



**MENTAL HEALTH USERS  
NETWORK OF ZAMBIA**



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**VALIDITY**

**UNITED NATIONS COMMITTEE ON THE RIGHTS OF PERSONS  
WITH DISABILITIES**

**30<sup>th</sup> Session, 4 – 22 March 2024**

**JOINT SUBMISSION TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS  
WITH DISABILITIES IN VIEW OF THE COMMITTEE'S EXAMINATION OF  
THE INITIAL REPORT OF THE REPUBLIC OF ZAMBIA UNDER ARTICLE 35  
OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

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**Submitted by**

**Mental Health Users Network of Zambia (MHUNZA)  
Disability Rights Watch (DRW)**

*With the support of*

**International Commission of Jurists (ICJ)  
Southern Africa Litigation Centre (SALC)  
Validity Foundation - Mental Disability Advocacy Centre**

**19 February 2024**

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## Introduction

1. This joint written submission outlines key issues of concern regarding Zambia's compliance with and implementation of the Convention on the Rights of Persons with Disabilities ("the CRPD"). The submission seeks to assist the Committee on the Rights of Persons with Disabilities ("CRPD Committee") with its consideration of the Republic of Zambia's initial report during the upcoming 30<sup>th</sup> Session. The submission has been written jointly by the **Mental Health Users Network of Zambia, Disability Rights Watch, the International Commission of Jurists, the Southern Africa Litigation Centre** and the **Validity Foundation**.
2. **Mental Health Users Network of Zambia** ("MHUNZA") is a non-governmental organization formed in 2000, and legally registered with the Registrar of Societies on the 2<sup>nd</sup> of January 2002 under registration number ORS/102/35/2672. MHUNZA was formed by visionary persons who had experienced mental health problems and had an experience with the mental health system. Over the years MHUNZA has taken up the role of identifying the needs and priorities of persons with mental disabilities, participating in the planning, implementation and evaluation of services and measures concerning lives of persons with mental disabilities and contributing to public awareness and advocating for change.
3. **Disability Rights Watch** ("DRW") was established in 2011 following Zambia's ratification of the United Nations Convention on the Rights of Persons with Disabilities in 2010. The organisation saw a gap in the development of quality programmes and advocacy initiatives by the disability rights movement that comply with the CRPD principles. DRW was thus incorporated as a company limited by guarantee under the laws establishing the Patents and Companies Registration Authority and is also incorporated as a disability service organisation under the laws establishing the Zambia Agency for Persons with Disabilities.
4. Composed of 60 eminent judges and lawyers from all regions of the world, the **International Commission of Jurists** ("ICJ") promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, 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. The ICJ is committed to securing the realization of all human rights for all people, and in particular the rights of marginalized and disadvantaged individuals and groups.
5. The **Southern Africa Litigation Centre** ("SALC"), established in 2005, aims to promote and advance human rights, the rule of law, and access to justice in Africa, predominantly in Southern Africa. SALC focuses on marginalised communities who face challenges in accessing legal, social and environmental justice. SALC uses strategic litigation, advocacy and capacity strengthening, which have allowed SALC to gain experience in protecting, promoting and advancing the rights of persons with disabilities. SALC has observer status with the African Commission on Human and Peoples' Rights.

6. The **Validity Foundation** is an international human rights organisation which uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. Validity’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. Validity Foundation has observer status with the UN Economic and Social Council (“ECOSOC”).
  
7. This submission seeks to provide information in connection with the List of Issues in relation to the initial report of Zambia adopted by the CRPD Committee on 20<sup>th</sup> October 2020 at its 14<sup>th</sup> virtual pre-session. It provides information about the rights of persons with intellectual disabilities and persons with psychosocial disabilities in Zambia and, in particular, addresses the following CRPD provisions:
  - A. Purpose and General Obligations (Articles 1 - 4)
  - B. Equality and Non-Discrimination (Article 5)
  - C. Women with Disabilities (Article 6)
  - D. Equal Recognition Before the Law (Article 12)
  - E. Access to Justice (Article 13)
  - F. Living Independently and Being Included in the Community (Article 19)
  - G. Right to Political Participation (Article 29)

## A. Purpose and General Obligations: Articles 1 - 4

8. Zambia has taken some steps towards enshrining the rights of persons with disabilities in its domestic legal framework. These efforts are evidenced by the ratification of the CRPD,<sup>1</sup> and its subsequent domestication through the Persons with Disabilities Act 2012 (“PWD Act”). The PWD Act was enacted to, among other things:

“provide for the domestication of the Convention on the Rights of Persons with Disabilities and its Optional Protocol and other international instruments on persons with disabilities to which Zambia is party, in order to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity”.<sup>2</sup>
9. Surprisingly, although Zambia is yet to ratify the Optional Protocol to the CRPD,<sup>3</sup> its ‘domestication’ is set out as one of the express purposes of the Persons with Disabilities Act in its Preamble. Zambia is also yet to ratify the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities,<sup>4</sup> a regional instrument aimed at promoting, protecting, and ensuring the full exercise of all human and peoples’ rights for persons with disabilities in Africa.<sup>5</sup>
10. Despite the enactment of the PWD Act, Zambia has yet to conduct a comprehensive review and amend its domestic legal framework to give effect to the general obligations and specific rights enshrined under the CRPD and other international law obligations relating to the rights of persons with disabilities. In this context, it is of concern that persons with disabilities, and particularly persons with intellectual disabilities and persons with psychosocial disabilities, continue to face marginalisation and discrimination. For example, although the Zambian Constitution includes disability as a prohibited ground of discrimination,<sup>6</sup> it disqualifies individuals from holding constitutional offices on the grounds of “mental or physical disability”.<sup>7</sup>
11. In addition, Zambian laws, including those that govern court procedures, maintain deeply derogatory terms such as “idiot”, “imbecile”, and “persons of unsound mind”,<sup>8</sup> to refer to persons with intellectual disabilities and persons with psychosocial disabilities. This is

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<sup>1</sup> Status of ratifications of the Convention on the Rights of Persons with Disabilities, available at [tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD](http://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD) (accessed 12 February 2024).

<sup>2</sup> See the Preamble of the Persons with Disabilities Act 2012.

<sup>3</sup> Status of ratifications of the Optional protocol to the Convention on the Rights of Persons with Disabilities, available at [tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=194&Lang=EN](http://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=194&Lang=EN) (accessed 12 February 2024).

<sup>4</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, available at [36440-treaty-protocol-to-the-achpr-on-the-rights-of-persons-with-disabilities-in-africa-e.pdf\(au.int\)](http://36440-treaty-protocol-to-the-achpr-on-the-rights-of-persons-with-disabilities-in-africa-e.pdf(au.int)) (accessed 12 February 2024).

<sup>5</sup> Status of ratifications of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (as at September 2023), available at [36440-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA\\_0.pdf\(au.int\)](http://36440-sl-PROTOCOL-TO-THE-AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS-ON-THE-RIGHTS-OF-PERSONS-WITH-DISABILITIES-IN-AFRICA-0.pdf(au.int)) (accessed 12 February 2024).

<sup>6</sup> Constitution of Zambia 2016, Article 23. See also the definition of “discrimination” on article 266 of the Constitution.

<sup>7</sup> See Chapter G concerning Article 29: Participation in Political and Public life, below.

<sup>8</sup> See Section 139 and 252 of the Penal Code, Section 160 and 166 of the Criminal Procedure Code.

despite a court decision,<sup>9</sup> and subsequent recommendations by the Zambian Law Development Commission,<sup>10</sup> proposing the removal of such derogatory terms from these laws.

12. As a further example, in 2019, Zambia enacted the Mental Health Act to replace the outdated Mental Disorders Act 1949, following advocacy and litigation pursued by disability rights advocates.<sup>11</sup> The Act maintains a medical model of disability in contradiction to, and incompatible with, the general obligations of the State under the CRPD. For example, it continues to allow the restriction of the exercise of legal capacity by persons with intellectual disabilities and persons with psychosocial disabilities.<sup>12</sup>
13. The reform of mental health legislation and resulting Mental Health Act illustrate the lack of genuine and effective participation of persons with disabilities and their representative organisations in such reform processes, leaving the impression that their contributions are simply not envisaged, let alone considered. During the legislative process leading to the adoption of the Mental Health Act, persons with disabilities submitted recommendations to the Parliamentary Committee on Health, Community Development and Social Services,<sup>13</sup> proposing the revision of provisions that restricted the exercise of legal capacity by persons with intellectual disabilities and persons with psychosocial disabilities. Yet, the resulting section 4 of the Act illustrates that these proposals were ignored, with the Act maintaining substitute decision-making regimes that conflict with the State's general and specific obligations under the CRPD.
14. The failure by the Zambian legislature to review laws to ensure their consistency with the CRPD, and the continuing enactment of laws that directly discriminate against persons with intellectual disabilities and persons with psychosocial disabilities, such as the Mental Health Act, illustrate that the Zambian legislature – whether due to inadequate knowledge or political will – has failed to ensure compliance with the country's obligations under the CRPD.

## Proposed recommendations to the Zambian authorities

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<sup>9</sup> *Gordon Maddox Mwewa and Ors v The Attorney General and Ors* (2017/HP/204) [2017] ZMHC 515 (9 October 2017) available at <https://zambialii.org/akn/zm/judgment/zmhc/2017/515/eng@2017-10-09> (accessed 12 February 2024) [hereafter: "Mwewa Case"].

