal assistance for persons with disabilities. The Protocol requires States to "ensure legal assistance including legal aid to persons with disabilities".<sup>18</sup>

**Recommendations:** Review and amend the provision of the Bill relating to access to justice to provide further detail:

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<sup>15</sup> Section 32 of reads:

- (1) The Chief Justice shall make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings.
- (2) A person with disability, who is denied bail shall be held in custody in a facility which is modified in accordance with the rules made by the Chief Justice or any other relevant law.
- (3) A person with disability shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho or before a magistrate on a preparatory examination.
- (4) A person with disability shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial justice process.

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[https://www.chr.up.ac.za/images/researchunits/dru/files/TOOLKIT\\_ON\\_JUSTICE\\_ACCOMMODATIONS\\_FOR\\_PERSONS\\_WITH\\_INTELLECTUAL\\_AND\\_PSYCHOSOCIAL\\_DISABILITIES\\_2023\\_FOR\\_WEB\\_1\\_1.pdf](https://www.chr.up.ac.za/images/researchunits/dru/files/TOOLKIT_ON_JUSTICE_ACCOMMODATIONS_FOR_PERSONS_WITH_INTELLECTUAL_AND_PSYCHOSOCIAL_DISABILITIES_2023_FOR_WEB_1_1.pdf)

<sup>17</sup>

Bornman, J. & Msipa, D., 2024, 'Accommodating persons with communication disabilities in court: Perspectives of law students', *African Journal of Disability* 13(0), a1385. <https://doi.org/10.4102/ajod.v13i0.1385>.

<sup>18</sup> Article 13(4).

- Mandating the Chief Justice to enact Rules to improve access to justice for persons with disabilities;
- Specifying the support personnel required to ensure access to justice for persons with disabilities;
- Directly placing an obligation on the State authorities to provide for appropriate training, including on disability rights and disability accessibility, for all justice actors including judicial officers, lawyers and police; and
- Affirming the right to legal assistance and legal aid for persons with disabilities.

## **Legal Capacity**

26. The introduction of a provision relating to the right to legal capacity of persons with disabilities is long overdue. Although the provision in the Bill represents some progress, it is inadequate in a number of respects.
27. First, the provision focuses on State obligations relating to legal capacity and does not, contrary to the provisions of the CRPD, explicitly recognize the right of persons with disabilities to “legal capacity on an equal basis with others in all aspects of life”.
28. Second, and, again, unlike that in the CRPD, the framing of the provision is not around the right to support to enhance and enable decision-making for persons with disabilities. Indeed, the word “support” is not used. Instead of focusing on support, the apparent aim of the provision is to ensure that measures to substitute decision-making are not abusive; are proportionate and effective; and are applied for the shortest time possible. Ultimately, the provision is therefore subject to an interpretation which reinforces substituted decision-making, thus undermining or negating the right to legal capacity.
29. This is of particular concern in the context of the CRPD Committee’s concluding observations to South Africa, which stressed that existing “guardianship and mental health laws ... maintain a substitute decision-making regime” and that “the absence of legislation and supported decision-making mechanisms for persons with disabilities that uphold the autonomy, rights, will and preferences of persons with disabilities in all areas of life”.<sup>19</sup> The Committee therefore recommended that South Africa “repeal all legislation that allows for substitute decision-making, and adopt legislation on supported decision-making”. The Bill not only falls short of the Committee’s prescription but may lend credence to an interpretation which will effectively reinforce the validity of the application of existing guardianship and mental health laws.
30. It is arguable that, under the heading of “dignity and equality” the Bill could be seen to have resolved this problem by asserting that persons with disabilities have the right on an equal basis with others to “access the support they require to exercise their legal capacity”.<sup>20</sup> Whether that is what is intended by the drafters of the Bill is unclear, but given the very real cause for concern about the adequacy of protection of the right to legal capacity in South African law, both the positioning of this provision in the Act and the overall emphasis

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<sup>19</sup> Para 22.

<sup>20</sup> Section 5(2)(f).

of the provision on legal capacity suggest that it may well be premised on an understanding that is inconsistent with a supported decision-making approach as required by the CRPD.

**Recommendations:** Revise the provision on legal capacity overall to ensure that it:

- affirms, positively, the right to legal capacity of persons with disabilities;
- affirms, positively, a supported decision-making approach which prohibits substituting decision making of persons with disabilities and prioritizes the enhancement of their legal capacity; and
- recognizes the need for the review and amendment of other laws – including guardianship and mental health laws – which currently operate to undermine the legal capacity of persons with disabilities.

### **Reasonable Accommodation**

31. In addition to the issues raised above in respect of the definition of reasonable accommodation and its connection to the definition of discrimination, the Bill confusingly provides for a “right to reasonable accommodation”. This is a departure from the CRPD which is not explained.

32. After having introduced a concept of “undue hardship,” as opposed to the CRPD’s “undue burden,” the Bill allows for the denial of a reasonable accommodation of the basis that it would produce an “undue hardship”.

### **Recommendations:**

- Reformulate the framing of this provision, given the submissions (paragraphs 11, 12, 15, 16) and corresponding recommendations above concerning the appropriate connection between reasonable accommodation and discrimination based on disability.
- Revise the provision to ensure its consistency with the CRPD, the Africa Disability Protocol and the jurisprudence of the CRPD Committee.

### **Necessary Accommodation**

33. As indicated in paragraphs 13, 14, and the corresponding recommendation above, section 9 of the Bill on “necessary accommodation” finds no basis in the CRPD and should be omitted.

### **Forced Treatment and Forced Institutionalization**

34. Article 25(d) of the CRPD provides for the need for healthcare to persons with disabilities to be provided on the basis of “free and informed consent”. The provision on healthcare in the Bill makes no mention of free and informed consent, despite the fact that elsewhere the Bill requires that “habilitation and rehabilitation” must be provided on the basis of free and informed consent.<sup>21</sup>

35. This omission is particularly concerning in light of the issues raised by the CRPD Committee in its concluding observations to South Africa in respect of the

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<sup>21</sup> Section 17(h).

prevalence of forced medical treatments for women and girls with disabilities including forced sterilization, forced abortion, and forced and experimental drug use for menstrual suppression.<sup>22</sup>

36. Moreover, forced treatment often occurs in the context of forced institutionalization of persons with disabilities. The Bill omits a section, as is present in the CRPD, on “living independently and being included in the community”. Instead, it includes a provision simply headed “community”.<sup>23</sup>

37. While this provision tracks substantially with the content of the CRPD itself, it is not consistent with the CRPD Committee’s subsequent jurisprudence on deinstitutionalization,<sup>24</sup> nor does it incorporate the recommendations of the CRPD Committee to South Africa in this respect. The Committee took issue with “the lack of a well-defined national strategic and legislative framework on deinstitutionalization” and suggested that South Africa “develop and adopt a national strategic and legislative framework on deinstitutionalization of persons with disabilities”.

### **Recommendations:**

- Revise the section on healthcare to affirm the need for free and informed consent of persons with disabilities. Include provisions specifically prohibiting healthcare provision without free and informed consent, including, as examples, forced abortion and forced sterilization.
- Review the Bill and revise the provision on “community” to ensure the Bill mandates the authorities to develop a timebound plan for deinstitutionalization of persons with disabilities consistently with the jurisprudence of the CRPD Committee.

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<sup>22</sup> CRPD Committee Concluding Observations, para 32.

<sup>23</sup> Section 13.

<sup>24</sup> <http://ohchr.org/en/documents/legal-standards-and-guidelines/crpd5-guidelines-deinstitutionalization-including>