<sup>10</sup> Zambia Law Development Commission, 'Review of the Penal Code Act, Chapter 87 of the Laws of Zambia and the Criminal Procedure Code Act, Chapter 88 of the Laws of Zambia: Project Report', February 2022, available at <https://www.zambialawdevelopment.org/download/reportreview-of-the-penal-code-act-chapter-87-of-the-laws-of-zambia-and-the-criminal-procedure-code-chapter-88-of-the-laws-of-zambia/> (accessed 12 October 2024); see also, Zambia Law Development Commission, 'It's a done deal: ZLDC hands over, to the Minister of Justice, the project report and proposed Bills on the review of the Penal Code Act Chapter 87 of the Laws of Zambia, and the Criminal Procedure Code Act, Chapter 88 of the Laws of Zambia', undated, available at <http://www.zambialawdevelopment.org/its-a-done-deal-zldc-hands-over-to-the-minister-of-justice-the-project-report-and-proposed-bills-on-the-review-of-the-penal-code-act-chapter-87-of-the-laws-of-zambia-and-the-criminal-proc/> (accessed 12 February 2024) [hereafter: "ZLDC Penal Code Review article"]. See further: Report of the Special Rapporteur on the rights of persons with disabilities on her visit to Zambia A/HRC/34/58/Add.2 (2016): <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F34%2F58%2FAdd.2&Language=F&DeviceType=Desktop&LangRequested=False> (accessed 12 February 2024) [hereafter: "Special Rapporteur Report on Zambia"].

<sup>11</sup> A more detailed analysis of this legislation is provided in Chapter D. Article 12 – Equal Recognition before the Law, below.

<sup>12</sup> See section 4 of the Mental Health Act. Further analysis is provided in Chapter D. Article 12 – Equal Recognition before the Law, below.

<sup>13</sup> DRW Memo concerning the Mental Health Bill 2019 available at <https://disabilityrightswatch.net/wp-content/uploads/2019/03/FINAL-DRW-SUBMISSION-TO-PARLIAMENTARY-COMMITTEE-ON-HEALTH-COMMUNITY-DEVELOPMENT-AND-SOCIAL-SERVICES.pdf> (accessed 12 February 2024).

- In consultation with persons with disabilities and their representative organisations, conduct a comprehensive review of all national legislation, policies and frameworks to ensure consistency with the CRPD and other human rights obligations relating to the rights of persons with all types of disabilities. On the completion of such a review the Zambian authorities must expeditiously undertake amendments to repeal or replace constitutional and legislative provisions that violate the State’s obligations under the CRPD.
- Ratify the Optional Protocol to the CRPD.
- Ratify, domesticate and implement the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa.
- Establish sustainable and genuinely effective consultative mechanisms for persons with disabilities and their representative organisations that respect their diversity and autonomy, in accordance with the CRPD and the Committee’s guidance under its General Comment No. 7.
- Develop and implement training and education programs for all policy makers, including members of the legislature, on ensuring the consistency of the Zambian legal and policy framework with the State’s general obligations and specific rights under the CRPD.

## B. Article 5: Equality and Non-Discrimination

15. The Constitution of the Republic of Zambia<sup>14</sup> upholds “the human rights and fundamental freedoms of every person” in its preamble, and includes “human dignity, equity, social justice, equality and non-discrimination” as the national values and principles.<sup>15</sup> It upholds the right to non-discrimination of all persons within the Republic of Zambia,<sup>16</sup> and further defines discrimination as: “directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.”<sup>17</sup>
16. The PWD Act defines a person with a disability as “a person with a permanent physical, mental, intellectual or sensory impairment”, and a disability as:  
 “a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an activity or perform a function as specified in this Constitution or as prescribed”.<sup>18</sup>
17. This definition does, in part, incorporate the CRPD’s social or human rights model approach to understanding disability as the interaction between societal and environmental barriers and an individual impairment. However, it is of concern that the definition seems to provide for the possibility that an impairment “alone” may constitute a disability. Should

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<sup>14</sup> Constitution of Zambia 1996 as amended in 2016 (hereafter: “Constitution of Zambia”).

<sup>15</sup> Constitution of Zambia Article 8(d).

<sup>16</sup> Article 23(1) of Constitution of Zambia provides ‘Subject to clauses (4), (5) and (7), **a law shall not make any provision that is discriminatory either of itself or in its effect.**(2) Subject to clauses (6), (7) and (8), **a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law** or in the **performance of the functions of any public office** or any public authority.’ [Emphasis Added]

<sup>17</sup> Constitution of Zambia Article 266.

<sup>18</sup> Section 2 of Persons with Disabilities Act.



the Act be interpreted in this manner, it would enable the direct application of a medical approach to disability in a manner that is inconsistent with the Preamble of the CRPD and, more specifically, with its express recognition that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal or environmental barriers that hinders their full and effective participation in society on an equal basis with others”.

18. The Act directly imports the definition of discrimination as enshrined in article 2 of the CRPD, namely,  
“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, and includes all forms of discrimination, such as denial of reasonable accommodation, and the term “discrimination on the basis of disability” shall be construed accordingly”.<sup>19</sup>
19. Discrimination against persons with disabilities, so defined, is prohibited by the Act.<sup>20</sup> As noted by the Government of Zambia in its initial report, Zambian courts have confirmed that both the Constitution and the PWD Act prohibit discrimination based on disability.<sup>21</sup> Notably, however, although the Act expressly recognises the denial of reasonable accommodation as a prohibited ground of discrimination, the Government of Zambia has not developed guidance or mechanisms to give effect to the duty to provide reasonable accommodations that may be required by persons with disabilities, nor set out procedures for persons with disabilities to challenge the lack of provision of reasonable accommodations.
20. In addition, notwithstanding the courts’ pronouncements and the enactment of the PWD Act, persons with disabilities continue to face widespread discrimination and social stigma in Zambia,<sup>22</sup> including barriers to accessing employment;<sup>23</sup> discrimination in the working environment;<sup>24</sup> limited access to public spaces and the built environment;<sup>25</sup> and lack of access to quality and inclusive education.<sup>26</sup> MHUNZA members have reported that many

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<sup>19</sup> Id.

<sup>20</sup> Sections 6, 19 of Persons with Disabilities Act.

<sup>21</sup> The *Mwewa Case* (n 9 above) states: “I find it incontrovertible that every person is supposed to be provided with health care services without discrimination. That is to say, persons with disabilities must enjoy the same health range, quality and standard of services and treatment as provided to others. There should be no discrimination whatsoever.” Page 45.

<sup>22</sup> Special Rapporteur Report on Zambia (n 10 above) paras 27-33.

<sup>23</sup> Ngumo Dumisani ‘A critical analysis of Zambia’s disability discrimination legal framework : reasonable accommodation and the right to work for persons with disabilities in Zambia’ available at <https://stax.strath.ac.uk/concern/theses/h415pb19t> (accessed 12 February 2024).

<sup>24</sup> ZILARD Secretariat ‘Study on Rights Of Persons with Disabilities in Working Life In Zambia’ (2023).

<sup>25</sup> Nicholas Kaponda ‘Persons With Disabilities and the Right of Access to the Built Environment in Zambia: A Socio-legal Case Study of the Regulatory Framework for Designing the Built Environment’ (2023) available at <https://www.diva-portal.org/smash/get/diva2:1777205/FULLTEXT02> (accessed 12 February 2024).

<sup>26</sup> Allan Mutambo & Mbulaheni Magure ‘A study of inclusive education provision in Zambia: Curriculum reform’ (2023) available at <https://ajod.org/index.php/ajod/article/view/1067/2420> (accessed 12 February 2024); Jacob R. R. Malungo et al ‘Qualitative Study from Zambia on Barriers to and Facilitators of Life-long Learning (Summary of Results)’ (December 2018), available at <https://www.unicef.org/zambia/media/1156/file/Zambia-NDS-disability-and-education-2015.pdf> (accessed 12 February 2024); Msipu Phiri, Joel, *The Right to Inclusive Education for Children with Intellectual Disabilities. A Comparative Legal Analysis of the Progress being Made in Zambia, Kenya and South Africa.* (2017). Available at

SSRN: <https://ssrn.com/abstract=3336146> or <http://dx.doi.org/10.2139/ssrn.3336146> (accessed 12 February



parents opt to hide their children with disabilities at home due to the stigma associated with having children with disabilities.<sup>27</sup>

21. As MHUNZA has noted, discrimination is particularly acute in respect of persons with intellectual disabilities and persons with psychosocial disabilities with devastating impacts, including when they interact with justice actors and the justice system.<sup>28</sup> A report of the Paralegal Alliance Network (“PAN”), of which MHUNZA is a member, concluded that, “people with psychosocial and intellectual disabilities in contact with criminal justice services are disadvantaged and discriminated against routinely and systematically”.<sup>29</sup> Routine and systematic discrimination prevails within the justice sector, undermining the role of the judiciary in ensuring equality for persons with disabilities and protection against discrimination on the basis of disability.

22. Some specific legal provisions target what are sometimes referred to as persons with “mental” disabilities in Zambian laws.<sup>30</sup> Section 3 of the PWD Act states that,

“Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as provided in this Act or any other matter specified or prescribed under this Act with respect to persons with disabilities, the provisions of this Act shall prevail to the extent of the inconsistency.”

23. Despite this provision, State officials of different branches of government appear to give primacy to other laws deemed to be more specific than the PWD Act. This undermines the effectiveness of the Act itself and gives rise to conflicting legal standards concerning the rights of persons with disabilities, stripping the PWD Act from effectively domesticating the CRPD and providing for vindication of rights enshrined therein.

24. Section 3 of the PWD Act was discussed in the *Mwewa* case, which, in turn, is discussed in greater detail under section D concerning Article 12 below. In determining whether section 3 of the PWD Act could be interpreted to prevail over discriminatory provisions of the Mental Disorders Act (1949), the Court incorrectly characterised the PWD Act in the following terms:

“A subordinate piece of legislation such as the Persons with Disabilities Act cannot void or repeal the Mental Disorders Act. In other words, the provisions of the Persons with Disabilities Act cannot be the basis for impeaching the Mental Disorders Act.”<sup>31</sup>

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2024). Section 23(1) of the Zambian Education Act provides that persons with disabilities are entitled to: “equality of access to, participation and the benefit of educational institutions for learners with special educational needs, promote interventions at all levels of the educational institution”.

<sup>27</sup> Interview with Sylvester Katontoka on the situation of children with intellectual disabilities in Zambia.

<sup>28</sup> MHUNZA & Paralegal Alliance Network Report (“PAN”) ‘Challenging disadvantage in Zambia: People with psychosocial and intellectual disabilities in the criminal justice system’ page vi available at <https://dullahomarainstitute.org.za/acjr/resource-centre/challenging-disadvantage-in-zambia-people-with-psychosocial-and-intellectual-disabilities-in-the-criminal-justice-system/view> [hereafter: “MHUNZA & PAN Report”].

<sup>29</sup> MHUNZA & PAN Report Page vii.

<sup>30</sup> See: Special Rapporteur’s Country Report, paragraph 22, which recommends, that Zambia “conduct a comprehensive legislative review to fully harmonize the national legal framework with the provisions of the Convention, including by revoking discriminatory provisions of the Constitution, the Penal Code, the Criminal Procedures Code, the Prisons Act, the Electoral Act and the Mental Disorders Act”.

<sup>31</sup> Mwewa Case (n 9 above) page 23.

The PWD Act is in fact primary legislation in Zambia, but was treated in this judgment as if it was subordinate, in contradiction with section 3 therein, which states:

“Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as provided in this Act or any other matter specific or prescribed under this Act with respect to persons with disabilities, *the provisions of this Act shall prevail to the extent of the inconsistency.*” [Emphasis added.]

25. Furthermore, the discriminatory application of facially neutral but overly broad criminal laws<sup>32</sup> has also been found to be a source of routine violations of the rights of persons with disabilities. For example, Section 27(b) of the Criminal Procedure Code gives powers to a police officer to arrest without a warrant anyone “who has no ostensible means of subsistence or who cannot give a satisfactory account of himself”. The PAN & MHUNZA report suggests that many persons arrested in such a manner are persons with intellectual disabilities or persons with psychosocial disabilities because of a lack of “understanding” and a perception that their behaviour is “different or challenging”.<sup>33</sup> The report also draws on evidence from interviews with government officials who indicate that “the police tend to treat persons with disabilities in an inhumane manner, for example, tying them up for fear of danger to others in the cell”.<sup>34</sup> This abuse is exacerbated by the fact that “families and communities rush people with disabilities to police whenever they see something wrong with them”.<sup>35</sup>
26. Zambia’s laws continue to retain discriminatory language undermining the rights of persons with disabilities to equality and non-discrimination. For example, the Zambian Penal Code retains the terms “idiot” and “imbecile” to refer to persons with intellectual disabilities and persons with psychosocial disabilities,<sup>36</sup> and the Criminal Procedure Code<sup>37</sup> and Penal Code<sup>38</sup> both contain phrases such as “unsoundness of mind” as purported legal standards. These legislative deficiencies remain despite condemnation of the High Court that such language, albeit in other legislation, is “highly offensive, derogatory and discriminatory”,<sup>39</sup> and that such terms expressly violate section 6(3) of the Persons with Disabilities Act.<sup>40</sup> In 2022, after a lengthy process of reviewing the Penal Code and the Criminal Procedure Act, the Zambian Law Development Commission recommended removal of terms including “idiot” and “imbecile” as they are “derogatory and are contrary to international human rights law”.<sup>41</sup>

### **Proposed Recommendations to the Zambian authorities**

- **Align the definition of “disability” in section 2 of the Persons with Disabilities Act with the CRPD to clarify that (i) disability is an evolving concept that results**

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<sup>32</sup> See, in general, ICJ “The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty” (March 2023), available: [https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report\\_final\\_print-version.pdf](https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf) (accessed 12 February 2024).

<sup>33</sup> MHUNZA & PAN (n 28 above) pages 30-32.

<sup>34</sup> MHUNZA & PAN Report (n 28 above) page 33.

<sup>35</sup> MHUNZA & PAN Report (n 28 above) page 30.

<sup>36</sup> See Section 139 of the Penal Code Chapter 87.

<sup>37</sup> See Section 160 and 166 of the Criminal Procedure Code.

<sup>38</sup> See Section 252 of the Penal Code.

<sup>39</sup> *Mwena Case* (n 9 above) page 47.

<sup>40</sup> Section 6(3) of the Persons with Disabilities Act provides that: “A person shall not call a person with disability any derogatory name because of the disability of that person.”

<sup>41</sup> ZLDC Penal Code Report article (n 10 above).

from the *interaction* between persons with impairments and attitudinal and other barriers that hinders their full and effective participation on an equal basis with others, and (ii) that makes clear that an impairment “alone” does not constitute a disability in terms of the Act.

- Take legislative and policy measures to ensure that the prohibition on discrimination on the basis of disability is fully complied with, in law and in practice, by all branches of the State, including the justice system, in all matters concerning persons with disabilities as required by Articles 3, 4 and 5 of the CRPD.
- Systematically amend and repeal legislation that is directly or indirectly discriminatory against persons with disabilities. Specifically, immediately repeal all legislative terms and provisions that are derogatory and constitute discrimination against persons with disabilities, including, *inter alia*, sections 27(b), 160 and 166 of the Criminal Procedure Code, and sections 139, 210 and 252 of the Penal Code.
- Adopt concrete mechanisms, policies and practices to ensure the provision of reasonable accommodations as specified under sections 2 and 6 of the Persons with Disabilities Act, in consultation with persons with disabilities and their representative organisations. Such mechanisms, policies and practices should (i) provide guidance on the provision of reasonable accommodations; (ii) confirm that the failure to provide reasonable accommodations constitutes discrimination on the basis of disability; and (iii) establish effective and easily accessible remedies in cases where reasonable accommodations have not been provided.

### C. Article 6: Women and Girls with Disabilities

27. No specific policies or pieces of legislation guarantee the rights of women and girls with disabilities in Zambia.<sup>42</sup> The rights of women and girls with disabilities are instead indirectly addressed through policies concerning the rights of persons with disabilities in general, and other laws that address gender issues.

28. The Constitution prohibits discrimination on various grounds, including on the bases of “sex” and “disability”.<sup>43</sup> The Constitution also provides that no law shall make any provision that is discriminatory either of itself or in its effect.<sup>44</sup> The Gender Equity and Equality Act (“GEE”), 2015 prohibits discrimination on the basis of “sex” by “a person, public body or private body”<sup>45</sup> and provides further detail on what kinds of discrimination are contemplated in Part V. It creates a criminal offence of sex discrimination and the possibility of imposition of a fine and/or up to 5 years’ imprisonment in cases of contravention.<sup>46</sup>

29. In its initial report under the CRPD, the Government of Zambia provides little detail on measures taken to respect, protect, promote and fulfil the rights of women and girls with

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<sup>42</sup> DRW Memorandum on the Welfare of Women and Girls with Disabilities in Zambia, page 2, available at [https://disabilityrightswatch.net/wp-content/uploads/2022/02/Memorandum\\_to\\_Committee\\_on-N-G\\_and\\_Gender\\_Matters\\_Jan-2022.pdf](https://disabilityrightswatch.net/wp-content/uploads/2022/02/Memorandum_to_Committee_on-N-G_and_Gender_Matters_Jan-2022.pdf), (accessed 12 February 2024).

<sup>43</sup> See article 23 of the Zambian Constitution read with Section 266 of the Constitution.

<sup>44</sup> Article 23(1) of the Zambian Constitution.

<sup>45</sup> Section 15(1) of The Gender Equity and Equality Act, 2015.

<sup>46</sup> Sections 15(4) read with section 56 of the Gender Equity and Equality Act, 2015.

disabilities. Whereas it is notable that the Government acknowledges that “women with disabilities face multiple discrimination”,<sup>47</sup> it merely asserts that “the protection and promotion of reproductive health rights especially for women and girls are guaranteed under the Gender Equity and Equality Act No. 22 of 2015 [and these] rights are inclusive of women and girls with disabilities”.<sup>48</sup> However, the GEE does not contain any specific provisions capable of addressing the multiple and intersecting forms of discrimination faced by women and girls with disabilities.

30. Similarly, while section 4(j) of the Persons with Disabilities Act lists “gender equality” as a “general principle”, it does not otherwise address women and girls with disabilities directly. Compounding the minimal legislative and policy specification in relation to women and girls with disabilities, DRW has noted that “women and girls with disabilities still face a lot of stigma and discrimination in almost all domains of life especially in education, health, and employment and livelihood”.<sup>49</sup> In addition, the Special Rapporteur on the Rights of Persons with Disabilities has noted that, “women and girls with disabilities, particularly those of low economic status, also face numerous barriers in enjoying their rights”.<sup>50</sup>
31. For example, in reality, the sexual and reproductive health and rights of women and girls with disabilities are often ignored. A recent study concludes that “a lack of information and awareness, physical inaccessibility, poverty, stigma, and exclusion from decision-making all play a part in denying women and girls with disabilities their right to sexual and reproductive health”.<sup>51</sup> Furthermore, the report notes that women with disabilities are often stigmatised when they go to hospital, being asked questions by nurses such as: “Even you? Who gave you that pregnancy? How can they impregnate a person with a disability?”<sup>52</sup> Such concerns are longstanding, with a 2014 Human Rights Watch report finding, for example, that “pervasive stigma and discrimination both in the community and by healthcare workers” are significant barriers to women with disabilities accessing HIV related services.<sup>53</sup> The report finds that such stigma emanates in part from beliefs that women with disabilities are asexual and that there remain “negative attitudes about their right to marry and have children”.<sup>54</sup>
32. Women and girls with disabilities in Zambia are at a disproportionate risk of gender-based violence in their homes, institutions, schools and within the community.<sup>55</sup> Despite this, community awareness programmes relating to gender-based violence frequently exclude persons with disabilities and parents of children with disabilities.<sup>56</sup> Persons with disabilities experience particular barriers to accessing information about critical healthcare and other

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<sup>47</sup> Para 82.

<sup>48</sup> Zambia’s report, para 85.

<sup>49</sup> Disability Rights Watch “The Welfare of Women and Girls with Disabilities in Zambia” (Feb 2022), page 5, available at <https://disabilityrightswatch.net/welfare-of-women-and-girls-with-disabilities-in-zambia/> (accessed 12 February 2024).

<sup>50</sup> Special Rapporteur Report on Zambia (n 10 above) para 30.

<sup>51</sup> MSI “Stories on choice from three women with disabilities”, 1 December 2023, available at <https://www.msichoices.org/latest/stories-from-three-women-with-disabilities/> (accessed 12 February 2024).

<sup>52</sup> Id.

<sup>53</sup> Human Rights Watch “We Are Also Dying of AIDS” Barriers to HIV Services and Treatment for Persons with Disabilities in Zambia (2014), page 2, available at [https://www.hrw.org/sites/default/files/reports/zambia0714\\_ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/zambia0714_ForUpload_1.pdf) (accessed 12 February 2024).

<sup>54</sup> Id. See also Special Rapporteur Report on Zambia (n 10 above) para 30.

<sup>55</sup> Special Rapporteur Report on Zambia (n 10 above) para 30.

<sup>56</sup> Special Rapporteur Report on Zambia (n 10 above) page 31.

protective services, such as post-exposure prophylaxis for HIV prevention, and protection services because information is not available/provided in accessible formats.<sup>57</sup>

33. The Anti-Gender-Based Violence Act, 2011 broadly defines and prohibits gender-based violence and harassment<sup>58</sup> and establishes a range of processes and institutional mechanisms geared towards supporting access to justice for victims of gender-based violence.<sup>59</sup> However, significant problems have resulted in non-implementation of the Act, including the fact that the Anti-GBV Committee is “non-functional”, the failure to set up the Anti-GBV Fund,<sup>60</sup> and inadequate provision of shelters for victims of GBV.<sup>61</sup>
34. The UN Special Rapporteur on the Rights of Persons with Disabilities has noted more generally that “when persons with disabilities, particularly women and girls, attempt to file complaints of abuse or discrimination, they are usually overlooked by the authorities owing to stigma and prejudicial attitudes” and that “victim support units in police stations mandated to focus on sexual and gender-based violence” are “not always adequately resourced and trained to handle complaints by persons with disabilities”.<sup>62</sup>

#### **Proposed recommendations to the Zambian authorities**

- **Conduct a comprehensive review of the Persons with Disabilities Act, the Anti-GBV Act and the Gender Equity Act to assess and enhance their effectiveness in accordance with the rights of women and girls with disabilities under the CRPD.**
- **Conduct a study and comprehensive review of the effectiveness, application and implementation of the Anti-GBV Act in providing legal protection to women and girls with disabilities, including its interaction with the Persons with Disabilities Act and the Gender Equity Act. In particular, this study should consider (i) the accessibility of facilities, services, police stations, shelters and courts for women and girls with disabilities affected by GBV; (ii) the extent to which police, lawyers, prosecutors, medical professionals, shelter staff and others are equipped to respond to women and girls with disabilities without discrimination in connection with instances of GBV; (iii) the availability and accessibility of services to women and girls with disabilities who have experienced sexual and gender-based violence; and (iv) whether, in this context, reasonable accommodations are provided as required.**
- **Develop and implement educational programmes on gender-based violence for women and girls with disabilities in learning institutions, health facilities and community-based women’s groups on all aspects of gender-based violence, including on identifying different forms of GBV, reporting and access to counselling, rehabilitation and safe-home services.**
- **Ensure that all State officials tasked with implementing provisions of the Anti-GBV Act, including police officers, immigration and correctional**

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<sup>57</sup> Special Rapporteur Report on Zambia (n 10 above) page 32.

<sup>58</sup> The Anti-Gender-Based Violence Act, 2011 section 3.

<sup>59</sup> The Anti-Gender-Based Violence Act, 2011, Part IV (shelters), Part V (Anti-GBV Committee), Part VI (Anti-GBV Fund).

<sup>60</sup> World Bank Social Sustainability and Inclusion and Human Development Global ‘Gender-Based Violence Assessment in Zambia’ (2022), page 15.

<sup>61</sup> Mushibwe, C. P; Chambeshi, M & Dr. Mpolomoka, D. L. (2021). Valuing Safehome Shelters for Victims of Violence in Lusaka Province, Zambia. *Journal of African Interdisciplinary Studies*, 5(9), 41 – 56.

<sup>62</sup> Special Rapporteur Report on Zambia (n 10 above) para 71.

facility officers, prosecutors, medical professionals and shelter staff, are equipped with the necessary knowledge and skills to effectively handle and address GBV and related matters affecting women and girls with disabilities taking into consideration multiple and intersectional discrimination.

- Take measures to increase access to comprehensive sexual and reproductive health rights education and sexual reproductive health services by women and girls with disabilities. This may include educational programmes targeted at the general population, women and girls with disabilities, healthcare workers, police and other law enforcement officers.

#### D. Article 12: Equal Recognition before the Law

35. Section 8 of the Persons with Disability Act recognises the right of every person with a disability to “enjoy legal capacity on an equal basis with others in all aspects of life”.<sup>63</sup> Whereas the legislation sets out positive obligations on a range of justice actors to guarantee the legal capacity of persons with disabilities, including to provide procedural, reasonable, gender and age-appropriate accommodations and supports, persons with disabilities, and in particular persons with intellectual disabilities and persons with psychosocial disabilities in Zambia, continue to face significant barriers in exercising their legal capacity. One of the most significant legal barriers relates to the content, interpretation and application of the Mental Health Act, 2019.
36. Zambia’s Parliament enacted the Mental Health Act, 2019 on 11 April 2019, thereby repealing and replacing the outdated Mental Disorders Act of 1949. The enactment followed a declaration by the High Court in the *Mwewa case*<sup>64</sup> that the 1949 Mental Disorders Act was outdated and not compliant with the rights-based approach to disability. The Court also declared section 5 of the 1949 Act as unconstitutional due to the use of derogatory terminology to refer to persons with intellectual disabilities and persons with psychosocial disabilities. Sections of the now repealed Mental Disorders Act had earlier provided the basis upon which involuntary detention of persons with intellectual disabilities and persons with psychosocial disabilities could take place in hospitals, police station and other such institutions.<sup>65</sup>
37. Although the Court declined to declare the 1949 Act as unconstitutional in its entirety, it called on the legislature to review it thoroughly.<sup>66</sup> Zambian civil society and OPDs, including some of the authors of the present report, campaigned for legal reform during a lengthy process culminating with the enactment of the Mental Health Act in early 2019.<sup>67</sup> Members of MHUNZA participated, to the extent permitted, by giving inputs into the process though it was “shrouded in secrecy” and inadequately inclusive.<sup>68</sup> It appears that

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<sup>63</sup> Section 8(1) of the Persons with Disabilities Act.

<sup>64</sup> *Mwewa Case* (n 9 above).

<sup>65</sup> *Mwewa case* (n 9 above) at para 43.

<sup>66</sup> *Mwewa case* (n 9 above) at 48.

<sup>67</sup> MHUNZA, MDAC & ZAFOD ‘Human rights and mental health in Zambia: Recommendations for action’, August 2014, available at

[https://www.mdac.org/sites/mdac.info/files/human\\_rights\\_and\\_mental\\_health\\_in\\_zambia\\_-\\_recommendations\\_for\\_action\\_0.pdf](https://www.mdac.org/sites/mdac.info/files/human_rights_and_mental_health_in_zambia_-_recommendations_for_action_0.pdf) (accessed 12 February 2024).

<sup>68</sup> Annabel Raw ‘You only have Rights if you are a Person: How Zambia is Legislating Away the Rights of Persons with Psychosocial Disabilities’ (2019) available at <https://africanlii.org/articles/2019-06-28/annabel-raw/you-only-have-rights-if-you-are-a-person-how-zambia-is-legislating-away-the-rights-of-persons-with-psychosocial->



even the UN Special Rapporteur on the Rights of Persons with Disabilities struggled to access the Mental Health Bill during the process.<sup>69</sup>

38. MHUNZA and local organisations expressed their concerns about the substance and process of the Bill before the Parliamentary Committee on Health, Community Development, and Social Services. Following their submissions, the Committee submitted a report to Parliament proposing a revision of the Bill on the grounds that the Bill “seems to lean more on the medical approach, to the exclusion of the social and human rights approach”, which created “gaps in the comprehensive protection of the rights of persons with mental disabilities”.<sup>70</sup>
39. While not providing a specific recommendation on what became the current section 4 of the Mental Health Act, the Parliamentary Committee pointed out that references to outdated United Nations Resolutions and WHO sources should be removed as these had been superseded by the CRPD.<sup>71</sup> Despite this and various other recommendations made by the Parliamentary Committee, within two months of the issue of its report, the Mental Health Act was enacted into law in a final version virtually unchanged from the Bill.<sup>72</sup> The Mental Health Act, 2019 is now the legislation governing aspects such as the legal capacity of persons with intellectual disabilities and persons with psychosocial disabilities in Zambia.
40. Section 4 of the Mental Health Act is entitled ‘Legal Capacity and Rights of Mental Patients’. It states:
  - “(1) Subject to the provisions of this Act, a mental patient shall enjoy legal capacity.
  - (2) Where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.
  - (3) Where a mental patient lacks legal capacity, a court may appoint a supporter.
  - (4) A mental patient who has legal capacity under subsection (1) may appoint a supporter through advance instructions.
  - (5) where a court declares that a mental patient does not have legal capacity, that person is legally disqualified under subsection (4) and any other written law.”
41. This provision is deeply problematic as it is drafted in such a way as to create significant uncertainty; it is difficult to understand and undermines the legal capacity of persons with disabilities as a universal attribute inherent in all persons by virtue of their humanity. As such, it is inconsistent with the CRPD, including with respect to the right to equal recognition before the law and the right to be free from discrimination.
42. A textual analysis of section 4 reveals, first, that the provision fails to assert the right to legal capacity of persons with disabilities. Moreover, subsections 4(2)-(4) specifically allow for discriminatory restrictions of the legal capacity on the basis of disability in violation of

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[disabilities#:~:text=In%20essence%2C%20it%20says%20that,from%20performing%20a%20function%20that](#) (accessed 12 February 2024).

<sup>69</sup> Special Rapporteur Report on Zambia (n 10 above) para 21.

<sup>70</sup> See the Report of The Committee on Health, Community Development and Social Services on The Mental Health Bill, N.A.B. No. 1 Of 2019 at page 16.

<sup>71</sup> Id. at page 17.

<sup>72</sup> Annabel Raw (n 68 above).



Article 12 of the CRPD. Section 4(2) wrongly allows for the restriction of legal capacity where it is deemed that a person lacks “mental capacity”, providing for courts to appoint a “supporter”. The term “supporter” is defined in section 2 of the Act as “*a person who represents a mental health service user or mental patient’s rights or interests*”. Under sections 4(5) and 4(4), a person deprived of legal capacity cannot choose a supporter. Consequently, while the provision uses the terminology of “support”, in practice it codifies a system of substituted decision-making, contrary to Article 12 of the CRPD.

43. Second, the Act defines “mental capacity” as “the capability to make independent informed decisions and to act on that decision and understand the consequences of the decision made and action taken”. If “independent” is understood to mean “without support or assistance”, then the Act’s provisions effectively result in the deprivation of legal capacity without the opportunity for support. This understanding reinforces the concern set out above.
44. Indeed, read with the definition of “mental patient”, section 4(2) in essence creates a system whereby any individual who has ever had a diagnosis by a mental health practitioner of a “mental illness, mental disorder, mental impairment or mental disability” can be determined by *any other person* to “lack mental capacity” rendering them “legally disqualified from performing a function that requires legal capacity”.
45. Third, the Act does not clarify the role of courts in determining whether a person lacks capacity. Section 4(5) may be interpreted as requiring a court order, however, there is no other dedicated provision in this respect within the Act.
46. Fourth, the provisions of section 4(5) of the Act on legal disqualification have the effect of permanently depriving persons with disabilities of their right to exercise their legal capacity in all areas of life. Thus, while a court may declare a person to lack legal capacity under section 4(5), it is seemingly only empowered/required to do so in an all-or-nothing way whereby denial of legal capacity is not restricted either in time or in respect of specific instances. The Act does not provide for a process by which an individual who has been “legal disqualified” can later have this status reversed or altered.
47. The effect of section 4, read as a whole, is that any individual ever diagnosed by a mental health practitioner with any condition, disability or impairment can be subjected to an unlimited, plenary form of guardianship with profoundly detrimental consequences for their rights across all areas of life. The legislation does not provide for any procedural safeguards or due process requirements whatsoever. As such, the Act represents not only a missed opportunity to redress the historic injustices faced by persons with intellectual disabilities and persons with psychosocial disabilities that prevailed under the old Mental Disorders Act, but entrenches their legal and social exclusion within and far beyond the mental health system.
48. Against this background, MHUNZA and its partners yet again doubled down on advocacy by calling for the amendment of the Act, including the complete overhaul of section 4.<sup>73</sup> In doing so they noted that section 4 views persons with intellectual disabilities and persons with psychosocial disabilities as “objects in law, no longer being human beings with wills

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<sup>73</sup> MHUNZA and Disability Rights Watch “An Urgent Call to Amend Section 4 of the 2019 Mental Health Act” (June 2019), available [https://disabilityrightswatch.net/policy-belief-an-urgent-call-for-the-repeal-of-section-4-of-the-2019-mental-health-act/policy-brief\\_june-2019/](https://disabilityrightswatch.net/policy-belief-an-urgent-call-for-the-repeal-of-section-4-of-the-2019-mental-health-act/policy-brief_june-2019/) (accessed 12 February 2024).

and preferences that are legally respected and protected”. They conclude pointedly that, “it does not respect us as people with the right to make choices in our lives”.<sup>74</sup>

49. Since the legal reform proposed was not forthcoming, MHUNZA approached the High Court to challenge the constitutionality of section 4 of the Act. The High Court rejected the challenge, relying, to a large extent, on the “Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care” adopted in 1991 by the UN General Assembly.<sup>75</sup> This is the same resolution that the Parliamentary Committee on Health, Community Development and Social Services had specifically recommended the Act should not embody.<sup>76</sup>
50. On appeal to the Supreme Court, the petitioners specifically argued that the High Court’s reliance on the Resolution was inappropriate and amounted to a failure to apply a range of international conventions including the CRPD, the ICCPR and the ACHPR.<sup>77</sup> They also argued that the High Court ought to have applied the Persons with Disabilities Act, given its role in domesticating the CRPD.<sup>78</sup> In addition, they further argued that section 4 of the Mental Health Act violated a range of their rights guaranteed by the Constitution, including the rights to life, liberty and security of the person; protection of personal liberty; freedom of expression and conscience; and freedom from discrimination.<sup>79</sup>
51. Through a judgment delivered on 25<sup>th</sup> September 2023, the Supreme Court essentially found that section 4(1) is sufficient to ensure the protection of the legal capacity of all “mental patients”.
52. The Court relied on several misguided grounds to reach its determination.
53. First, the Court considered the employment status of the petitioners, as well as their ability to participate in the hearings and brief their lawyers, as evidence that the prevailing laws do not stop them from exercising their legal capacity in Zambia.<sup>80</sup>
54. Second, the Court appeared to applaud the government for its efforts to improve its approach to mental health services, including by introducing the Mental Health Act to replace the Mental Disorders Act, despite the submissions of the applicants demonstrating how this piece of legislation was inconsistent with their rights as guaranteed by the Constitution, as well as international human rights law, including the CRPD.<sup>81</sup>

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<sup>74</sup> Id. at page 10.

<sup>75</sup> United Nations General Assembly, Resolution 46/119 (17 December 1991), Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

<sup>76</sup> See the Report of The Committee on Health, Community Development and Social Services on The Mental Health Bill, N.A.B. No. 1 Of 2019 at page 16.

<sup>77</sup> *Katontoka (Suing on his own behalf and The Executive Director of the Mental Health Users Network of Zambia) v Walinya (Suing on his own behalf and the Executive Director of Disability Rights Watch)* (Appeal No. 01 of 2023) [2023] ZMSC 16 (25 September 2023) paras 19-22.

<sup>78</sup> Id. paras 22-25.

<sup>79</sup> Id. paras 5-6.

<sup>80</sup> Id. paras 49-51.

<sup>81</sup> Id. paras 44; para 69 states: “In the earlier part of this judgment, we traced the history of the Act and alluded to the fact that we have moved from the Mental Disorder Act to the Mental Health Act. The significance of this is that the repeal of the Mental Disorders Act introduced legal capacity for mental patients in our legislation for the first time. This is a positive move as there was no such provision in the old Act which, to a large extent, discriminated against the rights of mental patients. The Mental Disorders Act was not only by definition discriminatory but also stigmatized mental patients. In its preamble, the intention was “ . . . to provide for care of persons suffering from

55. Third, the Court approved of the High Court’s singular reliance on the UN GA’s Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care – and not the CRPD – on the grounds that, while the Resolution “speak[s] specifically” to the situation of mental health, the CRPD is more “general”.<sup>82</sup> In light of this, the Supreme Court was satisfied that the 1991 Principles, and not the CRPD or any of the jurisprudence of this Committee or subsequent international standards, reflect “international best practice”.<sup>83</sup>
56. Having dismissed as irrelevant the legally binding provisions of the CRPD, the Court then proceeded to address the question of whether section 4 of the Mental Health Act impeded mental health patients from exercising their legal capacity. The Court noted that section 4(1) was sufficient to ensure the protection of the legal capacity of all mental patients,<sup>84</sup> and that the mere designation of an individual as a mental patient does not deprive an individual of legal capacity.
57. The Court concluded that, despite the domestication of the CRPD’s provisions on legal capacity in section 8 of the Persons with Disabilities Act, that provision “does not in any way provide a better prescription of legal capacity than Section 4(1) of the [Mental Health] Act”.<sup>85</sup> It rejected the appellants arguments that persons with disabilities should be “considered to be possessed of legal capacity whatsoever the state of their mental illness” on the basis that such a position: “fail[s] to recognize not only the fact that mental illness is of varying degrees”; and that the provisions of the Mental Health Act that strip legal capacity and impose a court-appointed ‘supporter’ “are not meant to discriminate against mental patients but rather protect them”.<sup>86</sup>
58. In respect of the appellants’ objection that section 4(3) provides for the appointment of a substituted decision-maker for an individual without their consent and in direct disregard of the individual’s will and preferences, the Court interpreted the provision to require the “active participation by mental patients in the decision on the appointment of a supporter”.<sup>87</sup> This, the Court concluded, was sufficient to ensure that such a person’s will and preferences would be respected.<sup>88</sup> With respect to the CRPD, the Court then proceeded to assert that its interpretation of section 4 “speak[s] in broader terms to the principles set out in Article 12 of the CRPD”.<sup>89</sup> It plainly does not.
59. With this judgment, the Zambian Supreme Court has affirmed the provisions of the Mental Health Act. In light of this, there is legitimate concern, however, that the Mental Health Act remains fundamentally incompatible with the CRPD and that it actually violates the

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mental disorder or mental defect; to provide for the custody of their persons and administration of their estates ... ". This suggests a total lack of legal capacity on the part of mental patients and the ill perceived need for society to care for them regardless of the level of their mental state. The old Act treated mental patients as "objects of charity" to borrow a phrase from Mr. Mwale's lexicon".

<sup>82</sup> Id. para 61.

<sup>83</sup> Id. para 60.

<sup>84</sup> Id. para 68.

<sup>85</sup> Id. para 72.

<sup>86</sup> Id. para 74 where the Court stated: “The rationale for the provision is that it provides protection to mental patients when the degree of their illness is such that they are wanting in mental capacity. In such a case, the law will shield such mental patients from contractual and other obligations they may have committed themselves to while laboring under the incapacity.”

<sup>87</sup> Id. para 77.

<sup>88</sup> Id. para 77.

<sup>89</sup> Id. para 79.

right all persons with disabilities to equality before the law and to non-discrimination. It maintains medical-model discriminatory terminology including “mental patients” or “mental disorder”. It endorses and entrenches a system of substituted decision-making for persons with disabilities, without any substantive or procedural safeguards. And it places reliance on outdated standards that have been replaced by the CRPD.

#### **Proposed Recommendations to the Zambian authorities**

- **Repeal all laws, and discontinue all policies and practices that undermine and violate the right to equality before the law, non-discrimination and the legal capacity of persons with disabilities, in particularly for persons with intellectual disabilities and persons with psychosocial disabilities, across all spheres of life. In particular, adopt measures to prohibit the deprivation of legal capacity of persons with disabilities through formal mechanisms and informal social processes or customary practices, unregulated professional practices, and within conventional and traditional health delivery settings.**
- **Establish programmes and mechanisms for persons with disabilities to access the support they may require to exercise their legal capacity across all spheres of life; ensure legal recognition of such support arrangements and that adequate mechanisms be in place to prevent exploitation and abuse of persons with disabilities seeking to exercise their legal capacity.**
  - **Immediately amend the Mental Health Act in accordance with the CRPD. Repeal all provisions therein that are derogatory and that violate the right to legal capacity of persons with disabilities, particularly of persons with intellectual disabilities and persons with psychosocial disabilities. Remove all and replace all forms of substitute decision-making with freely chosen support that persons with disabilities may require to exercise their legal capacity in conformity with their will and preferences. Amendments are required to, *inter alia*: section 2 in respect of the definitions of “informed decision”; “involuntary admission”; “mental capacity”, “supporter”; sections 4(1), 4(2), 4(3), 4(4) and 4(5), and section 20(2) to remove the possibility of substitute decision-making; section 22(1)(a) and section 23(1) to remove the possibility of third-party consent to admission, treatment, care, rehabilitation or palliation; and section 25(3) to abolish involuntary admission.**
- **Establish mechanisms for monitoring and evaluating the implementation of legal provisions relating to persons with intellectual disabilities and persons with psychosocial disabilities, with a view to ensuring that the right to legal capacity is upheld and that substitute decision-making and abuse is prevented.**
- **Provide information and training to all public and judicial officers on the right to legal capacity for all persons with disabilities.**

#### **Proposed Recommendation to the CRPD Committee**

- **Consider clarifying that States parties to the CRPD should no longer rely on the UN General Assembly’s “Principles for the protection of persons with mental illness and the improvement of mental health care” as it predates the CRPD and violates its provisions.**

### **E. Article 13: Access to Justice**

60. Zambia’s legal system relies on both English common law and customary law.<sup>90</sup> Criminal matters are largely dealt with under common law. The main institutions of the criminal justice system are the police, National Prosecution Authority, courts and judiciary, Legal Aid Board and prison service.<sup>91</sup> Zambia’s courts system includes the Constitutional Court, which has original and final jurisdiction on constitutional matters;<sup>92</sup> the Supreme Court, which hears appeal cases only;<sup>93</sup> the Court of Appeal;<sup>94</sup> the High Court,<sup>95</sup> which has unlimited and original jurisdiction on both civil and criminal matters; and the Local Courts.<sup>96</sup>
61. Section 8(2) of the Persons with Disabilities Act specifically requires justice actors to take “all necessary measures to ensure that persons with disabilities have equal and effective protection and benefit of the law without discrimination”.<sup>97</sup> Section 8(3) clarifies that:  
“where a person with a disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with a disability and provide procedural and other appropriate facilities to enable the persons with a disability to access justice and participate effectively in the proceedings”.
62. Section 9 of the Persons with Disabilities Act further requires “law enforcement agencies” to make “reasonable accommodation” for persons with disabilities “including at investigative and other preliminary stages of the matter” and throughout their interaction with such an individual.
63. Despite these provisions, the Special Rapporteur on the Rights of Persons with Disabilities has described access to justice as a “major challenge” in Zambia.<sup>98</sup> The remainder of the present section focuses on two major challenges to access to justice for persons with disabilities in Zambia: 1) provisions excluding legal capacity; and 2) failure to provide procedural accommodations.

#### Legal Capacity and Access to Justice

64. A range of legal provisions in the Criminal Procedure Code, including in particular sections 160-167, are inconsistent with the CRPD.
65. Headed as “Procedure in Case of the Insanity or Other Incapacity of an Accused Person”, these provisions require a court to determine whether “by reason of unsoundness of mind or of any other disability” an individual is “incapable of making a proper defence”,<sup>99</sup> and enter a plea of guilty. Thereafter, and in the absence of the participation of the individual concerned, the Court must make a finding of whether the evidence available – almost exclusively that of the prosecution – would “justify a conviction”. If the Court finds that it would do so, it “shall order the accused to be detained during the President's pleasure”.<sup>100</sup>

<sup>90</sup> William Church ‘The Common Law and Zambia’ page 9.

<sup>91</sup> MHUNZA & PAN Report (n 28 above) page 17.

<sup>92</sup> <https://judiciaryzambia.com/constitutional-court/>

<sup>93</sup> <https://judiciaryzambia.com/supreme-court/>

<sup>94</sup> <https://judiciaryzambia.com/court-of-appeal/>

<sup>95</sup> <https://judiciaryzambia.com/high-court/>

<sup>96</sup> <https://judiciaryzambia.com/local-courts/>

<sup>97</sup> Section 8(2). The language used in section 8(2) attributes this obligation to the ‘judicature’, which can be more broadly interpreted to include all those involved in the administration of justice, or, in other words, “justice actors”.

<sup>98</sup> Special Rapporteur Report on Zambia (n 10 above) para 70.

<sup>99</sup> Section 160 of the Criminal Procedure Code.

<sup>100</sup> Section 161 Criminal Procedure Code.

Such an order is “sufficient authority” for detention “in any mental institution, prison or other place where facilities exist for the detention of persons”.<sup>101</sup>

66. Only the President is empowered to release a person detained under these provisions, and even where they do, such an order may be conditional and “may at any time by order” be revoked.<sup>102</sup> This release will be upon the “advice of a medical officer” to direct that a person so detained is presented in court for a re-evaluation or determination that the detained is capable of making a defence.<sup>103</sup>
67. Section 167 recognises an “insanity defence” and empowers a Court to make a finding of “not guilty by reason of insanity”. If a court makes such a finding it is required to order that the accused be detained at the President’s pleasure.<sup>104</sup> Evidence suggests that this indefinite detention at the President’s pleasure results in “detainees frequently spending very long periods in detention, with little hope for release”.<sup>105</sup>
68. Furthermore, people with intellectual and psychosocial disabilities are denied the right to access justice on grounds that they do not have legal capacity in Zambia. For instance, a recent study by the Centre for Human Rights, University of Pretoria, found that persons with intellectual disabilities and persons with psychosocial disabilities are in practice not considered to be competent witness in criminal trials.<sup>106</sup> Despite no legislative provision stripping such persons of competence to testify, common practice is that the testimony of persons with intellectual and psychosocial disabilities is constantly put in question.<sup>107</sup> This is also due to the misconception that that an individual’s disability makes them an incompetent and unreliable witnesses. A finding of incompetence means that the witness will not be permitted to testify, and this may in turn have a negative impact on the outcome of the cases in which persons with intellectual disabilities and persons with psychosocial disabilities are involved, including as victims of crime.
69. The fitness to stand trial of accused persons with intellectual and psychosocial disabilities is often questioned on the basis that they are not able to present a proper defence due to the nature of their disability.<sup>108</sup> This is because of the misconception that they are unable to understand the trial process due to their “mental incapacity”. When a person with an intellectual disability or a person with a psychosocial disability is an accused person, the court is required to do a fitness test in order to determine whether they are competent to plead. If the accused is found to be unfit to make his defence, the court is required to enter a plea of not guilty and hear the evidence for the prosecution and for the defence.<sup>109</sup> If the evidence would justify a conviction, the Court is then required to order the accused to be detained “during the President’s pleasure”.<sup>110</sup>

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<sup>101</sup> Section 163 Criminal Procedure Code.

<sup>102</sup> Section 164 Criminal Procedure Code.

<sup>103</sup> Section 165 Criminal Procedure Code.

<sup>104</sup> Section 167(1) & (3) Criminal Procedure Code.

<sup>105</sup> MHUNZA & PAN Report (n 28 above) page 101.

<sup>106</sup> Centre for Human Rights ‘Persons with Disabilities and Barriers to Equal Access to Justice in Zambia: A research study of the Criminal justice system’ (2022) at 29. [Hereafter: “CHR Report”].

<sup>107</sup> Id.

<sup>108</sup> Section 160 of the Criminal Procedure Code provides “Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability, incapable of making a proper defence, the court shall inquire into and determine such question as soon as it arises.”

<sup>109</sup> See Section 161(1) of the Criminal Procedure Code.

<sup>110</sup> Section 161(2)(a) of the Criminal Procedure Code.



70. Persons with intellectual disabilities and persons with psychosocial disabilities are detained during the President’s pleasure “in any mental institution, prison or other place where facilities exist for the detention of persons”.<sup>111</sup> The practice of detaining persons with intellectual disabilities and persons with psychosocial disabilities during the president’s pleasure is not only discriminatory but also denies them equal access to justice compared to their nondisabled counterparts.

#### Procedural Accommodations

71. Despite the generality of the application of section 9 of the PWD Act, procedural accommodations are not specifically required by any law in the context of legal processes. The Criminal Procedure Code, for instance, makes no reference to “reasonable” or “procedural” accommodations. The provision of any accommodations is therefore extremely uncommon. There is no practice, for example, of ensuring the availability of “intermediaries” to persons with intellectual disabilities and persons with psychosocial disabilities with a view to ensuring effective communication during legal proceedings, despite clear guidance from the UN Special Rapporteur on the Rights of Persons with Disabilities of the importance of their role in ensuring equal access to justice.<sup>112</sup>
72. Moreover, inaccessible, and unaccommodating practices are ubiquitous and built into provisions of key legislation governing the administration of justice.
73. Section 196 of the Criminal Procedure Code, for instance, allows a court to record the demeanour of a witness in a trial. Such recordings of demeanour are then used to make findings on their reliability as a witness.<sup>113</sup> This leads to erroneous assumptions being made about persons with intellectual disabilities and persons with psychosocial disabilities by judges. For example, some persons with intellectual disabilities and persons with psychosocial disabilities may speak with their head down and avoid eye contact, which a court might mistake as a sign of dishonesty. The application of the law of evidence poses specific challenges for persons with intellectual disabilities and persons with psychosocial disabilities.<sup>114</sup> Some of the central elements upon which evidential rules are typically based, such as credible behaviour and reliable conveyance of information, may not be capable of non-discriminatory application when the individuals in question are persons with intellectual disabilities or persons with psychosocial disabilities.<sup>115</sup>

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<sup>111</sup> Section 163(1) of the Criminal Procedure Code.

<sup>112</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities, August 2020), available at <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/10/Access-to-Justice-EN.pdf> (accessed 12 February 2024). See also CHR “Persons With Disabilities And Barriers To Equal Access to Justice In Zambia: A research study of the criminal justice system” (2022), pages 35, 39, available at <https://www.chr.up.ac.za/latest-news/3106-persons-with-disabilities-and-barriers-to-equal-access-to-justice-a-study-of-the-criminal-justice-system-in-botswana-south-africa-and-zambia> (accessed 12 February 2024).

<sup>113</sup> Section 196 of the Criminal Procedure Code provides that “A magistrate shall record the sex and approximate age of each witness and may also record such remarks (if any) as he thinks material respecting the demeanour of any witness whilst under examination.”

<sup>114</sup> N Ziv ‘Witnesses with mental disabilities: Accommodations and the search for truth’ (2007) 27 *Disability Studies Quarterly*.

<sup>115</sup> Id.



74. Another example is section 24 of the *Zambian High Court Act*, which mandates every witness at a trial to be examined *viva voce* in open court.<sup>116</sup> This means that a witness is usually required to appear before the court in person and give oral evidence. The principle of hearing the evidence of witnesses is a fundamental feature of the adversarial trial.<sup>117</sup> However, it assumes that all witnesses possess the ability for effective oral communication in the same circumstances and absent the provisions of procedural accommodations. Some individual's disabilities affect their ability to communicate verbally. Furthermore, the anxiety associated with speaking in open court may further hinder those with intellectual and psychosocial disability's ability to communicate effectively in such an environment.
75. Furthermore, witnesses and accused persons are often required to attend court through summons or warrants.<sup>118</sup> In most cases, when summons are issued, they are provided in writing and must be personally served by a police officer, or an officer of the court.<sup>119</sup> Once served, an accused person must sign the back of the duplicate copy to confirm receipt.<sup>120</sup> Summons are therefore routinely issued in formats and by means that make them inaccessible to persons with disabilities.<sup>121</sup>
76. Finally, there is no requirement under *Zambian law* that summons and other important legal documents such as warrants be issued in accessible formats or by accessible means.

#### **Proposed recommendation to the *Zambian authorities***

- **Repeal all sections of the *Criminal Procedure Code* which conflict with international human rights law and standards, including sections 160, 161, 162, 163, 164, 165, 166, 167 and 167A.**
- **Review and amend all sections of the *Criminal Procedure Code* which have a discriminatory impact on persons with disabilities, including sections 92(1), 93(1)-(2), and section 196.**
- **Review and amend all sections of the *Zambia High Court Act* which have a discriminatory impact on persons with disabilities, including section 24.**
- **In order to provide for supported decision-making in all legal processes and comply with the requirement to provide procedural, gender and age-appropriate accommodations, take measures to:**
  - **Ensure that all assessments of disability in all legal processes be individualised and aimed at determining how to support an individual person with a disability to participate fully and on an equal basis.**
  - **Ensure the enactment of laws and policies, including judicial rules and guidelines for justice institutions, that require the provision of procedural, gender and age-appropriate accommodations tailored to meet the needs of all persons with disabilities who interact with the justice system.**

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<sup>116</sup> Section 24 of the *Rules of the *Zambian High Court** provides that:

“In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial or any suit shall be examined *viva voce* and in open court; but the Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court may think reasonable; or that any witness whose attendance in court ought, for some sufficient cause, to be dispensed with be examined by interrogatories or otherwise before an officer of the Court or other person.”

<sup>117</sup> L Ellison *The adversarial process and the vulnerable witness* (2001) 11.

<sup>118</sup> Sec 91(1) of the *Criminal Procedure Code*.

<sup>119</sup> Sec 93(1) of the *Criminal Procedure Code*.

<sup>120</sup> Sec 93(2) of the *Criminal Procedure Code*.

<sup>121</sup> CHR Report (n 106 above) page 33.

- Establish, adequately resource and implement an easily accessible system for judges and other justice actors pertaining to requesting, assessing and identifying appropriate procedural, age and gender-accommodations and supports for all persons with disabilities who interact with the justice system.
- Ensure access to trained justice intermediaries to all persons with disabilities who require support to communicate effectively with justice actors, including judges, lawyers, court staff and police officers.
- Ensure the provision of adequate training to all justice personnel on disability rights and procedural, gender and age-appropriate accommodations. Persons with disabilities should be involved in developing and implementing such trainings.

## F. Article 19: Living independently and being included in the community

77. Persons with intellectual disabilities and persons psychosocial disabilities in Zambia are subjected to institutionalisation because of many of the laws described above. Such institutionalisation often occurs in mental health hospitals. Zambia has only one psychiatric hospital, Chainama Hills Hospital, which is based in the capital city of Lusaka. According to the 2020 Mental Health Atlas,<sup>122</sup> the country had 760 mental health professionals in total, amounting to 4.26 professionals per 100,000 people in its population of more than 20 million.<sup>123</sup> There are no specific data on the number of persons with intellectual disabilities and persons with psychosocial disabilities who are institutionalised at Chainama Hills Hospital but by MHUNZA and Validity (formerly MDAC) indicated that it is always overcrowded.<sup>124</sup>
78. Apart from Chainama, there are smaller units, called annexes, in seven provincial headquarters: Ndola, Mansa, Kasama, Kabwe, Chipata, Mongu and Livingstone.<sup>125</sup> These provide a few extra beds and are staffed by clinical officers and psychiatric nurses. People in these unites were reported not to have their own beds, to sleep on the floor and share filthy mattresses without sheets.<sup>126</sup>
79. Many persons with intellectual disabilities and persons with psychosocial disabilities in Zambia reported feeling unsafe in their communities and having suffered negative attitudes, insults, threats and physical assault, exploitation and ill-treatment in the community, including at the hands of the police.<sup>127</sup> Abuse is reportedly common in family settings,<sup>128</sup> with some family members chaining and locking up persons with intellectual disabilities and persons with psychosocial disabilities.<sup>129</sup>

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<sup>122</sup> Mental Health Atlas 2020 available at [Mental Health Atlas 2020 Country Profile: Zambia \(who.int\)](https://www.who.int/mentalhealth/atlas2020/country-profiles/zambia) (accessed 12 February 2024).

<sup>123</sup> Id.

<sup>124</sup> MHUNZA, DRW & MDAC Report 'Human Rights and Mental Health in Zambia' (August 2014), available at [https://www.mdac.org/sites/mdac.info/files/human\\_rights\\_and\\_mental\\_health\\_in\\_zambia\\_-\\_recommendations\\_for\\_action\\_0.pdf](https://www.mdac.org/sites/mdac.info/files/human_rights_and_mental_health_in_zambia_-_recommendations_for_action_0.pdf) (accesses 12 February 2024) [hereafter: "MHUNZA, DRW & MDAC Report"].

<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/28/68 (2015) para 60.

80. In addition, traditional healers play a significant role in communities, taking on an enhanced role where conventional services are limited or non-existent. In some cases, persons with psychosocial disabilities have reported that they have been subjected to abuse by traditional healers, undermining their right to live in the community. Prevailing attitudes mean that mental health issues are sometimes incorrectly viewed as possession by evil spirits or “disturbances in the relationship between people and divinity, divine punishment for past actions, or an unbalance due to social issues”.<sup>130</sup> Persons with intellectual disabilities and persons with psychosocial disabilities “frequently [...] go to traditional healers before accessing mental health services”. In these places they report being locked up, chained or otherwise abused by traditional healers.<sup>131</sup>

#### **Proposed Recommendations to the Zambian authorities**

- **Repeal laws, discontinue policies and remove practices that facilitate or enable the institutionalisation of persons with intellectual disabilities and persons with psychosocial disabilities.**
- **Develop, adopt and implement a national deinstitutionalisation strategy and plan in close consultation with survivors of institutionalisation and organisations of persons with disabilities, with a particular focus on ensuring all persons with disabilities can access individualised support and services that enable them to exercise their right to independent living in the community, and enhance the accessibility of general public services in accordance with Article 19, General comment no. 5 and the Guidelines on Deinstitutionalization, including in Emergencies.**
- **Immediately take measures to ensure humane and dignified conditions at all healthcare facilities, and ensure that persons with disabilities can access general and specialised healthcare services, including mental healthcare services, in the community and on the basis of their free and informed consent.**
- **Monitor, investigate and, where appropriate, prosecute conventional and traditional health practitioners responsible for abuse of persons with disabilities under the guise of ‘care’, ‘treatment’, or otherwise.**

### **G. Article 29: Participation in Political and Public Life**

81. Article 46 of the Zambian Constitution guarantees everyone who has attained the age of eighteen to be registered as a voter and vote.<sup>132</sup> However, there are several provisions within the Zambian legal framework, including its Constitution, which restrict the political participation of persons with intellectual disabilities and persons with psychosocial disabilities.

82. Section 7(1)(d) of Electoral Act disqualifies any person who “adjudged otherwise declared to be of unsound mind” or “is detained under the Criminal Procedure Code during the

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<sup>130</sup> MHUNZA, DRW & MDAC Report (n 124 above).

<sup>131</sup> Id., <https://www.mdac.org/en/books/6c-abuse-traditional-healers>.

<sup>132</sup> See Article 46 of the Zambian Constitution 2016; see also Section 3 of Electoral Act.

pleasure of the President” from registering to vote.<sup>133</sup> As a result, persons with psychosocial disabilities and persons with intellectual disabilities are completely disenfranchised-

83. Moreover, the Zambian Constitution disqualifies individuals from holding various public offices on the grounds of “a mental or physical disability that would make the person incapable” of performing the functions of their office. This includes election as a: Member of Parliament;<sup>134</sup> President; Vice-President;<sup>135</sup> and a member of a Commission.<sup>136</sup> In addition various constitutional provisions indicate that public offices “become vacant” if the incumbent has “a mental or physical disability that would make the person incapable” of performing the functions of their office. Such positions include Speaker of Parliament;<sup>137</sup> Minister, including Provincial minister;<sup>138</sup> Judge;<sup>139</sup> Councillor;<sup>140</sup> Chief;<sup>141</sup> Attorney-General;<sup>142</sup> Solicitor-General.<sup>143</sup> The Special Rapporteur on the rights of persons with disabilities has recommended that such discriminatory constitutional provisions are revoked.<sup>144</sup>
84. Persons with disabilities face numerous challenges while participating in public life in Zambia.<sup>145</sup> During the 2021 general elections, persons with disabilities “identified political violence as a major obstacle for political participation”.<sup>146</sup> The candidacy fee, which was unreasonably high, also affected the extent to which persons with disabilities were able to participate in these elections.<sup>147</sup>
85. In 2011 the High Court in *Brotherton N.O. v. Electoral Commission of Zambia*,<sup>148</sup> ordered the Electoral Commission to put in place measures to ensure that participation of people with disabilities in elections is effective. Though the Electoral Commission took some to this effect, the Zambia Federation of Disability Organizations observers reported:

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<sup>133</sup> Section 7(1)(d) of the Electoral Act provides:

“7. (1) No person shall be qualified for registration as a voter, and no person shall be registered as a voter, who—

...

(d) under any law in force in Zambia, is adjudged or otherwise declared to be of unsound mind, or is detained under the Criminal Procedure Code during the pleasure of the President;

...”

<sup>134</sup> Article 70(2)(d) of Zambian Constitution.

<sup>135</sup> Article 100 (2)(F), and Article 107 of Zambian Constitution.

<sup>136</sup> Article 240(f) of Zambian Constitution.

<sup>137</sup> Article 83(1)(b) of Zambian Constitution.

<sup>138</sup> Article 116(3)(f) of Zambian Constitution. See also article 117(2)(e) of Zambian Constitution on removal of a provincial Minister from office.

<sup>139</sup> Article 143(a) and 144(9) of Zambian Constitution.

<sup>140</sup> Article 157(2)(F) of Zambian Constitution.

<sup>141</sup> Article 170(2)(f) of Zambian Constitution.

<sup>142</sup> Article 178(1)(d) of Zambian Constitution.

<sup>143</sup> Article 179(4)(d) of Zambian Constitution.

<sup>144</sup> Special Rapporteur Report on Zambia (n 10 above) para 81.

<sup>145</sup> Riina Pilke & Wamundila Waliyua (2022): Persons with disabilities: participation and politics - the case of Zambia, Development in Practice.

<sup>146</sup> Id.

<sup>147</sup> Id. at 22.

<sup>148</sup> *Brotherton N.O. v. Electoral Commission of Zambia*, judgment of 18 September 2011.

“problems of accessibility in 62% of the 74 polling stations its mission observed, while tactile braille jackets for blind voters and sign language instructions were only available at 43% and 34% of the polling stations observed, respectively”.<sup>149</sup>

86. The result is that more than a decade after the High Court’s decision:  
“organizations representing people with disabilities expressed serious concern regarding the lack of progress by the electoral commission to ensure the participation of people with disabilities in the electoral process”.<sup>150</sup>

**Proposed Recommendations to the Zambian authorities:**

- **Repeal all sections of the Constitution which prevent persons with disabilities from being elected to or holding public office on the basis of disability, including, *inter alia*: Articles 70(2)(d); 83(1)(b); 100 (2)(f); 107; 116(3)(f); 117(2)(e); 143(a); 144(9); 157(2)(f); 170(2)(f); 178(1)(d); 179(4)(d); and 240(f).**
- **Repeal section 7(1)(d) of the Electoral Act.**
- **Ensure that all election-related information, communications, materials and polling stations are accessible, and reasonable accommodations are provided to persons with disabilities in order to exercise their right to vote.**
- **Take all necessary measures to facilitate the participation of persons with intellectual disabilities and persons with psychosocial disabilities in public life, including through removing legal, institutional, attitudinal and other barriers that impede such participation.**

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<sup>149</sup> The Carter Centre ‘Analyzing Zambia’s 2021 General Elections’ (2021), 136.

<sup>150</sup> *Id.*